Setting Aside Arbitral Awards in Singapore: Studies of Recent Cases

Nicolas Tang FCIArb[1]
& Jolene Gwee[2]

Receive; August 15, 2023, Revised; September 11, 2023, Accepted ; September 15 ,2023

Abstract

Once an arbitral award is issued by an arbitral tribunal, the award is final and binding on the parties to the dispute, in the same way as a court judgment is final and binding in a lawsuit. Needless to say, this does not bode well for the party in whose favour the award is made against, who may be of the view that the award should not have been made the way it was for some reason. In which case, the party may apply to have the arbitral award set aside.

The article reviews some recent applications to the Singapore courts to set aside Singapore-seated arbitral awards, and in particular the reasoning of the Singapore Courts in reaching decisions on whether or not to set aside. We hope that this article will offer practical guidance to Thai legal practitioners, Thai legal counsel and THAC arbitrators and tribunals.

I. Introduction

In the context of a Singapore-seated international arbitration,[3] a party to the arbitration who is dissatisfied with the outcome can apply to the Singapore courts to set aside the arbitral award on any of the grounds set out in Section 24 of the International Arbitration Act 1994 of Singapore (**"IAA"**) and Article34 of the UNCITRAL Model Law on International Commercial Arbitration (**"Model Law"**) – the latter of which has the force of law in Singapore.[4] Any such application to set aside must be brought within three months from the date the party making the application received the award, or, if a request to the tribunal to correct or interpret the award pursuant to Article 33 of the Model Law had been made, then within three months from the date on which this request had been disposed of by the tribunal.[5]

[1] Panel of Arbitrators (THAC); Reserve Panel of Arbitrators (SIAC); LLB (Hons) (Nottingham); Advocate and Solicitor (Singapore); Solicitor (England & Wales); Solicitor (Hong Kong); Attorney-at-Law (New York); Mediator, Singapore International Mediation Institute; Mediation Advocate, International Mediation Institute; Founder and Managing Director, Farallon Law Corporation.

[2] LLB (Hons) (The University of Queensland); Advocate and Solicitor (Singapore); Mediator, Singapore International Mediation Institute; Senior Associate, Farallon Law Corporation.

[3] According to Section 5(2) of the IAA, an arbitration is international if: (a) at least one of the parties has its place of business outside of Singapore; (b) the place of arbitration, or the place where a substantial part of the obligations of the commercial relationship is to be performed, or the place with which the subject matter of the dispute is most closely connected, is outside of the state where the parties have their place of business; or (c) the parties have agreed that the subject matter of the arbitration agreement relates to more than one country.

[4] Section 3 of the IAA.

[5] Art 34(3) of the Model Law.

The grounds to set aside an award are limited, however, and the Singapore court hearing a setting-aside application under the IAA has no power to investigate the merits of the dispute or to review any finding of law or fact made by the tribunal. Indeed, the Singapore courts expressly adopt a policy of minimal curial intervention in arbitration proceedings, whether domestic or international, to respect and preserve the autonomy of the arbitral process.[6] Accordingly, the Singapore courts typically read an arbitral award supportively with *"a reading which is likely to uphold it rather than to destroy it"*,[7] recognising that it is *"not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process"*.[8]

That said, the Singapore courts do recognise that there may be situations where there have been meaningful breaches of the rules of natural justice that have actually caused prejudice – these would certainly have to be remedied.[9]

II. Grounds for setting aside: Overview.

The grounds on which a party may set aside an award under Article 34 of the Model Law and Section 24 of the IAA are tabled as follows:

Model Law	
Art 34(a)(i)	The party to the arbitration agreement was under some incapacity; or the arbitration agreement is not valid under the law to which the parties have subjected it or under Singapore law
Art 34(a)(ii)	The party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case
Art 34(a)(iii)	The award deals with a dispute 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
Art 34(a)(iv)	The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties

6 Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd [2007] 3 SLR(R) 86 at [65(c)].

7 Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd [2007] 3 SLR(R) 86 at [59].

8 Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd [2007] 3 SLR(R) 86 at [65(f)].

9 Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd [2007] 3 SLR(R) 86 at [65(f)].

Model Law	
Art 34(b)(i)	The court finds that the subject-matter of the dispute is not capable of settlement by arbitration under Singapore law
Art 34(b)(ii)	The court finds that the award is in conflict with the public policy of Singapore

IAA	
Section 24(a)	The making of the award was induced or affected by fraud or corruption
Section 24(b)	There was a breach of the rules of natural justice with the making of the award, such that the rights of a party have been prejudiced

Consistent with the policy of minimal curial intervention, the statistics show that on average, less than one-third of applications which are made to the Singapore courts to set aside an award are allowed, whether in whole or in part.[10] In 2021, out of 21 reported setting-aside applications, only 6 applications were allowed in whole or in part. In 2022, there were 18 reported setting-aside applications, out of which only 5 applications were allowed in whole or in part.[11]

A review of some of the more recent setting aside cases, in order of significance as to the ground relied upon for setting aside, is instructive as to the situations in which the Singapore courts found it necessary to intervene and have an award set aside.

III. Grounds for setting aside: Cases.

A. Breach of natural justice: Section 24(b) of the IAA

Easily the most common ground invoked for the purposes of setting aside an arbitral award, the concept of breach of natural justice comprises two pillars: impartiality/equality in treatment and a right to a fair hearing. These two pillars are entrenched in Article 18 of the Model Law which reads as follows:

> *"Article 18. Equal treatment of parties*
>
> *The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."*

[10] Lawrence Boo & Delphine Ho, "Arbitration" (2021) 22 SAL Ann Rev 87.

[11] Lawrence Boo & Delphine Ho, "Arbitration" (published on e-First 10 July 2023, SAL Annual Review).

Sai Wan Shipping Ltd v Landmark Line Co, Ltd is a striking example of how a tribunal should never repeatedly fail to give equal treatment to parties to an arbitration, let alone blatantly prefer one party over another under the excuse of the other party not having complied with an order/direction – any award made under such circumstances would most certainly not be received well by the Singapore Courts and would highly likely be set aside by the Courts without any qualms.

