

# RECENT SINGAPORE DECISIONS ON INTERNATIONAL ARBITRATION

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## ABSTRACT

*International arbitration has developed in Singapore due to the conducive climate provided to arbitration by the judiciary. Unlike their Indian counterparts who are notorious for following an interventionist policy in international arbitrations, Singaporean courts have managed the delicate balancing act between intervention and support. Judicial decisions in Singapore are characterised by their clear understanding of the role that international arbitrations play in commerce and the policy underlying international laws on arbitration. The article discusses some of the recent decisions of the Singapore judiciary which highlight this trend and contrasts it to India.*

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## I. INTRODUCTION

Singapore Courts have a strong record of supporting international arbitrations. They have developed considerable expertise and understanding of the role which arbitration plays in the resolution of international commercial disputes and of the policies underlying the supporting international laws such as the New York Convention and the UNCITRAL Model Law. This does not mean that the courts turn a blind eye to any problem exposed in an arbitration nor does it mean that the courts will enforce all foreign awards or will refuse to set aside awards made in international arbitrations held in Singapore. The Singapore courts have established an appropriate balance between intervention and support which, in general, displays an appreciation of the importance of upholding arbitrations except in very clear cases where judicial recourse is clearly warranted.

Below are some recent decisions of the Singapore courts which illustrate the approach adopted in that country. Where appropriate, references made to the corresponding position in India, by way of contrast.

## II. THE PUBLIC POLICY EXCEPTION TO CHALLENGE AWARDS AND RESIST ENFORCEMENT

'Public policy' forms one of the grounds to set aside an arbitral award under Article 34 of the UNCITRAL Model Law on international commercial arbitration. It forms a ground to resist the recognition and enforcement of an award under Article 36 of the Model Law. It also forms one of the exceptions under Article V (2) (b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards to the enforcement of a foreign arbitral award.

In the context of the Model Law, every jurisdiction is entitled to define and give effect to its own public policy. It has, therefore, lent itself to various definitions ranging from a state's basic notions to morality and justice to patent illegality in the arbitral award. For more reasons than this alone, it was probably aptly described by Lord Burrough in the early 19<sup>th</sup> century as "*an unruly horse*" which "*once you get astride it you never know where it will carry you*".<sup>1</sup>

India and Singapore both adopted the Model Law. India enacted the Arbitration and Conciliation Act, 1996 (Hereinafter, "Indian Act"). In doing so,

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1 Richardson v. Mellish, (1824) 2 Bing 229, 252 [Court of Common Pleas, England].

India adopted the Model Law in large parts while providing several modifications to enable it to cover both domestic and international arbitrations by way of a single legislation.

Singapore, on the other hand, adopted the Model Law in entirety with minor modifications for international arbitrations in its International Arbitration Act (Cap 143A) (Hereinafter, "IAA"). It enacted a separate legislation to provide for domestic arbitrations, the Arbitration Act (Cap 10) (Hereinafter, "AA").

Consequently, the public policy exemption forms a ground equally in India as well as Singapore to challenge an award or to resist the enforcement of a foreign award in those jurisdictions. However, the interpretations of this amorphous ground are a matter of some interest.

#### **A. India**

In 1961, India enacted the Foreign Awards (Recognition and Enforcement) Act to give effect to the New York Convention. Dealing with a challenge<sup>2</sup> to the enforcement of a foreign award rendered under the ICC Rules in Paris under that legislation, the Supreme Court of India took the view that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) the fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.

Owing to a 2003 decision of the Supreme Court of India,<sup>3</sup> the scope and ambit of 'public policy' for the purposes of a challenge to an award rendered in a domestic arbitration under Section 34 of the Indian Act was broadened. The Court now took the view that the decision and interpretation of the term 'public policy' in *Renusagar* must be limited to resisting the enforcement of foreign awards in India. On this basis, the Court proceeded to include an additional all-encompassing ground of 'patent illegality' as being a component of 'public policy' for the purposes of a challenge to an award rendered in India. In essence, this would cover all errors of law in an award.

In 2008,<sup>4</sup> the Supreme Court of India took the view that Section 34 of the Indian Act providing the grounds to set aside domestic awards was equally applicable

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2 *Renusagar Power Co. Ltd. v. General Electric Co.*, (1994) Supp. 1 SCC 644 [Supreme Court of India]. [Hereinafter, "*Renusagar*"]

3 *ONGC v. Saw Pipes*, (2003) 5 SCC 705 [Supreme Court of India]. [Hereinafter, "*Saw Pipes*"]

4 *Venture Global Engineering v. Satyam Computer Services*, (2008) 4 SCC 190 [Supreme Court of India].

to arbitrations seated outside India. Section 34 forms part of Part I of the Indian Act that largely incorporates the provisions of the Model Law on the conduct of arbitrations. Part II of the Indian Act codifies the New York and Geneva Conventions and provides for the recognition and enforcement of foreign awards in India. The only exception provided by the Court was the implied or express exclusion of Part I of the Indian Act. This followed an earlier decision of the Court in 2002.<sup>5</sup>

The direct and inevitable effect of these decisions is that an award rendered in a seat outside India is now capable of being set aside on grounds of public policy for being 'patently illegal' or containing an error of law. This was never the intention of the Model Law, and is overbroad and unfortunate.

