Case Note

THE ROLE OF PLEADINGS IN DETERMINING AN ARBITRATOR'S MANDATE

PT Prima International Development v Kempinski Hotels SA
[2012] 4 SLR 98

This Court of Appeal decision clarifies the role of pleadings in determining an arbitrator's mandate. The decision deserves careful consideration because it shows (in what was decided as well as what was not decided) that there are not only similarities, but also differences in the role of pleadings, techniques of pleading, and even what is considered pleadings in litigation and arbitration.

Gerald Chien-Yi **KUPPUSAMY**
LLM (Harvard), LLB (National University of Singapore); FCIArb, FSIArb;
Advocate and Solicitor (Singapore),
Attorney and Counsellor-at-Law (New York State);
Senior Legal Consultant, Baker & McKenzie.Wong & Leow.

I. Introduction

1 In *PT Prima International Development v Kempinski Hotels SA*[1] ("*Kempinski*"), the Court of Appeal reinstated awards set aside, on the grounds that the arbitrator had decided issues that had not been formally pleaded, thereby acting beyond the scope of his mandate.

2 The Court of Appeal decision has been lauded as "mark[ing] the long trend of the Singapore courts' pro-arbitration and pro-enforcement approach and confirms the position that the Singapore courts will not interfere with the decision of the arbitral tribunal except on the limited grounds set out in the International Arbitration Act[2] and in the absence of real prejudice being caused to the wronged party".[3]

3 In particular, the Court of Appeal's judgment is noteworthy for four reasons. First, it clarifies that pleadings play a role in arbitration, in delimiting the jurisdiction of the tribunal. Second, while the court

1 [2012] 4 SLR 98.
2 Cap 143A, 2002 Rev Ed.
3 Michael Pryles, "Singapore: The Hub of Arbitration in Asia" <http://www.siac.org.sg/index.php?option=com_content&view=article&id=405:singapore-the-hub-of-arbitration-in-asia&catid=56:articles&Itemid=171> (accessed 3 January 2013).

© 2013 contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

affirmed the role of pleadings arbitration, it declined to impose fact-based pleading techniques on international arbitration; instead, the court held that "any new fact or change in the law in the course of the Arbitration which would affect [the Claimant's] right to [its] remedies must fall within the scope of the parties' submission to arbitration".[4] Third, as will be argued below, the decision does not limit what may be considered "pleadings" for the purposes of arbitration. In particular, it is argued that it would be dangerous to read the Court of Appeal judgment as limiting the "pleadings" to the notice of arbitration, or the notice of arbitration and the statements or points of claim and defence. Finally, this case demonstrates that the court will look at whether real prejudice is caused to the wronged party.

II. Background

4 In 1994, Kempinski Hotels SA ("Kempinski") entered into an operating and management contract ("the Management Contract") to operate and manage, for at least 20 years, a hotel in Jakarta ("the Hotel") owned by PT Prima International Development ("Prima"). The Management Contract was governed by Indonesian law and contained an arbitration agreement, which provided that "[a]ny dispute or difference arising out of or in connection with or resulting from [the Management Contract], its application or interpretation … shall be referred to and determined by arbitration under the Rules of the [Singapore International Arbitration Centre]".[5]

5 Between 1996 and 2000, the Indonesian Ministry of Tourism issued three decisions that essentially made it illegal for a foreign entity to manage hotels in Indonesia unless it set up a company incorporated in Indonesia or entered into a joint venture with Indonesian partners (the "Three Decisions"). Acting on certain legal advice, however, Kempinski continued to manage the Hotel, without changing the entity operating the Hotel to an Indonesian company or amending the Management Contract.

III. The arbitration and the "pleadings"

6 Disputes arose between the parties, and on 6 February 2002, Prima gave Kempinski written notice of termination of the Management Contract. In May 2002, Kempinski commenced arbitration proceedings, by its notice of arbitration essentially claiming that Prima had wrongfully repudiated the Management Contract and seeking, among

4 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [48].
5 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [4].

© 2013 contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

other things, specific performance of the Management Contract or, alternatively, damages including loss of profits for the remainder of the term of the Management Contract. The same remedies were reiterated in its points of claim.