In the arbitration, the Tribunal issued a first partial award in favour of Landmark (the claimant). Landmark later served further submissions to recover the balance of its claim, and requested that Sai Wan serve its defence within 28 days, i.e. on or before 31 March 2021. Without hearing from Sai Wan, the Tribunal ordered that Sai Wan serve its defence submissions by 4pm London time on 31 March 2021, and stated that *"if [Sai Wan] fails to respond to this order, [Landmark] may apply for a short final and peremptory order which will include a severe sanction against [Sai Wan] in the event it fails to comply"*.[12]

On 1 April 2021, the Tribunal extended the deadline to 5pm London time on 9 April 2021, and also issued a final and peremptory order on the same day with a warning that if Sai Wan failed to comply with the order, a sanction would be imposed on Sai Wan in that Sai Wan would be *"barred from advancing any positive case by way of defence (or counterclaim) and from adducing any positive evidence in the matter and it will then simply be for [Landmark] to prove their case"*.[13]

On 9 April 2021, Sai Wan served its defence submissions, but after 5pm due to technical issues. However, because Sai Wan had served its submissions after 5pm, the Arbitrator did not consider Sai Wan's defence. The Tribunal allowed further evidence and submissions by Landmark, but did not allow Sai Wan to respond to the same. Eventually, the Tribunal issued a second award in Landmark's favour without hearing witnesses, and on a documents-only basis.[14]

Sai Wan applied to the General Division of the Singapore High Court to set aside the second award under Section 24(b) of the IAA and Art 34(2)(a)(ii) of the Model Law for breach of natural justice. The Court found that there was indeed a breach of natural justice:

(a) In relation to the original deadline for the filing of defence submissions, the Tribunal did not give Sai Wan any opportunity to provide input on the time needed, and only heard Landmark but not Sai Wan when fixing these timelines.[15]

---

12 Sai Wan Shipping Ltd v Landmark Line Co Ltd [2022] 4 SLR 1302 at [12]

13 Sai Wan Shipping Ltd v Landmark Line Co Ltd [2022] 4 SLR 1302 at [12]

14 Sai Wan Shipping Ltd v Landmark Line Co Ltd [2022] 4 SLR 1302 at [18]-[21].

15 Sai Wan Shipping Ltd v Landmark Line Co Ltd [2022] 4 SLR 1302 at [57], [72].

(b) There was no basis for the peremptory order to be made, because the parties had agreed to extend the original timeline for Sai Wan's defence submissions. Even if there had been a default on the deadline submission, the Tribunal failed to determine the sufficiency of cause and failed to give Sai Wan an opportunity to address the Tribunal before making the peremptory order.[16]

(c) The Tribunal was wrong to think that unless Landmark agreed, the Tribunal had no discretion whether to allow Sai Wan's late submission of its defence. This failure to hear Sai Wan on whether the sanction should be applied was a breach of natural justice.[17]

(d) The effect of the peremptory order was to bar Sai Wan from advancing both a positive defence and a negative defence,[18] which led the Tribunal to make the second award without any evidence or submissions from Sai Wan. Had the Tribunal given Sai Wan the opportunity to address on whether there had been any default, the Tribunal may well not have made the peremptory order. The breach of natural justice prejudiced Sai Wan's rights.[19]

Where a tribunal's chain of reasoning is manifestly incoherent, this would suggest that the tribunal has not understood the case put before it by the parties, such that the parties were not accorded a fair hearing. In such a situation, an award can be set aside as well – as illustrated by *BZV v BZW*.[20]

In this case, the Tribunal issued an award dismissing the plaintiff's two claims: the "Delay Claim" and "Rating Claim", and dismissing the defendant's counterclaim. The plaintiff applied to set aside the part of the award relating to the dismissal of the Delay and Rating Claims under Section 24(b) of the IAA for breach of natural justice, and Art 34(2)(a)(iii) of the Model Law for dealing in matters beyond the scope of submission to arbitration.

As regards the issue of natural justice, the General Division of the Singapore High Court found that the Tribunal had breached the fair hearing rule.

(a) The Court considered that there were only two possibilities as to the Tribunal's chain of reasoning in deciding to dismiss the Delay Claim and Rating Claim: either that chain of reasoning adopted one of the defendants' defences in the arbitration or it did not.[21] Regardless of which possibility, there was a clear breach of natural justice by the Tribunal:

16 Sai Wan Shipping Ltd v Landmark Line Co Ltd [2022] 4 SLR 1302 at [64].

17 Sai Wan Shipping Ltd v Landmark Line Co Ltd [2022] 4 SLR 1302 at [67], [69].

18 Sai Wan Shipping Ltd v Landmark Line Co Ltd [2022] 4 SLR 1302 at [65].

19 Sai Wan Shipping Ltd v Landmark Line Co Ltd [2022] 4 SLR 1302 at [74], [77].

20 [2022] 3 SLR 447.

21 BZV v BZW [2022] 3 SLR 447 at [208].

(i) The first possibility was that the Tribunal dismissed the Delay Claim for some reason other than the defendant's prevention principle defence and dismissed the Rating Claim for some reason other than the defendant's estoppel defence. If so, this meant that the Tribunal dismissed each of the plaintiff's claims for reasons completely unconnected to the defendants' defences, and this was a clear breach of the fair hearing rule.[22]

(ii) The second possibility was that the Tribunal dismissed the Delay Claim because it adopted the defendants' prevention principle defence in its chain of reasoning and dismissed the Rating Claim because it adopted the defendants' estoppel defence in its chain of reasoning. Yet, in relying on each defence, the tribunal failed to apply its mind at all to the essential issue of causation (as regards the prevention principle defence) and the existence of a representation (as regards the estoppel defence).[23]

(b) On both claims, if the Tribunal had applied its mind to the parties' cases and the essential issues arising from the parties' arguments, it certainly could have found in favour of the plaintiff on both the Delay Claim and Ratings Claim. The Tribunal's breach of natural justice on both claims thus caused real prejudice to the plaintiff.[24]

The High Court's decision to set aside the award was upheld by the Singapore Court of Appeal.[25]

On the other hand, the fair hearing rule does not mandate the setting out of a party's full arguments in the award to show that the tribunal had understood and considered the material put in the course of the arbitration. Just because a party's full arguments have not been set out in the award does not mean that there is a denial of natural justice. The case of *Year Sun Chemitanks Terminal Corp v Gunvor Singapore Pte Ltd*[26] makes this point.