There are, however, certain amendments proposed to the Indian Act which seek to add an Explanation to Section 34 to specify the scope of public policy as only constituting the three grounds originally intended to be made available to set aside a domestic award. There is also another amendment proposed to clarify that Part I of the Indian Act (of which Section 34 forms a part) will not apply to foreign arbitrations or awards except for the grant of interim measures of protection.

## B. Singapore

Singapore's legal system has constantly and strongly supported international arbitration, party autonomy and the finality of arbitral awards.

In *AJU v. AJT*,<sup>6</sup> claims were brought by the respondent against the appellant in arbitration in relation to a contract under which the appellant was required to stage a tennis tournament in Bangkok, Thailand for a term of five years. Subsequent to commencement of arbitration, the appellant made a complaint of fraud, forgery and use of a forged document against the respondent's sole director and two related companies to the Thai police. The Thai police commenced investigations.

During this period, the parties entered into a separate agreement agreeing to withdraw all criminal proceedings in consideration for payment of an amount of US\$ 470,000. Consequently, the complaint with the Thai police was withdrawn by the appellant and a cessation order was issued by the special prosecutor's office. Thai prosecution confirmed that a non-prosecution order was issued in respect of the charge of forgery on the basis that "*the evidence was not enough to prosecute*".

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5 Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105 [Supreme Court of India].

6 *AJU v. AJT*, (2011) SGCA 41 [Singapore Court of Appeal]. [Hereinafter, "*AJU*"]

The respondent however refused to terminate the arbitration proceedings on the basis of a mere statement because it was insufficient evidence and this meant that investigations could still be reactivated by new evidence. The appellant proceeded to apply to terminate the arbitration proceedings on the ground that parties had reached full and final settlement of all claims between them but was challenged by the respondent, who argued that the concluding agreement between them was invalid and unenforceable on the grounds of duress, undue influence and illegality.

The tribunal concluded that the concluding agreement was not illegal and that there was insufficient evidence to support any allegations of undue influence, duress and bribery. The tribunal further took the view that as long as the public prosecutor retained the power and right to continue with their investigations on forgery with whatever evidence they had or uncovered, the appellant's withdrawal of their complaint could not be said to be illegal. On this basis, by way of an interim award, the tribunal found that the arbitration proceedings had been terminated.

The High Court took the view that agreements to stifle prosecution, especially in relation to the withdrawal of charges of a non-compoundable offence, were contrary to public policy. In the context of these facts, the Court took the view that if the agreement was in furtherance of an illegal purpose under the law of place of performance, it would be contrary to the public policy of Singapore for the purposes of Article 34 of the Model Law. On this basis, the High Court set aside the award as being contrary to the public policy of Singapore.

On appeal, the key issue was whether the High Court was correct to have re-examined the tribunal's finding that the settlement agreement was valid.

The Court of Appeal first clarified that the concept of 'public policy' was the same in Singapore irrespective of whether it was being applied to test an award rendered in Singapore in a challenge or to an award rendered outside in an attempt to resist enforcement. The Court took the view that any award under Singapore's IAA was an award with an 'international focus' and must be treated as such. This by itself is in sharp contrast to the Indian Supreme Court's view in *Saw Pipes* on this issue.

The Court went on to adopt the more interventionist approach taken by the English decision in *Soleimany*<sup>7</sup> as opposed to the less interventionist approach in

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7 *Soleimany v. Soleimany*, (1999) QB 785 [Court of Appeals, England]. [Hereinafter, "*Soleimany*"]

*Westacre*.<sup>8</sup> In doing so, the Court clarified that it was entitled to decide for itself, as a matter of law, what the public policy of Singapore was and whether any agreement governed by Singapore law was illegal. The Court found that the High Court had chosen to set aside the award on the basis that the tribunal's factual finding that the concluding agreement did not require the appellant to do anything illegal and was therefore not an illegal contract, was incorrect. The Court took the view that such a finding of fact, whether correct or erroneous, would not engage the public policy of Singapore, as opposed to a finding of law. On this basis, the Court took the view that the High Court ought not to have reopened the tribunal's findings.