7 Initially, Prima, in its points of defence and counterclaim, pleaded that the termination of the Management Contract was valid under Indonesian law and counterclaimed for damages for breach of the Management Contract. However, in the course of the arbitration, Prima applied for and was granted leave to amend its points of defence to plead *force majeure* and supervening illegality, specifically that the contract had become illegal due to the Three Decisions after 3 May 2000 (when the last of the Three Decisions was issued). If Prima was right and the Management Contract was illegal, then Prima argued that Kempinski's claim for damages would be limited to a period ending on 3 May 2001 (in other words, that one year was a reasonable time for Kempinski to comply with the Three Decisions). Therefore, Kempinski's claim that the 6 February 2002 notice of termination was a breach of the Management Contract would be moot.

IV. The first and second awards

8 The issues of illegality and *force majeure* were heard as preliminary issues in two tranches. The arbitrator issued a first award, finding the Management Contract valid but incapable of being performed except in a manner consistent with the Three Decisions. In a second award, the arbitrator answered four questions that the parties had referred to him. The questions concerned whether, given the finding in the first award, remedies arising from the Management Contract including claims for damages were still available to Kempinski or, if not, whether Kempinski's claim should be dismissed. The second award ruled out *force majeure* because the contract might still be performed through three alternative methods consistent with the Three Decisions.[6] Thus, Kempinski could still claim damages and Kempinski's claim need not be dismissed.

V. The third and fourth awards

9 Before the second award was published, Kempinski entered into a contract to manage another hotel – on the same street and within one mile of the Hotel – through an Indonesian incorporated company

6 The three methods were novation of the Management Contract to an Indonesian company, delegation of performance through an Indonesian company or modification of the Management Contract to include an Indonesian company within a tripartite agreement.

© 2013 contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

("the New Management Contract"). Prima discovered this after the second award was published, and wrote to the arbitrator purporting to seek "clarification" of the first and second awards in light of this information. Specifically, Prima requested the arbitrator to consider whether the three methods of performing the Management Contract in compliance with the Three Decisions were still possible in light of the New Management Contract, which, it contended, was in breach of exclusivity provisions in the Management Contract.

10 A procedural conference was held, and Kempinski was directed to provide specific disclosures. Kempinski did not comply with those directions, save to disclose that the New Management Contract was entered into on 28 April 2006. What followed was characterised by the Court of Appeal as "extensive correspondence, written submissions and expert opinions … exchanged *vis-à-vis* the legal effect of the New Management Contract".[7] The tribunal then published its third award, holding, among other things, that the alternative methods to perform the contract consistently with the Three Decisions were no longer possible in light of the New Management Contract, but there remained the possibility of damages for the period between the alleged termination of the Management Contract and the date on which Kempinski entered into the New Management Contract ("the Intervening Period").

11 The arbitrator directed the parties to file submissions on whether, in the event Kempinski succeeded on liability, any damages would be payable for the Intervening Period. Prima argued that reasonable time for Kempinski to comply with the Three Decisions had expired before the Intervening Period began, and that any award of damages for the Intervening Period would be contrary to the public policy of Indonesia. Kempinski did not comply with the arbitrator's directions, and instead commenced proceedings in the High Court to set aside the third award. The arbitrator agreed that awarding damages for the Intervening Period would be against the public policy of Indonesia. In a fourth award, the tribunal ruled that Kempinski could not claim damages for the Intervening Period, and that its claims for relief, including specific performance, had wholly failed.

12 Kempinski commenced proceedings in the High Court to also set aside the fourth award and a consequential cost award on the basis that, amongst other grounds, that they dealt with an issue that had not been formally pleaded ("the Pleading Argument"). In the High Court, Kempinski only succeeded in setting aside the third, fourth and the cost

7 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 (CA) at [51]; see also the same case at [50] and *Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 633 (HC) at [20]–[23].

© 2013 contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

award on the basis of the Pleading Argument, and it is this aspect of the case on which this note focuses.

VI. The High Court set aside the awards

13 The High Court agreed with Kempinski that the third award should be set aside on the ground that failure to plead the New Management Contract had resulted in the tribunal making a decision that was beyond the scope of the submission to arbitration. Article 34(2)(*a*)(iii) of the UNCITRAL Model Law on International Commercial Arbitration[8] (the "Model Law"; set out in the First Sched to the International Arbitration Act)[9] provides that an award that decides matters beyond the scope of the submission to arbitration may be set aside. The High Court reasoned that to determine whether matters in an award were within or outside the scope of submission to arbitration, a reference to the pleadings would usually have to be made. The High Court held that the New Management Contract had not been pleaded, and therefore its legal effect was not an issue that was submitted for arbitration. As the Court of Appeal said:[10]

> The Judge held that the Arbitrator would have had the jurisdiction to decide what legal effect the New Management Contract had only if Prima applied for leave to amend its pleadings to plead that new point and thereby allowed Kempinski to amend its pleadings as well to reply to that point.