In this case, the General Division of the Singapore High Court dismissed the claimant's application to set aside the award, as it found that the Arbitrator had considered and understood the thrust of the claimant's arguments and there was no *"clear and virtually inescapable"* inference that the Arbitrator had failed to consider the arguments.

---

22 BZV v BZW [2022] 3 SLR 447 at [209].

23 BZV v BZW [2022] 3 SLR 447 at [210].

24 BZV v BZW [2022] 3 SLR 447 at [213].

25 BZW v BZV [2022] 1 SLR 1080.

26 [2021] 3 SLR 1271.

The Court stated that if the claimant intended to advance a particular argument on certain issues in the arbitration proceedings, it was incumbent on the claimant to raise the point clearly before the Tribunal at the material time, but the claimant did not do so.[27] Further, the Arbitrator's decision was well within the ambit of the wide discretionary powers of the Arbitrator to determine matters pertaining to procedure and evidence; what the Arbitrator had done was within the range of what a reasonable and fair-minded tribunal in the same circumstances might have done.[28]

B. Party applying to set aside award had been unable to present his case: Article 34(2)(a)(ii) of the Model Law

If an arbitration had progressed in a particular manner such that a party was unable to present his case to the tribunal, an award made under such circumstances may well be set aside pursuant to Art 34(2)(a)(ii) of the Model Law. This ground is commonly invoked alongside the ground of breach of natural justice for setting aside, as the circumstances for both grounds tend to be fairly similar. The threshold for succeeding on this ground would appear to be fairly high, however, as the cases show.

Take for example *CNQ v CNR.*[29] This case concerned parties who were involved in two arbitrations before the same arbitrator. In both arbitrations, CNR claimed damages against CNQ for non-acceptance of goods under a contract. Each arbitration, however, involved a different period, and there were other differences such as CNQ's successful reliance on *force majeure* in the Second Arbitration to excuse non-acceptance for two months of the period. An award was made in favour of CNR for both arbitrations, with the same measure of damages applied.

CNQ applied to the General Division of the High Court of Singapore to set aside both awards. It was unsuccessful in respect of the first award.[30] For the second award, CNQ argued that the Arbitrator had (i) failed to attempt to understand the new evidence and contentions in the Second Arbitration; and (ii) prejudged the Second Arbitration, by being inclined to decide it in the same way as he had decided the First Arbitration.[31] The grounds relied upon were Art 34(2)(a)(ii) of the Model Law and Section 24(b) of the IAA.

---

[27] Year Sun Chemitanks Terminal Corp v Gunvor Singapore Pte Ltd [2021] 3 SLR 1271 at [45].

[28] Year Sun Chemitanks Terminal Corp v Gunvor Singapore Pte Ltd [2021] 3 SLR 1271 at [66].

[29] [2022] SGHC 267.

[30] Reported as CNQ v CNR [2021] SGHC 287.

[31] CNQ v CNR [2022] SGHC 267 at [4].

CNQ's arguments failed.

(a) In respect of the first argument, the Court held that the Arbitrator did not make any mistaken conclusion that led him to disregard CNQ's contention for some non-spot price. This was because CNQ did not contend for a non-spot price in the first place – both parties sought to use spot prices in their respective damages computations, and the arbitrator had gone along in that direction.[32] Further, there were several areas in the Second Award which showed that the Arbitrator had considered the pricing data which was put to the Tribunal, and the use which CNQ's expert made of it.[33]

(b) In respect of the second argument, CNQ's justification was that the Arbitrator had prejudged by failing to attempt to understand two issues: of the appropriate method to determine the market price of preforms, and of whether CNR bore a duty to prove its efforts to mitigate.[34] The Court held that the Arbitrator had, in respect of each of the three methods put forth by CNQ's expert for the estimation of market prices for preforms, attempted to understand each method and there was no failure or reluctance to attempt understanding each method.[35] There was also no failure by the Arbitrator to attempt to understand CNQ's new evidence and contentions in the Second Arbitration on the issue of mitigation, before then deciding the issue in the same way that he had in the First Arbitration.[36]

What is notable is that in reaching its findings that the Arbitrator had dealt with CNQ's case at length and had not prejudged, the Court in *CNQ v CNR* had carefully scrutinised not just the hearing transcripts, but the First Award and Second Award in particular as well. This highlights the importance for a tribunal to set out its reasoning for its findings clearly and coherently and (if necessary) in detail, in its award. That way, it cannot be said that the tribunal had not understood the case put before it by the parties such that the award should be set aside. This is to be contrasted with the problematic chain of reasoning in *BZV v BZW,* above.

The importance for a tribunal to clearly and coherently set out its chain of reasoning for its findings is again illustrated by the case of *CMJ v CML*.[37] CMJ sought to set aside an award on the basis that they had not been given a full opportunity to present their case. In the award, the Tribunal had dismissed all of CMJ's claims, and upheld CML's counterclaim to a limited extent. CMJ's reasons for seeking to set aside were as follows:

---

32 CNQ v CNR [2022] SGHC 267 at [27].

33 CNQ v CNR [2022] SGHC 267 at [28].

34 CNQ v CNR [2022] SGHC 267 at [56].

35 CNQ v CNR [2022] SGHC 267 at [33]-[43].

36 CNQ v CNR [2022] SGHC 267 at [44]-[52].

37 [2022] 3 SLR 319.