Interestingly, the Court also drew support from Section 19B(1) of the IAA which calls for the court to give deference to the factual findings of the tribunal.<sup>9</sup>

In an earlier decision,<sup>10</sup> the High Court was dealing with a challenge to an award arising out of a dispute between two Pakistani companies about a gas supply agreement. The arbitration was held in Singapore with English law as the governing law. The losing party applied to set aside the award on the ground that it was perverse and irrational and that the tribunal's interpretation of certain terms imposed impossible obligations upon it, and contained manifest errors of law.

The High Court took the view that the ground of perversity, unreasonableness and irrationality was not available to challenge an award independently in as much as the *Wednesbury* test<sup>11</sup> does not lend itself to challenging arbitral awards. Dealing specifically with the public policy argument put forth, the Court observed that a party had to have crossed a very high threshold and demonstrated egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice. Having failed to do so in that case, an ambiguous and generalized contention that the award was perverse or irrational could not, of itself, amount to a breach of public policy.

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8 *Westacre Investments Inc v. Jugoinport-SPDR Holding Co Ltd and Others*, (2000) 1 QB 288 [Court of Appeals, England]. [Hereinafter, "*Westacre*"]

9 §19B, International Arbitration Act (Cap 143A) reads as follows:

"19B.Effect of award —(1) An award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties and on any persons claiming through or under them and may be relied upon by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction."

10 *Sui Southern Gas Co Ltd v. Habibullah Coastal Power Co (Pte) Ltd*, (2010) 3 SLR 1 [High Court of Singapore].

11 The *Wednesbury* test of unreasonableness is commonly applied as a test in judicial review of the validity of administrative decisions. See *Associated Provincial Picture Houses Ltd v. Wednesbury Corp*, (1947) 2 All ER 680 [Court of Appeals, England]. [Hereinafter, "*Wednesbury*"]

### *Recent Singapore Decisions on International Arbitration*

Perhaps the most oft quoted decision of the Singapore court on the area is that of *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA*.<sup>12</sup> In that case, two awards were rendered in two separate SIAC arbitral proceedings between the same parties. *PT Asuransi* applied to set aside the second award on the basis that it conflicted with the first award and that it was in breach of Singapore public policy, relying on Section 19B of the IAA.

The Court of Appeal took the view that there were no public policy implications arising solely from conflicting arbitral decisions on the same dispute. The Court observed rather succinctly that the public policy of the State encompasses a narrow scope and can only operate where upholding the arbitral award would “shock the conscience” or 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”. In making this determination, the Court was of the view that errors of law or fact, *per se*, did not engage the public policy of Singapore under Article 34(2)(b)(ii) of the Model Law.

Interestingly, the Court of Appeal specifically refused to apply *Saw Pipes* that was placed reliance on before it by *PT Asuransi*. The Court took the view that, in contrast, the IAA, gave primacy to the autonomy of arbitral proceedings and allowed court intervention in only the prescribed situations. The Court also observed that *Saw Pipes* had not been accepted in New Zealand,<sup>13</sup> as being an overbroad view of what may constitute conflict with public policy for the purposes of Article 34 of the Model Law.

*PT Asuransi* has of course been subsequently followed as forming the essential statement of the courts’ approach in Singapore to the public policy exception under Article 34.<sup>14</sup>

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12 *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA*, (2007) 1 SLR (R) 597 [Singapore Court of Appeal]. [Hereinafter, “*PT Asuransi*”]

13 See *Downer-Hill Joint Venture v. Government of Fiji*, (2005) 1 NZLR 554, ¶80 [High Court of New Zealand]; *Downer Connect Ltd v. Pot Hole People Ltd*, CIV 2003-409-002878 (19 May 2004, unreported), [Christchurch High Court, New Zealand] ¶136.

14 See *VV v. VW*, (2008) 2 SLR (R) 929 [Singapore Court of Appeal] (in the context of a challenge to a costs award) and *Swiss Singapore Overseas Enterprises Pte Ltd v. Exim Rajathi India Pvt Ltd*, (2010) 1 SLR 573 [Singapore Court of Appeal] (in the context of a challenge to an award on grounds of suppression of documents and perjury amounting to fraud).

### III. OTHER GROUNDS TO CHALLENGE AWARDS AND RESIST ENFORCEMENT

Article 34 of the Model Law prescribes the grounds on which a court can set aside an arbitral award. Apart from the somewhat infamous public policy exception, broadly speaking, an award can be set aside on the five grounds in Article 34 (2). In the Singapore context, Section 24 of the IAA prescribes two additional grounds to set aside an award of a tribunal if:

- (i) the making of the award was induced or affected by fraud or corruption; or
- (ii) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party were prejudiced.

In *Soh Beng Tee*,<sup>15</sup> the second of these grounds under the IAA was pressed into service to challenge an award. The appellant in that case was employed by the respondent as the main contractor to construct a condominium. The respondent terminated the employment of the contractor based on delays in completion of the project. In arbitration proceedings, the tribunal found in favour of the appellant that the contract had been wrongfully terminated and that the appellant was actually entitled to extensions of time due to acts of the respondent which caused performance to be set at large. The respondent applied to set aside the award under Section 24 of the IAA. The Trial Judge set aside the award on the ground that the respondent had not been heard adequately on the question of time for performance being set at large, and on the basis that this formed the foundation of the award.