14 The High Court also set aside the fourth award on the basis that it was neither based on any pleaded case nor had evidence been admitted in relation to whether an award of damages for the Intervening Period would be contrary to public policy.[11]

15 The High Court rejected, in particular, two of Prima's arguments that particularly shape the contribution of this case to the jurisprudence on arbitral awards. First, Prima argued that there is no rule in arbitration that limits the jurisdiction of the tribunal to the pleadings (the "Role of Pleadings Argument"). Prima contended that the jurisdiction of the tribunal was determined by the scope of the arbitration agreement and not by the pleadings. Second, Prima argued that the rules of pleading in arbitration are much more flexible than the rules of pleading in court and do not require all material facts to be

8 Adopted 21 June 1985.
9 Cap 143A, 2002 Rev Ed.
10 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [40].
11 The Court of Appeal reversed holding that "public policy is a question of law which an arbitrator must take cognisance of if he becomes aware of it in the course of hearing the evidence presented during arbitral proceedings": *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [72].

© 2013 contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

stated and specifically pleaded as would be required in court litigation (the "Rules of Pleading Argument").

16 Although Prima did not advance the Rules of Pleading Argument in quite the same way before the Court of Appeal, arguably, that argument was vindicated in the Court of Appeal judgment. However, the Role of Pleadings Argument was clearly rejected again by the Court of Appeal.

VII. Prima's arguments before the Court of Appeal

17 Before the Court of Appeal, Prima reiterated the Role of Pleadings Argument: that it was the scope of the arbitration agreement, not the parties' pleadings, that determined the "scope of submission to arbitration" for the purposes of Art 34(2)(*a*)(iii) of the Model Law. Prima also argued that pleadings are not essential in international arbitration because the essence of procedural fairness lies in Art 18 of the Model Law,[12] which does not require the filing of pleadings.

18 In the Court of Appeal, Prima put its Rules of Pleading Argument in a slightly different way from how it had argued in the High Court. Prima had argued in the High Court that "it was not required to plead material facts because the dispute was being adjudicated by an arbitrator".[13] In response, the High Court reasoned that "[p]leadings are an essential component of a procedurally fair hearing both before a court and before a tribunal",[14] and thus Prima's argument was surprising and wrong. Therefore in the Court of Appeal Prima argued that, subject to the requirements of Art 18 of the Model Law, an arbitrator is allowed to determine the arbitration procedure to be followed, including the required content or content specificity of the pleadings.

VIII. The role of pleadings in arbitration and litigation

19 Rejecting Prima's Role of Pleadings Argument, the Court of Appeal explained the role and function of pleadings in arbitration and highlighted similarities with litigation. The court's explanation of the role of pleadings must be seen in light of the focus of the court's analysis – "whether the legal effect of the New Management Contract was part of, or directly related to, the dispute the parties submitted for

12 The requirements being equality of treatment and a full opportunity to present his case.
13 *Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 633 at [55].
14 *Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 633 at [55].

© 2013 contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

arbitration".[15] That was the focus of the analysis because, as the court emphasised, "where an arbitral award had been made on issues that had been submitted for arbitration, one party could not be allowed to introduce a new dispute which was not within the scope of submission to arbitration".[16] This was a reiteration of the court's observations in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*,[17] that Art 34(2)(*a*)(iii) was a reflection of the principle that an arbitral tribunal has no jurisdiction to decide any issue not referred to it for determination by the parties.

20 Effectively rejecting Prima's Role of Pleadings Argument, the Court of Appeal explained:[18]

> It is plain that the scope of an arbitration agreement in the broad sense is not the same as the as the scope of submission to arbitration. The former must encompass the latter, but the converse does not necessarily apply, in that the particular matters submitted for arbitration may not be all the matters covered by the arbitration agreement. The parties to an arbitration agreement are not obliged to submit whatever disputes they may have for arbitration. Those disputes which they choose to submit for arbitration will demarcate the jurisdiction of the arbitral tribunal in the arbitral proceedings between them.