(a) The witness statements of two of CMJ's witnesses had not been admitted in the arbitration. These witness statements contained evidence that pertained to certain issues on which factual findings had been made. The failure to admit these statements meant that CMJ had been denied the opportunity to properly respond to CML's evidence and CMJ had suffered real prejudice.[38]

(b) The Tribunal had denied CMJ's expert of the opportunity to respond by way of a full written report to the joint expert report tendered.[39]

(c) The Tribunal had failed to apply its mind to an important aspect of CMJ's submissions, as it had come to a conclusion without making a finding as to whether CML was under a specific kind of duty on the facts of the case. This was directly relevant to the issue of whether CML had breached their obligations to CMJ.[40]

The Singapore International Commercial Court dismissed the application.

(a) On the first ground, the Court held that CMJ's witness had been given the opportunity at the evidentiary hearing to adduce the evidence that they say should have been admitted, but the witness did not do so. If there were further materials, these should have been put before the Tribunal and not left to be placed before the court in a setting-aside application.[41]

(b) On the third ground, the Court held that the issue of whether CML's conduct constituted a breach of their obligations under certain documents had indeed been raised before the Tribunal. It was implicit through the Tribunal's reasoning that the Tribunal had considered the respective arguments and submissions by the parties on this point. There was no failure in the award to properly address this issue.[42]

(c) On the second ground, the Court held that the Tribunal had acted in a way that was both fair and reasonable in the circumstances of the case. The Court considered the fact that the Tribunal had (i) anticipated in its second procedural order that further evidence might have to be adduced to rebut matters that arose as part of the Rejoinder and that this was to be done by way of oral evidence at the hearing; (ii) allowed CMJ to introduce 10 additional Chinese law authorities; and (iii) allocated an extra 1.5 hours to CMJ for oral presentations by their experts and a total of 4 hours for presenting their case so as to be able to deal with issues that arose as part of the Rejoinder and that these issues were then canvassed fully in written closing submissions. The Court also reviewed the transcripts of the evidentiary hearing and was satisfied that the Tribunal did not rush CMJ's expert – rather, the Tribunal was merely moving matters along in accordance with the timetable for the hearing.[43]

---

38 CMJ v CML [2022] 3 SLR 319 at [43].

39 CMJ v CML [2022] 3 SLR 319 at [44].

40 CMJ v CML [2022] 3 SLR 319 at [74].

41 CMJ v CML [2022] 3 SLR 319 at [69]-[70].

42 CMJ v CML [2022] 3 SLR 319 at [73]-[82].

43 CMJ v CML [2022] 3 SLR 319 at [91]-[92].

CMJ v CML also shows how crucial it is for a tribunal to be alive to the matters raised throughout the course of arbitration proceedings, and to be flexible in its management of an arbitration. If the tribunal in *CMJ v CML* had not recognised that there were other matters that potentially required addressing in subsequent stages of the arbitration, and had not given CMJ extra time and opportunity to present their case, it is possible that there might be an issue as to whether the matter had been fairly and properly heard.

It is to be borne in mind that being alive to the matters raised in an arbitration also means being alive to the true positions of the parties, even if the positions may not have been too clearly pleaded. The tribunal is not responsible for how parties put forth their cases, and so long as an award had been made on the basis of the information put to the tribunal, the award will unlikely be disturbed by the courts.

CIM v CIN[44] illustrates this. CIN (the buyer) commenced arbitration against CIM (the seller) for damage for failing to deliver the contracted amount of goods. CIM's defence was that it was not obliged to deliver a portion of the goods, as conditions precedent in respect of the delivery had not been satisfied. In response to this, CIN argued that CIM had through its own failures prevented the satisfaction of the conditions precedent, and that it was not entitled to rely on these failures to excuse the non-delivery (the "prevention principle").

Notably however, CIN's pleadings did not actually plead the prevention principle – its pleadings only said that it was *"unrealistic"* for CIM to suggest that CIN was able to proceed with nominating the performing vessel.[45] This led to CIM misunderstanding CIN's arguments to be on the basis of anticipatory breach, and CIM proceeded in the arbitration on the basis of this misunderstood position. It was only in its final written reply closing submissions that CIN expressly referred to the prevention principle. The Tribunal accepted CIN's case, and made its award in favour of CIN (the "Finding").

CIM applied to set aside the award on the basis that there was a breach of the rules of natural justice, CIM had been deprived of an opportunity to present its case, and the Tribunal's findings went beyond the scope of submission to arbitration.

The General Division of the Singapore High Court found that, on an objective view of the materials before the Tribunal, the prevention principle was brought into play by CIN's Statement of Reply and was also consistently raised throughout the course of the arbitration even before CIN filed its written reply closing submissions. So, the Tribunal was entitled to make the Finding, which rested on the prevention principle.[46] Whether or not CIM's counsel genuinely misunderstood CIN's pleadings, or deliberately

---

[44] [2021] 4 SLR 1176.

[45] CIM v CIN [2021] 4 SLR 1176 at [8].

[46] CIM v CIN [2021] 4 SLR 1176 at [59].

mischaracterised them, was hence irrelevant.[47] It was clear that the Tribunal understood that from the pleadings, the opening, the course of the evidence-taking and the submissions, that CIN did rely on the prevention principle, and if CIM wished to succeed it would have to deal with the prevention principle (which it did not do).[48]

C. Award exceeds scope of submission to arbitration: Article 34(2)(a)(iii) of the Model Law

In arbitral proceedings, the scope of submission is typically defined by what is set out in the parties' pleadings and submissions which would set out the issues to be determined. Needless to say, it is only within the scope of the issues raised that a tribunal should make its findings, or else the entire objective of having an arbitral tribunal decide on issues in dispute would be pointless and any award made beyond the scope of submission will have to be set aside. What is considered to be within or beyond the scope of submission, however, is nuanced and not so straightforward, as the cases show.

In *CAJ v CAI,*[49] the award was successfully set aside on the basis that the Tribunal had exceeded the scope of submission to arbitration.

The Tribunal had rendered an award on its acceptance of the claimants' extension of time defence ("EOT Defence"), such that the respondent was only entitled to receive liquidated damages for a shorter period. The respondent applied to the Singapore High Court to partially set aside the award on the basis that: (a) by ruling upon and allowing the EOT Defence, the Tribunal had exceeded the scope of the parties' submission to arbitration; and/or (b) the award had been made in breach of natural justice. This was allowed by the High Court.