The Court of Appeal, in laying the framework for a challenge to an award under Section 24 of the IAA took the view that a party challenging an arbitration award as having contravened the rules of natural justice had to establish: (a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its rights. In keeping with the general approach taken by Singapore courts to arbitration, the court observed that as a matter of both principle and policy, the courts will seek to support rather than frustrate or subvert the arbitration process in order to promote the two primary objectives of the IAA; namely, seeking to respect and preserve party autonomy and to ensure procedural fairness.

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15 *SohBeng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd*, (2007) 3 SLR (R) 86 [Singapore Court of Appeal]. [Hereinafter, "*SohBeng Tee*"]



### *Recent Singapore Decisions on International Arbitration*

In the case, the court took the view that even assuming that the issue of whether time was at large was not entirely alive during the hearings, that by itself would not imply that the arbitrator had failed to adhere to the rules of natural justice. This, the court, was particularly true given the pleadings of parties on the issue and other attendant circumstances.

Importantly, while noting that it was imperative to adhere to a narrow scope and basis to challenge an award, the court observed somewhat profoundly that “*it was not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process; rather, an award should be read generously such that only meaningful breaches of the rules of natural justice that had actually caused prejudice were ultimately remedied*”.

But Singapore courts have not always been quick to jump to the defence of an award. In *CRW Joint Operation*,<sup>16</sup> PGN, an Indonesian state company, entered into an agreement in 2006 with CRW for the construction, by CRW, of a pipeline and optical fibre cable in Indonesia. The contract adopted the standard provisions of the Federation Internationale des Ingenieurs Conseil (FIDIC) Conditions of Contract for Construction (1<sup>st</sup> Edition, 1999) with some modifications. When disputes arose, the parties referred the dispute to a Dispute Adjudication Board (DAB), which rendered several decisions. PGN accepted all of these decisions bar one, which required PGN to pay CRW approximately US\$ 17 million. PGN submitted a notice of dissatisfaction and CRW filed for arbitration with the ICC, in relation to the decision of the DAB. The tribunal made an award in favour of CRW directing PGN to pay the US\$ 17 million. CRW registered the award in Singapore as a judgment while PGN applied to have the award set aside under Section 24, IAA.

The High Court set aside the award on the basis that the tribunal was required to review the merits of the case and by failing to do so the tribunal had acted outside the scope of its mandate under the 1999 FIDIC Conditions of Contract.

Article 34(2)(a)(iii) provides a ground to seek the setting aside of an award if the award dealt 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.

The Court of Appeal took the view that a failure by an arbitral tribunal to deal with *every* issue referred to it will not ordinarily render its arbitral award liable to be set aside, the relevant question is of prejudice caused to a party. Moreover, it found that mere errors of law or fact are not sufficient to warrant setting aside an

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<sup>16</sup> *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK*, (2011) SGCA 33 [Singapore Court of Appeal]. [Hereinafter, “*CRW Joint Operation*”]

arbitral award under Article 34(2)(a)(iii) of the Model Law. Echoing *Soh Beng Tee*, the Court observed that to set aside an arbitral award under Section 24(b), IAA, the court must be satisfied that (i) the arbitral tribunal breached a rule of natural justice in making the arbitral award; and (ii) such a breach of natural justice caused *actual or real prejudice* to the party challenging the award.

On the case, the court came to the conclusion that the tribunal was required to review the merits of the case and by failing to do so, the tribunal had acted outside the scope of its mandate under the FIDIC Conditions of Contract. In doing so, the court found that PGN had effectively been denied an opportunity to assail the decision of the DAB and that consequently there had been a breach of natural justice causing actual prejudice to a party. On this basis, the court affirmed the decision of the High Court to set aside the award.

In a slightly earlier decision, an award rendered by a tribunal (of which I was the Chairman) was challenged by the Government of the Republic of Philippines.<sup>17</sup> In that case, the Philippines Supreme Court had taken the view that certain concession contracts awarded by the government were null and void. Simultaneously, arbitration had been commenced by the concessionaire on the same contracts. The government contested the jurisdiction of our tribunal on the basis of the Supreme Court decision.

The tribunal, on a multitude of facts and legal principles, took the view that, the arbitration agreement and the arbitration proceedings were both governed by Singapore law. The tribunal proceeded to hear the dispute and rendered a partial award, which came to be challenged.