21 Thus, the Court of Appeal explained that "[t]he role of pleadings in arbitral proceedings is to provide a convenient way for the parties to define the jurisdiction of the arbitrator by setting out the precise nature and scope of the dispute in respect of which they seek the arbitrator's adjudication".[19] The court reasoned that "[i]t is for this purpose that Art 23 of the Model Law provides for the compulsory filing of pleadings".[20] The court also referred to Rule 18 of the Singapore International Arbitration Centre ("SIAC") Rules[21] as providing for pleadings to be filed. In order to determine if a tribunal has the jurisdiction to make an award in respect of a particular dispute, the court held that it is necessary to refer to the pleaded case of each party to the arbitration and the issues of law or fact raised in the pleadings to see whether they encompass that dispute.

22 Then the Court of Appeal, explaining that pleadings play a similar role in litigation, endorsed various statements summarising the

---

15 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [31].
16 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [31].
17 [2007] 1 SLR(R) 597 at [37].
18 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [32].
19 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [33].
20 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [33].
21 2nd Ed, 1997.

© 2013 contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

function and principles of pleading in litigation, which can be summarised as follows:

(a) pleadings determine the jurisdiction of the court *vis-à-vis* the issues to be tried by defining the issues and informing the court of those issues;[22]

(b) pleadings give fair notice of the case, which has to be met, so that the opposing party may direct his evidence to the issue disclosed;[23] and

(c) it is when departure from the pleading will cause prejudice that it is in the interests of justice that the other party should be entitled to insist that this is not permitted unless the pleading is appropriately amended.[24]

IX. The legal effect of the New Management Contract was not a new dispute

23 Having affirmed the role of pleadings in defining the arbitrator's jurisdiction, the Court of Appeal then turned to the question of whether the legal effect of the New Management Contract was within the disputes submitted to the arbitrator for adjudication.[25] The Court of Appeal took a very broad view of what it considered to be the dispute that was submitted to arbitration.

24 First, the court held that, "[i]n the present case, the scope of the parties' submission to arbitration is delineated by the Notice of Arbitration filed by Kempinski" in which they alleged that Prima's purported termination of the Management Contract was wrongful and consequently sought certain reliefs.[26]

25 Second, the court considered that Kempinski claimed damages for the remainder of the term of the Management Contract or specific performance, both in the notice of arbitration and its points of claim.[27] The Court of Appeal held that "any new fact or change in the law in the course of the Arbitration which would affect Kempinski's right to these remedies must fall within the scope of the parties' submission to

22 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [35]–[36].
23 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [35] and [38].
24 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [38].
25 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [42].
26 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [39].
27 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [6] and [42].

© 2013 contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

arbitration".[28] Additionally, "any new fact or change in the law arising after the submission to arbitration which is ancillary to the dispute submitted for arbitration and which is known to all the parties to the arbitration is part of that dispute and need not be specifically pleaded".[29] Therefore, Prima was entitled and did raise the New Management Contract as part of its defence of *force majeure*, which was the underlying legal basis of the third award.[30]

26 Finally, the court pointed out that Kempinski was given sufficient notice of and opportunity to meet Prima's defence of *force majeure* and "did not suffer any prejudice in any way since it was given ample opportunity"[31] to address the legal effect of the New Management Contract.

X. Rules of pleading in arbitration

27 The Court of Appeal clearly affirmed the role of pleadings in delimiting the tribunal's mandate. However, the disposition of Prima's Rules of Pleading Argument is harder to discern. The court did not expressly endorse Prima's argument that, subject to Art 18 of the Model Law, the requirements and content specificity of pleadings are a matter of procedure to be determined by the tribunal. This is not surprising because the court's focus was not on what the appropriate procedure in arbitration would be when a new fact or legal issue is raised, but whether the tribunal had jurisdiction to decide the dispute to which that new fact or legal issue relates. Nonetheless, the Court of Appeal's focus on the dispute (as opposed to whether specific facts or issues were pleaded) implicitly rejects the imposition of a fact-based approach to pleadings in arbitration.

28 One of the basic principles on which a fact-based pleading system is based is that "each party must plead the material facts upon which he relies for his claim or defence".[32] A corollary of that principle is that "a distinction must be made between pleading a legal conclusion … and pleading the facts which form the basis for that conclusion".[33] As a result of the High Court decision, this principle has been thought to be

28 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [48].
29 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [47].
30 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [46]–[47].
31 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [51].
32 Sir Jack Jacob & Iain S Goldrein, *Pleadings: Principles and Practice* (Sweet & Maxwell, 1990) at p 4.
33 Jeffrey Pinsler, *Principles of Civil Procedure* (Academy Publishing, 2013) at para 15.017.