The respondent appealed to the Singapore Court of Appeal, which reversed the High Court's decision such that the award was set aside. The Court of Appeal held that:

(a) The EOT Defence was based on "General Condition 40", which was a contractual provision of the agreements between the parties. This defence was therefore necessarily fact-sensitive and was not merely an issue which arose naturally from the arbitration. Evidence had to be led to satisfy the contractual conditions stipulated and to plead such a defence. However, none of the conditions were pleaded or even canvassed by the appellants in the course of the Arbitration until the appellants' written closing submissions.[50] Given that the EOT Defence had not been expressly raised in the pleadings,the Lists of Issues or the Terms of Reference, the EOT Defence cannot be considered to be within the scope of the Arbitration.[51]

47 CIM v CIN [2021] 4 SLR 1176 at [69].

48 CIM v CIN [2021] 4 SLR 1176 at [71].

49 [2022] 1 SLR 505.

50 CAJ v CAI [2022] 1 SLR 505 at [29]-[32].

51 CAJ v CAI [2022] 1 SLR 505 at [43]-[46].

(b) This was a classic case of a breach of natural justice. The EOT Defence was a completely new defence, and the respondent did not have reasonable notice that it was necessary to engage with this issue of the EOT Defence until the EOT Defence belatedly appeared in the appellants' written closing submissions, and so the respondent did not have a fair and reasonable opportunity to respond to the EOT Defence. If the respondent had been given the opportunity to lead further evidence, test the appellants' evidence and tender further legal submissions, this could have reasonably made a difference to the Tribunal's determination.[52]

(c) Further, the respondent had in its written closing submissions clearly set out the reasons why it objected to the Tribunal's consideration of the EOT Defence. Even though the Tribunal had prior experience dealing with extension of time claims for other construction projects, this was immaterial in the present case, as the Tribunal did not have the benefit of pleadings, specific evidence (both factual and expert) and arguments to determine the proper extension of time to be granted in the present case. The Tribunal's failure to inform the parties as to how its "experience" would bear on the extension of time issue was another classic case of breach of natural justice.[53]

Likewise in *Phoenixfin Pte Ltd v Convexity Ltd,*[54] the Singapore Court of Appeal agreed with the Singapore High Court's finding that Convexity did not have a full opportunity to address the issue of a penalty, and so upheld the High Court's decision for the award to be set aside on the basis that the award exceeded the scope of the reference to arbitration.

Phoenixfin had commenced arbitration against Convexity seeking payment of a "Make Whole Amount", which was a fee stipulated in the contract between the parties that Phoenixfin would have to pay Convexity if Convexity terminated the contract early. In the arbitration, Phoenixfin did not plead in its original defence that the Make Whole Amount was a penalty under English law (the "Penalty Issue"). When Phoenixfin applied to amend its defence to include the Penalty Issue, Convexity objected to the amendment, and the tribunal disallowed the amendment application. Later on, the tribunal issued an award dismissing Convexity's claim on the basis that the Make Whole Amount was not allowed as it was a penalty.

The Singapore High Court set aside part of the Award on the basis that there had been a breach of natural justice, that the arbitral tribunal had exceeded the scope of submission to arbitration, and had acted contrary to the arbitral procedure agreed.

---

52 CAJ v CAI [2022] 1 SLR 505 at [54].

53 CAJ v CAI [2022] 1 SLR 505 at [55].

54 [2022] 2 SLR 13.

This was upheld on appeal to the Court of Appeal, which held that:

(a) There was a breach of natural justice. Convexity did not have the full opportunity to address the Penalty Issue as it was not pleaded and was not an active issue until the Tribunal had attempted to re-introduce it.[55] Because the Penalty Issue was not an active issue, even if Convexity had notice of the Penalty Issue, this did not mean that Convexity had the burden of leading evidence on the issue.[56] The Tribunal's ruling did not clearly show that the Penalty Issue had been admitted into the scope of the arbitration.[57]

(b) The Tribunal had unilaterally reintroduced the Penalty Issue at the oral reply hearing, but this could not override the fact that the Tribunal had indeed dismissed the amendment application seeking to include the Penalty Issue earlier on, such that the Penalty Issue was not brought into the arbitration.[58] The Tribunal was not entitled to bring the Penalty Issue up again, when the inclusion of the Penalty Issue as an issue to be decided in the arbitration had been specifically rejected – this was an unexpected and unpleasant surprise to Convexity as it did not have a fair opportunity to address the issue.[59]

Phoenixfin Pte Ltd v Convexity Ltd shows that it is imperative that a tribunal exercise care in considering parties' applications and any other issues raised in the course of the arbitration. If the tribunal has taken a certain course of action earlier on in the proceedings (e.g. disallowing the inclusion of certain issues) for some justifiable reason, the tribunal ought to be consistent and not later on act in a way that would run contrary to the earlier course of action taken (e.g. introducing the issues which were excluded earlier on) and render its award on such basis. Not only would the eventual award be problematic for having been decided on something not within the scope of submission to arbitration, there may also be an issue of impartiality. The tribunal would however have to be very careful not to disregard issues particularly if they have already been included in pleadings. This is because pleadings play a significant role in setting out the scope of submission to arbitration, by providing clarity as to the issues being raised.

It should however be noted that an award will not be considered as being out of the scope of submission to arbitration just because the tribunal's decision was based on some point which a party did not regard as a key point of its case. This is illustrated by the case of *CDM v CDP.*[60]

In *CDM v CDP,* an award had been made for the appellants to pay the respondent a sum which was stated in the contract to be a fourth instalment of the total contract sum (the "Fourth Instalment"). The appellants applied to the Singapore High Court to set aside the part of the award relating to the

55 Phoenixfin Pte Ltd v Convexity Ltd [2022] 2 SLR 13 at [41].

56 Phoenixfin Pte Ltd v Convexity Ltd [2022] 2 SLR 13 a [43].

57 Phoenixfin Pte Ltd v Convexity Ltd [2022] 2 SLR 13 a [45].

58 Phoenixfin Pte Ltd v Convexity Ltd [2022] 2 SLR 13 a [49].

59 Phoenixfin Pte Ltd v Convexity Ltd [2022] 2 SLR 13 a [53].

60 [2021] 2 SLR 235.

respondent's claim for the Fourth Instalment, on the basis that the award had been made in excess of the tribunal's jurisdiction and in breach of the right to present their case. The appellants' application was dismissed, and the appellants appealed to the Singapore Court of Appeal. The Singapore Court of Appeal disagreed with the appellants' position.