The High Court declined to interfere on the broad basis that it was entirely within the tribunal's remit to consider whether the arbitration agreement could be separated from the main contract. Equally, the court found that it was within the tribunal's remit to consider whether the arbitration clause was severable in the sense that it could be governed by a law that was different from that which governed the main contract. On the government's plea that its jurisdictional challenge had been pre-judged by the tribunal's determination that Singapore had been chosen as the seat, the court found that an application to set aside an award was not an appeal on the merits. The Court took the strong view that an award could not be considered in the same way as the court would consider the findings of a body over whom it had appellate jurisdiction.

These are only a few instances of the broad supportive and non-interventionist approach adopted by the Singapore courts in the context of challenges to arbitral awards.

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17 Government of the Republic of the Philippines v. Philippine International Air Terminals Co, Inc, (2007) 1 SLR (R) 278 [Singapore Court of Appeal].

## IV. ENFORCEMENT OF ARBITRATION AGREEMENTS

The genesis of any arbitration lies in the agreement between parties to arbitrate. A well drafted arbitration agreement has a major impact on the speed and cost effectiveness of the process. The wording is therefore crucial to avoid increased costs and delays. However, often, it is only after detailed negotiations on commercial terms, obligations, representations, warranties, indemnity obligations, have taken place that attention is turned to what is aptly called the 'midnight clause'.<sup>18</sup> Parties and lawyers quite often tend to be perfunctory in their approach to drafting the clause. In this context, it is interesting to see how courts have approached the question of enforcing arbitration agreements.

There are, of course, two limbs. One, in an area where there is a problematic clause and another more general area where courts are called upon to stay proceedings in court in order to enforce an arbitration agreement between two parties.

### A. Problematic Clauses

In *Insignia Technology*,<sup>19</sup> parties had entered into a license agreement which provided for disputes to be resolved by arbitration "*before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce*". This clearly portended disaster. When disputes arose, the respondent approached the ICC for resolution of the dispute. The jurisdiction of the ICC was contested by the appellant and the arbitration was withdrawn. The respondent then commenced arbitration at the SIAC. The tribunal, in the course of considering the appellant's contentions on jurisdiction and the fatal uncertainty question requested the SIAC to indicate whether it could administer the arbitration under the ICC Rules. The SIAC responded affirmatively, indicating that the SIAC Secretariat, Registrar and Board of Directors would undertake the roles of the ICC Secretary-General, Secretariat and ICC Court respectively. The tribunal, on this basis and others, decided that it had jurisdiction to hear the dispute.

Insignia applied to the High Court to set aside the tribunal's decision to assume jurisdiction. Insignia contended that the parties' agreement for the arbitration to be administered by the SIAC under the ICC Rules could not be fulfilled as the

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18 ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 132 (2004).

19 *Insignia Technology Co Ltd v. Alstom Technology Ltd*, (2009) 3 SLR (R) 936 [Singapore Court of Appeal]. [Hereinafter, "*Insignia Technology*"]

ICC Rules had many unique features which could not be administered by a non-ICC institution. Moreover, it contended that, without the involvement of the ICC Secretariat and the ICC Court, the arbitration would not bear the "ICC's hallmark of quality". In assuming jurisdiction, the tribunal, Insignia argued, had rewritten the arbitration agreement. The High Court rejected Insignia's application.

The Court of Appeal in rejecting Insignia's appeal took the view that where parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars. Moreover, it found that it was necessary to apply the principle of effective and purposive interpretation to make a commercially logical and sensible construction of an arbitration agreement especially given the inherently private and consensual nature of arbitration. Party autonomy, it said, must be given due respect and that effect must be given to (workable) arbitration arrangements in international arbitration, subject only to public policy considerations to the contrary.

The court proceeded to find that, based on Insignia's conduct; its contention that an 'inferior' arbitration mechanism (under SIAC) would be foisted on parties could not be accepted. This was, more so, owing to SIAC's commitment to party autonomy demonstrated through its willingness to administer the arbitration under the ICC Rules.

## B. Staying Proceedings

In the second area of cases, the issue that often arises is whether a 'dispute' exists in order for a court to stay proceedings in favour of arbitration under Section 6, IAA.<sup>20</sup> In *Tjong Very Sumito*,<sup>21</sup> parties entered into a share purchase

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20 The relevant portion of §6, International Arbitration Act (Cap 143A) reads as follows:

6. Enforcement of international arbitration agreement – (1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.

(2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

21 *Tjong Very Sumito v. Antig Investments Pte.Ltd*, (2009) 4 SLR (R) 732 [Singapore Court of Appeal]. [Hereinafter, "*Tjong Very Sumito*"]

agreement under which the appellant agreed to sell 72% of the shareholding of a company to the respondent. The payment terms were varied by a supplemental agreement, whereby the respondent agreed to pay the amounts to a third party. When disputes arose in relation to the supplemental agreement, the appellant commenced proceedings in court. The respondent applied for a stay of proceedings on the basis that all disputes relating to the share purchase agreement were subject a binding arbitration clause. The assistant registrar dismissed the respondent's stay application; the respondent succeeded on appeal and was granted a stay of proceedings in favour of arbitration.