The Court of Appeal held that the question of when the Fourth Instalment was dependent on the issue as to whether the parties had approved the second launch of the project. This particular issue had been placed squarely before the Tribunal, as could be seen from the extensive attention to this issue in the parties' pleadings,[61] the agreed list of issues,[62] parties' opening statements,[63] and in evidence put forth during the evidentiary hearing.[64]

The Court of Appeal also expressed that, just because a party had formed the view that the tribunal had decided the dispute on a matter which the party perceived as not being the "focus" or "crux" of the dispute, was not a basis for the party to then assert that the tribunal had acted in excess of jurisdiction. So long as the issue did in fact fall within the scope of parties' submission to arbitration, a tribunal deciding a dispute based on the said issue was "neither here nor there".[65]

Indeed, in *CJA v CIZ,*[66] the Singapore Court of Appeal held that an arbitral tribunal was entitled to arrive at conclusions that were different from the views adopted by parties, provided that the conclusions were based on evidence that was before the tribunal, and that it consulted the parties where the conclusions might involve a dramatic departure from what had been presented to it.[67]

Hence in that case, the Court of Appeal held that the findings of the Tribunal did not involve a new difference outside the scope of parties' submission to arbitration. This was because the Tribunal had prompted parties to consider the particular issue in question,[68] parties had indeed submitted on this issue and the respondent had sufficient opportunity to canvass evidence on the contextual dimension and commercial purpose of the agreement in question,[69] and the chain of reasoning adopted by the Tribunal in arriving at its findings also bore sufficient nexus to parties' cases, so the issue would have arisen by reasonable implication on parties' pleadings or, at the very least, been brought to the parties' notice.[70]

---

61 CDM v CDP [2021] 2 SLR 235 at [20]-[24].
62 CDM v CDP [2021] 2 SLR 235 at [25]-[29].
63 CDM v CDP [2021] 2 SLR 235 at [30]-[32].
64 CDM v CDP [2021] 2 SLR 235 at [33].
65 CDM v CDP [2021] 2 SLR 235 at [44].
66 [2022] 2 SLR 557.
67 CJA v CIZ [2022] 2 SLR 557 at [72].
68 [CJA v CIZ [2022] 2 SLR 557 at [57]-[59].
69 CJA v CIZ [2022] 2 SLR 557 at [77].
70 CJA v CIZ [2022] 2 SLR 557 at [78].

D. Arbitral procedure not in accordance with parties' agreement: Article 34(2)(a)(iv) of the Model Law

If the procedure of an arbitration is not conducted according to what was agreed between the parties, an award made in the arbitration may be set aside. This respects the concept of party autonomy, which is fundamental to arbitration. But just because a party thinks an arbitral procedure was not followed does not mean that the courts will easily agree that this was indeed so. The cases show that so long as the tribunal adopted a fair construction of the agreed procedure and conducted the arbitration in accordance with its construction of the procedure and the applicable procedural rules of the arbitration, the courts will be reluctant to set aside an award made on this ground of the Model Law.

In *CEF v CEH,*[71] the appellant CEF argued that a particular aspect of the award should be set aside under Art 34(2)(a)(iv) of the Model Law, on the basis that it was uncertain, ambiguous, impossible and/or unenforceable and therefore not in accordance with the parties' agreement, the ICC Rules and/or the Model Law.[72]

The Singapore Court of Appeal rejected the appellant's arguments on a few fronts.

(a) It does not make sense to suggest that an award can be set aside on the basis that it is "unenforceable". An award becomes unenforceable because it is set aside; it is not set aside because it is unenforceable.[73]

(b) Under the procedural rules governing the arbitration, the Tribunal's primary duty was to ensure that the procedural requirements for enforcement were satisfied – which included ensuring that the procedural rules governing the arbitration are satisfied, signing and dating the award, and arranging for the award to be delivered to the parties in the manner laid down by the relevant rules to the arbitration. So long as the Tribunal showed that it had used *"every effort"* to ensure the enforceability of the award in the jurisdictions wherein the award can reasonably be expected to be enforced, the Tribunal would be considered as having discharged its duty as regards the substantive requirements for enforcement.[74]

(c) Uncertainty or ambiguity is not a basis to set aside an award under Art 34(2)(a)(iv) of the Model Law.[75] In any event, the appellant's arguments about the contents of the award seemed to the Court to really be about impossibility/workability of the award,[76] not uncertainty or ambiguity. In which case, the Court stated that impossibility or unworkability was not a basis to justify setting aside an award, much less under Art 34(2)(a)(iv) of the Model Law.[77]

---

71 [2022] 2 SLR 918.

72 CEF v CEH [2022] 2 SLR 918 at [31(a)(i)], [33].

73 CEF v CEH [2022] 2 SLR 918 at [35].

74 CEF v CEH [2022] 2 SLR 918 at [39].

75 CEF v CEH [2022] 2 SLR 918 at [43].

76 CEF v CEH [2022] 2 SLR 918 at [48].

77 CEF v CEH [2022] 2 SLR 918 at [52]. In any event, the Singapore Court of Appeal did not consider the award to be impossible or unworkable.

In *Lao Holdings NV and another v Government of the Lao People's Democratic Republic,*[78] the Singapore Court of Appeal expressly stated that as a general rule, the court will not revisit a tribunal's construction of an agreed procedure in an arbitral agreement entered into between the parties where the construction is open on the text of the agreement – so even if there may be more than one construction, and the court may think that another construction of the procedure is to be preferred over the tribunal's construction, the court will still accept the tribunal's construction.[79]

The Court of Appeal added that it is only where the tribunal adopts and acts upon a construction which is simply not possible on any reading of the text, that the tribunal will be considered to not have adhered to the agreed procedure. If so, the court will step in to determine the content of the agreed arbitral procedure.[80]

In this case, the Court of Appeal held that the Tribunals' construction of the particular text in question was open, having regard to the context in which the text was agreed to including the applicable arbitral rules. Since the Tribunals had adopted a construction which was open, the Tribunals were entitled to do so, and there was no basis for the Court to disturb the Tribunals' actions following their adoption of such a construction.[81]

E. Party under some incapacity: Article 34(2)(a)(i) of the Model Law

If a party was under some incapacity that impacted upon its ability to meaningfully participate in the arbitration, an award may be set aside for such reason, under Art 34(2)(a)(i) of the Model Law. This is a ground that is not commonly raised, however, and in *CPU v CPX,* [82] which was the only recent case in which this particular ground was relied on, the application was dismissed.

An award was made against the respondents in the arbitration. The respondents applied to the Singapore International Commercial Court to set aside the award, arguing that the first and second respondents had been under an incapacity as a result of mental conditions which impended their ability to make rational decisions especially at times of immense stress, and the arbitration agreements were invalid as they had been entered into under duress/coercion.[83] The respondents sought to rely on certain medical reports pertaining to the mental conditions of the first and second respondents in this regard.[84] The respondents also raised

78 [2023] 1 SLR 55.

79 Lao Holdings NV and another v Government of the Lao People's Democratic Republic [2023] 1 SLR 55 at [102].

80 Lao Holdings NV and another v Government of the Lao People's Democratic Republic [2023] 1 SLR 55 at [102].

81 Lao Holdings NV and another v Government of the Lao People's Democratic Republic [2023] 1 SLR 55 at [138].

82 [2022] 4 SLR 314.

83 CPU v CPX [2022] 4 SLR 314 at [7].

84 CPU v CPX [2022] 4 SLR 314 at [58].

an issue about how the Tribunal's refusal to allow such medical reports was a breach of the rules of natural justice.[85]

The Court dismissed the setting-aside application. On the issue of the respondents' mental conditions and medical reports:

(a) The Court held that the Tribunal's decision to exclude the medical reports was an exercise of a case management power that was within the Tribunal's jurisdiction, and the Tribunal's reasons for reaching that decision were reasonable and fair-minded.[86] Even if the Tribunal had allowed the medical reports to be admitted in evidence, the contents of the medical reports lacked legal or factual weight and would not have reasonably made a difference to the findings of the Tribunal.[87]

(b) Crucially, although the medical reports made general observations about the first and second respondents' mental conditions and treatment history, there was nothing in the reports to suggest that they were suffering from mental illnesses of such severity and extent, that they were incapable of understanding the effect of the settlement contracts (or of making a rational decision) at the material time.[88]

F. Fraud/corruption: Section 24(a) of the IAA

An award can also be set aside if it can be shown that the making of the award had been induced or affected by fraud/corruption. The threshold for establishing fraud is a very high one, however, and the case of *CLX v CLY* [89] is instructive in this regard.

In *CLX v CLY,* the crux of the applicant's argument on the issue of fraud was that the first defendant had dishonestly concealed and/or gave false evidence to the Tribunal regarding the alleged actual condition of the overhead cranes (the "Overhead Cranes") which was the subject of the parties' dispute.[90] According to the applicant, the first defendant must have known of the condition of the Overhead Cranes since they were dismantled by the first defendant's contractor and remained in the first defendant's possession and care throughout the Arbitration. It was dishonest for the first defendant to conceal that the Overhead Cranes had not just been dismantled, but had been dismembered/destroyed and with parts either missing or cannibalised. It was also dishonest of the first defendant to falsely represent to the Arbitrator that the Overhead Cranes had merely been dismantled and had not been tampered with pending the outcome of the Arbitration.[91]

---

85 CPU v CPX [2022] 4 SLR 314 at [7].

86 CPU v CPX [2022] 4 SLR 314 at [60].

87 CPU v CPX [2022] 4 SLR 314 at [62].

88 CPU v CPX [2022] 4 SLR 314 at [63].

89 [2022] SGHC 17.

90 CLX v CLY [2022] SGHC 17 at [6].

91 CLX v CLY [2022] SGHC 17 at [60].

The General Division of the Singapore High Court dismissed the application.

(a) The Court was of the view that the Arbitrator did not make any factual findings as to the condition of the Overhead Cranes such as to be unaware of the conditions of the cranes. Even if the Arbitrator was indeed unaware of the conditions, the plaintiff did not meet the requirements set out in *Bloomberry*[92] and prove that the first defendant had deliberately concealed material information from the Arbitrator or given false evidence to mislead the Arbitrator.[93]

(b) The Court also found that the applicant had not established a convincing case of dishonesty or bad faith on the part of the defendant. If there was evidence that the first defendant had intentionally destroyed or cannibalised the Overhead Cranes or parts thereof, this would have provided strong support for the allegation that there was a deliberate misrepresentation to the Arbitrator and/or a deliberate concealment from the Arbitrator of the actual condition of the Overhead Cranes – but there was no such evidence.[94] Even any evidence of negligence or carelessness by the first defendant in preventing harm to the Overhead Cranes would still not be sufficient to show deliberate concealment or the intention to give false evidence.[95] Just because the first defendant must or ought to have known about the condition of the Overhead Cranes because the Overhead Cranes were dismantled by its contractor and remained in its possession and care throughout the Arbitration was also insufficient to demonstrate fraud.[96]

It should be noted that what was particularly key to the dismissal of the application was how the applicant did not satisfy the high threshold for establishing fraud. Indeed, the Court noted that while perjury and the deliberate suppression or withholding of documents in an arbitration can amount to obtaining an award by fraud, where fraud is alleged, *"strong and cogent evidence"* has to be adduced and the court will not infer a finding of fraud.[97]

G. Public policy: Article 34(2)(b)(ii) of the Model Law

An award may be set aside if it contravenes the public policy of the state in which the award is sought to be set aside. The test is whether the upholding of the arbitral award would *"shock the conscience"*; is *"clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public"*; or *"where it violates the forum's most basic notion of morality and justice"*.[98] Needless to say, this public policy ground under Art 34(2)(b)(ii) of the Model Law is a very narrow ground.