The Court of Appeal laid down certain broad principles, on the basis of which, a party could obtain a stay of proceedings in favour of arbitration under Section 6, IAA:

- i) The party applying for a stay had to show that he was party to an arbitration agreement and that the proceedings fell within the terms of the arbitration agreement.
- ii) The court must grant a stay if these pre-conditions are satisfied unless it is demonstrated that the arbitration agreement was null and void, inoperative or incapable of being performed.
- iii) If the agreement provides for arbitration of disputes, the subject matter of proceedings would fall outside the arbitration agreement if there is no 'dispute', or if the dispute is unrelated to the contract which contains the arbitration agreement.
- iv) Courts should be slow to find reasons to assume jurisdiction over a matter that the parties have agreed to refer to arbitration. In doing so, the word 'dispute' must be interpreted broadly. This was particularly so since the thrust of the IAA was geared towards minimizing court involvement in matters that the parties have agreed to submit to arbitration.
- v) It was sufficient for a defendant to simply assert that he disputes or denies the claim in order to obtain a stay of proceedings in favour of arbitration; the court is not to examine whether there is "in fact" a dispute, or a genuine dispute.
- vi) The court could also infer a denial of a claim by the defendant's prevarication or silence or the parties' previous inconclusive discussions.

- vii) The only exception to the rule of refusing to grant a stay in support of the scrupulous enforcement of arbitration agreements is where a defendant unequivocally admits the claim both as to liability and quantum.
- viii) The court will not assess the merits of the 'dispute' and must leave such matters to be determined by the arbitrator.

The decision in *Tjong Very* signifies a departure from the long-held belief that a court can in all cases examine the validity of the defence, such as whether there is "a genuine dispute", "no real dispute", "a case to which there is no defence" or "there is no arguable defence," or whether it can be said that the claim "is indisputably due" as if it is an application for summary judgment.

In a converse example of the approach, in *Merrill Lynch*,<sup>22</sup> the High Court refused to stay proceedings where it found that there was no real dispute on the liability to pay. In that case, a director opened an account with Merrill Lynch in the name of the defendant company. The director gave instructions to purchase certain shares in an Indonesian company which was fulfilled. On the settlement date for payment, the bank arranged to pay for the shares and unsuccessfully attempted to debit the amount from the account. The bank made repeated demands to the director for settlement of payments but only part payment was made. The bank then proceeded to exercise its rights to liquidate the shares and other assets in the account and simultaneously commenced an action to recover the remaining outstanding amounts. The defendant company applied to stay the proceedings on the ground that there was a legal dispute on the liability to pay and that it had a counter claim for damages.

The High Court took the view that a mere refusal to pay an amount that was indisputably due or a mere counter claim, would not constitute a 'dispute' entitling the defaulting party to arbitration and might amount to an abuse of process. The court clarified that while it would not determine the merits of the dispute, it was fully entitled to determine if a dispute which fell within the terms of the arbitration agreement actually existed.

### C. India

In the Indian context, the question arises in the context of Sections 5, 8 and 45 of the Indian Act. Section 5 provides, through a non obstante clause, that in any

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22 *Merrill Lynch Pierce, Fenner & Smith Inc v. Prem Ramchand Harjani*, (2009) 4 SLR (R) 16 [Singapore Court of Appeal] [Hereinafter, "*Merrill Lynch*"].

matter governed by Part I of the Indian Act, no judicial authority shall interfere except where so provided for. Section 8 is a related provision which mandates that a judicial authority before which an action is brought in a matter which is the subject matter of an arbitration agreement shall refer the parties to arbitration. Both Sections 5 and 8 depart from, and are in fact more stringent than their corresponding provisions in the Model Law.<sup>23</sup> While Indian courts have dismissed actions and required parties to place their case before the tribunal in some situations,<sup>24</sup> in some other cases, this has not been the case.<sup>25</sup>

Section 45, on the other hand, applies to foreign arbitrations and requires that a judicial authority before which an action is brought in a matter which is the subject matter of an arbitration agreement shall refer the parties to arbitration. The only exception is if the court finds that the agreement to be null and void, inoperative or incapable of being performed. An issue arose in 2005 as to whether the determination by a court of the validity of the arbitration agreement, was a prima facie determination or whether it required a final decision. The Indian Supreme Court took the view that this was to be determined only on a prima facie basis keeping in mind the objective of enabling "*expeditious arbitration without avoidable intervention by judicial authorities*".<sup>26</sup>

## **V. POWER OF COURT TO GRANT INTERIM MEASURES**

By itself, this area has required reams of paper in jurisprudential thought and writing on the approach to be taken by courts. It is interesting though to examine

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23 In contrast, Article 5 of the Model Law does not contain a non obstante clause. Similarly, Article 8 of the Model Law provides an exception to the mandate to a judicial authority to refer to arbitration an action is brought in a matter which is the subject matter of an arbitration agreement where the agreement is "*null and void, inoperative or incapable of being performed*".

24 See *CDC Financial Services (Mauritius) Ltd. v. BPL Communications*, (2003) 12 SCC 140 [Supreme Court of India], where the Indian Supreme Court rejected the respondent's contention that a pledge of shares sought to be enforced through arbitration would result in the takeover of a foreign telecom company in a manner contrary to Indian law. The Court found that this being a contention on merits fell within the sole jurisdiction of the arbitrators.

25 See *Sukanaya Holdings v. Jayesh Pandya*, (2003) 5 SCC 531 [Supreme Court of India], where the Supreme Court refused to stay the court action on the ground that the subject matter of the arbitration agreement was not the same as the subject matter of the civil suit and the parties in the two actions were not identical. The Court took the view that it could not 'split' the cause of action such that a part of it was decided by the tribunal and the rest by the court.

26 *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.*, (2005) 7 SCC 234 [Supreme Court of India].

the Indian and Singapore experience on the issue, which have uncannily not been very different.

Foremost, is the *Bhatia*<sup>27</sup> decision of the Supreme Court of India taking the view that Part I<sup>28</sup> of the Indian Act applies equally to international commercial arbitrations that are seated outside India. The decision came about in the context of a request for interim relief made by a party to an ICC arbitration seated in Paris. The request was made to, and rejected by a district judge. The appeal to the High Court was also rejected. However, the Supreme Court took the view that *unless expressly or impliedly excluded*, the provisions of Part I would also apply to arbitrations seated outside India. The argument that succeeded, amongst others, was that Section 2 (2) of the Indian Act which provided that Part I would apply where the place of arbitration was in India, did not use the word 'only', implying that Parliament had not provided that Part I is not to apply to arbitrations which take place outside India.

To the extent that it was necessary to confer a power on Indian courts to grant interim measures to aid arbitrations seated outside India, *Bhatia* was perhaps necessary and correct. However, to the extent that it has been applied in varied contexts on the application of Part I to arbitrations seated outside India, including for appointment of arbitrators and setting aside of awards, it has, no doubt, only complicated matters.

Singapore went through a similar corrective measure albeit in a slightly different manner.

Magnifica, a Panamanian company, entered into a memorandum of agreement to sell a vessel to Swift-Fortune, a Liberian company. Pursuant to the agreement, Swift-Fortune placed US\$1.9 million with a bank in Singapore in the joint names of the parties, to be released only in accordance with a joint written instruction. Legal completion of the sale was to take place in Singapore, although the vessel was to be delivered to China. The agreement provided that it was governed by English law and any dispute arising out of it would be referred to arbitration in London. The delivery of the ship was delayed resulting in Swift-Fortune claiming damages for approximately US\$2.5 million. Shortly prior to the date fixed for the

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27 *Bhatia International v. Bulk Trading S.A.*, (2002) 4 SCC 105 [Supreme Court of India]. [Hereinafter, "*Bhatia*"]

28 Part I of the Indian Act incorporates the provisions of the Model Law on the conduct of arbitrations. Part II codifies the New York and Geneva Conventions and provides for the recognition and enforcement of foreign awards in India.



delayed completion, Swift-Fortune sought and obtained a Mareva injunction from the Singapore courts restraining Magnifica from disposing of or dealing with its assets in Singapore up to a value of US\$2.5 million. Magnifica applied to set aside the proceedings and the Mareva injunction on the ground that the Singapore courts did not have jurisdiction or power to grant the injunction. The Singapore High Court allowed Magnifica's application and Swift-Fortune appealed to the Court of Appeal.

The Court of Appeal was faced with the issue of whether the power of Singapore courts under Section 12(7), IAA to grant interim measures of protection, applied not only to international arbitrations with a seat in Singapore but also to international arbitration proceedings seated outside Singapore i.e. foreign international arbitrations. Not very dissimilar to the question faced by the Indian Supreme Court in *Bhatia*!