---

92 Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another [2021] 3 SLR 725. The key principles from the requirements in Bloomberry are set out at [59] of CLX v CLY [2022] SGHC 17.

93 CLX v CLY [2022] SGHC 17 at [66], [70].

94 CLX v CLY [2022] SGHC 17 at [75].

95 CLX v CLY [2022] SGHC 17 at [76].

96 CLX v CLY [2022] SGHC 17 at [79].

97 CLX v CLY [2022] SGHC 17 at [58]-[59].

98 PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA [2007] 1 SLR(R) 597 at [59].

An interesting example where a setting aside application on the public policy ground was dismissed is *CBX v CBZ*.[99] The case concerned an agreement whose governing law was Thai law with arbitration under the ICC Rules, and seated in Singapore. Arbitration was commenced as a result of unpaid instalments. The Tribunal rendered its award in favour of the defendants, ordering that the plaintiffs pay the defendants the principal sums *plus* compounded interest (the "Compound Interest Orders"). The plaintiffs then filed an application to set aside the award on the basis that in coming to its decisions, the Tribunal exceeded its jurisdiction, failed to afford the plaintiffs a reasonable opportunity to present their case, and contravened Singapore public policy.

On the point of Singapore public policy, the plaintiff's case was that the Compound Interest Orders contravene Thai mandatory law (as Thai law does not permit the awarding of compound interest), and it would be against public order and good morals in Thailand to enforce the Compound Interest Orders. As Thailand is a state with which Singapore maintains friendly relations and the Compound Interest Orders constitute "palpable and indisputable illegality" under Thai law,[100] the Singapore court should set aside the Compound Interest Orders

The Court held that the award was not contrary to Singapore public policy.

(a) The awarding of compound interest was not against Singapore public policy as Sections 12(5) and 20 of the IAA authorise tribunals to award compound interest.[101] This was merely a situation of an erroneous exercise of the Tribunal's power, where the Tribunal was fully aware that Thai law prohibited compound interest in most (but not all) situations, and having considered the issue, the Tribunal then took the wrong view that Thai law allowed annualised compound interest on moneys due under the sale and purchase agreements, as an exception.[102]

(b) Whether or not the Compound Interest Orders were enforceable as a matter of Thai public policy was a question best left to the Thai court to determine, if the defendants ever sought to enforce the Compound Interest Orders in Thailand. Save in a case of obvious criminal conduct, the Singapore court should not have to discern what a Thai court would do on an enforcement action and then reason backwards that, because the Thai court is likely to refuse enforcement as a matter of Thai "public policy", the Singapore court should set aside the Compound Interest Orders, in the interest of comity, as contrary to Singapore public policy.[103]

---

98 PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA [2007] 1 SLR(R) 597 at [59].

99 [2020] 5 SLR 184.

100 CBX v CBZ [2020] 5 SLR 184 at [52].

101 CBX v CBZ [2020] 5 SLR 184 at [52].

102 CBX v CBZ [2020] 5 SLR 184 at [58].

IV. Remission of the award instead of setting aside

In certain situations, the Singapore courts may suspend the setting-aside proceedings and remit the award to the same tribunal pursuant to Article 34(4) of the Model Law instead, in order for the tribunal to resume the arbitral proceedings, or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside. Essentially, this can be seen as the courts' way of giving the tribunal a second chance to clarify/reconsider certain aspects of its award which have been identified to be problematic and at risk of being set aside.

Remission does not come easily, however. If there are too many areas of challenge in the award (i.e. there are too many problematic issues identified for setting-aside), little to no confidence in the tribunal being able to approach the issues of challenge in a balanced and fair way, and/or no real benefits to the parties (usually in terms of time and costs) for the matter to be reviewed by the tribunal, it is unlikely that the Singapore courts will agree to remit the matter to the tribunal for reconsideration.

An example of a refusal to remit the matter back to the Tribunal as an alternative to setting aside was Sai Wan Shipping Ltd v Landmark Line Co, Ltd – the General Division of the Singapore High Court expressly refused to do so as this was *"hardly a case of mere oversight in failing to give a party a reasonable opportunity to be heard"*.[104]

V. Conclusion

It is never welcome news for any tribunal to be faced with the possibility of having its own award set aside.

Thailand's Arbitration Act B.E. 2545 (A.D. 2002) (the "Act") is largely modelled after the Model Law, with Section 40 of the Act setting out various grounds similar to those in the Model Law for which an award may be set aside by application to the domestic courts. The grounds set out in Section 40(1) and (2) of the Act closely correspond to the grounds set out in Article 34(a) and (b) of the Model Law respectively.

Ultimately, at the crux of every setting-aside application is the question of whether natural justice was accorded to each of the parties – whether they were properly and fairly heard, and treated equally alongside the other party to the dispute. Indeed, in a way it can be said that natural justice is the overarching umbrella over the various grounds for setting-aside. While each case turns on its own facts, so long as every tribunal bears in mind the two pillars of natural justice over the course of an arbitration, it stands to reason that an award that is later made will be able to stand up to scrutiny by the courts.

---

103 CBX v CBZ [2020] 5 SLR 184 at [61].

104 Sai Wan Shipping Ltd v Landmark Line Co Ltd [2022] 4 SLR 1302 at [78].

Given the wide-spread and increasing adoption in Thailand of international arbitration (under the auspices of THAC, SIAC or HKIAC etc) as a method of resolving disputes, we hope that this article can serve as a valuable guide to Thai legal practitioners, Thai legal counsel and THAC arbitrators and tribunals in understanding certain pitfalls which may occur during the course of arbitration proceedings, so as to increase the enforceability of the arbitral award.