The Court considered the legislative intent behind Section 12, IAA and noted that the provision was enacted to enable the proper functioning of international arbitrations in Singapore. To this extent, the Court found that a literal interpretation of the provision would be contrary to the spirit of international arbitration and did not promote the legislative object. However, the Court rejected the argument that Section 12(7) applies equally to foreign international arbitrations. The Court took the view that accepting such an argument would disrupt the rights of parties in foreign arbitrations in as much as other powers under Section 12 would also be implied into arbitration agreements automatically. More importantly, the Court took the view that for Singapore courts to assume such a power would be "*contrary to the spirit of international arbitrations*". Additionally, the Court also considered that the exercise of such powers may impeach the powers of a foreign arbitral tribunal conducting arbitration proceedings under a foreign law. The Court found that it could not exercise jurisdiction to grant supervisory and supportive measures contrary to the chosen law of the foreign arbitration.<sup>29</sup>

Interestingly, six months before the decision in *Swift Fortune* was rendered by the Court of Appeal, the High Court,<sup>30</sup> took the view that it had the power under Section 12(7), IAA to assist, by way of interim orders, international arbitrations both in Singapore and abroad. The Court of Appeal (in *Swift Fortune*) distinguished

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29 *Swift-Fortune Ltd v. Magnifica Marine SA*, (2007) 1 SLR 629 [Singapore Court of Appeal]. [Hereinafter, "*Swift Fortune*"]

30 *Front Carriers Ltd v. Atlantic & Orient Shipping Corp*, (2006) 3 SLR (R) 854 [High Court of Singapore].

that decision as being based on a cause of action that was justiciable in a Singapore court and hence lent itself differently to an application of the Civil Law Act and the powers conferred by that legislation (read with the Model Law) on Singapore courts.

Immediately after the *Swift Fortune* decision, the Singapore Parliament passed the International Arbitration (Amendment) Bill, 2009 to introduce a new Section 12-A to specifically clothe Singapore courts with the power to grant injunctive relief and interim measures of protection to aid arbitrations seated outside Singapore.

In India, of some importance, are the proposed amendments the Indian Act. One of the amendments proposed is to Section 2(2) of the Indian Act to provide the word 'only' as the missing link as it would seem. This amendment would change the basis of the *Bhatia* decision. There is also a proposed proviso to confer courts with the power to grant interim measures under Section 9 to aid international commercial arbitrations seated outside India in a New York Convention country.

This may very well be in line with the revisions to the Model Law in 2006 and the inclusion of new Article 17J.<sup>31</sup>

## VI. SEAT AND VENUE

The concepts of seat and venue of arbitration have remained similar if not synonymous to the uninitiated. But they are not. The seat of arbitration is a crucial factor in any international arbitration. The law of the seat of the arbitration applies to determine all matters to aid and support the arbitration including any challenge to an award that results from that arbitration. The venue of the arbitration on the other hand is borne purely out of the convenience of parties and could, theoretically, be anywhere in the world or in a space capsule if that pleased parties and the tribunal.

It is not uncommon for parties to exploit the confusion to their advantage. In *PT Garuda Indonesia*,<sup>32</sup> parties entered into an aircraft lease agreement which stipulated Jakarta as the seat of arbitration. Parties conducted hearings in Singapore

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31 Article 17J of the Model Law reads as follows:

*"A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration."*

32 *PT Garuda Indonesia v. Birgen Air*, (2002) 1 SLR (R) 401 [Singapore Court of Appeal]. [Hereinafter, "*PT Garuda Indonesia*"]

and award was rendered which clearly stated that it was rendered in Jakarta. Garuda filed a notice of originating motion in Singapore to set aside the award which was granted. The other party applied to have the notice of motion set aside.

The Court of Appeal found that the parties had only agreed to a change in the venue of the hearing and not the seat of arbitration and that there was a distinction between the two. It observed that the place of arbitration did not change merely because the tribunal held the hearing at a different place; it only changed where the parties had expressly agreed to it. On this basis, the court found that there was no basis to file a challenge to the award in Singapore.

In a similar situation of sorts in India,<sup>33</sup> Videocon industries and the government of India had entered into a production sharing contract which stipulated the seat of arbitration to be in Kuala Lumpur. Due to the unfortunate break out of the SARS epidemic at the time, the tribunal shifted its hearings to Amsterdam and then to London. A partial award was rendered. The court proceedings arose in different circumstances, in the context of a plea for certain interim measures of protection from an Indian court, and issues relating to its jurisdiction to grant such measures.

However, the Indian Supreme Court took the view that the 'juridical seat' of the arbitration could not be altered without the express agreement of the parties and that only the 'physical seat' (correctly described as venue) of arbitration had shifted to London in the case.

Parties would, of course, do well to specify the seat of arbitration clearly in their agreements and also request tribunals to specify that a change in venue was only what it was, a change in venue and not the seat of arbitration.

## **VII. CONCLUSION**

Singapore has developed as an important centre for international commercial arbitration. In large part, this has been due to the support provided by the Supreme Court of Singapore. The judges have demonstrated an acute awareness of the role which international arbitration plays in commerce and have struck an appropriate balance between the need to support and assist international arbitration on the one hand, with the need for occasional judicial supervision and intervention when required. In so doing, they have developed an impressive body of case law which might well serve as a useful guide to courts in other jurisdictions.

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33 *Videocon Industries Ltd. v. Union of India*, (2011) 6 SCC 161 [Supreme Court of India].