© 2013 contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

so fundamental "that it even applies to arbitration".[34] The Court of Appeal holding, that "any new fact or change in the law arising after the submission to arbitration which is ancillary to the dispute submitted for arbitration and which is known to all the parties to the arbitration is part of that dispute and need not be specifically pleaded",[35] is a clear departure from a principle requiring that material facts be pleaded. Additionally, the Court of Appeal holding, that "any new fact or change in the law in the course of the Arbitration which would affect Kempinski's right to these remedies must fall within the scope of the parties' submission to arbitration", is a further departure from a fact-based pleading system.

29 This departure from a fact-based pleading system is most welcome because international arbitration must cater to parties from different legal systems that have different conceptions of the rules of pleading. For example, US Federal Courts and most state jurisdictions have replaced fact-based pleading with notice pleading.[36] Under Rule 8(a)(2) of the US Federal Rules of Civil Procedure,[37] a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief". The US Court of Appeals for the Eighth Circuit has held that "the clear purpose of [Rule 8(a)(2) of the Federal Rules of Civil Procedure] is to give notice to the other party and not to formulate issues or fully summari[s]e the facts involved".[38] In the other extreme, in Germany, the pleadings encompass all the written submissions to the court and contain detailed facts, evidence and law.[39]

30 The court's focus instead on the remedies sought as delimiting the dispute is consistent with the approach of courts in other jurisdictions that have annulled awards granting relief that exceeds the scope of the claims presented to it by the parties.[40] For example, under French law, "[t]he fact that arbitrators may have based their decision on allegations or arguments which were not put forward by the parties does not amount to a failure to comply with their brief. Only an award granting more to a party than what this party had asked for can be annulled".[41]

34 Jeffrey Pinsler, *Principles of Civil Procedure* (Academy Publishing, 2013) at para 15.017.
35 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [47].
36 Sir Jack Jacob & Iain S Goldrein, *Pleadings: Principles and Practice* (Sweet & Maxwell, 1990) at p 53.
37 As amended to 1 December 2010.
38 *Clausen & Sons Ltd v Theo Hamm Brewing Co* F 2d 388 at 390 (8th Cir, 1968).
39 Sir Jack Jacob & Iain S Goldrein, *Pleadings: Principles and Practice* (Sweet & Maxwell, 1990) at p 326.
40 See Gary B Born, *International Commercial Arbitration* vol II (Kluwer Law International, 2009) at p 2608, fn 293 (collecting cases).
41 *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer Law International, 1999) at para 1631.

© 2013 contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

XI. The unarticulated definition of "pleadings"

31 Given the focus of the arguments on the role and rules of pleading in arbitration, it is (in a sense) surprising that neither the High Court nor the Court of Appeal expressly defined what was meant by "pleadings" for the purposes of an international arbitration. A precise definition of "pleadings" for the purposes of international arbitration is problematic for a number of reasons.

32 First, there is the problem of terminology. The word "pleading" does not appear in the Model Law. In particular, it is not used in Art 23 of the Model Law, which provides for compulsory statements of claim and defence. This is unsurprising because the word is not used in Arts 18 to 20 of the UNCITRAL Arbitration Rules,[42] after which Art 23 was modelled.[43] Similarly, the word "pleading" is not used anywhere in the arbitration rules of the International Centre for Dispute Resolution or the London Court of International Arbitration,[44] or in the rule concerning submission of written statements in the SIAC Rules[45] and International Chamber of Commerce ("ICC") Rules.[46] The term "pleadings" is used in the International Centre for Settlement of Investment Disputes Arbitration Rules[47] to refer to all the documents filed in the written procedure. These rules provide that the memorial, counter-memorial and, if necessary, reply and rejoinder shall contain: a statement of the relevant facts (or an admission or denial of the facts stated in the previous pleading); any necessary additional facts; a statement of law (or observations concerning the statement of law in the previous pleading, or a statement of law in answer); and the submissions.

42 Adopted 28 April 1976.
43 Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 3rd Ed, 2010) at para 5-083. The word "plea" is, however, used in Art 16 of the UNCITRAL Model Law on International Commercial Arbitration (1985) and Art 21 of the UNCITRAL Arbitration Rules (1976): "[a] plea that the arbitral tribunal does not have jurisdiction".
44 International Centre for Dispute Resolution Rules (1 June 2009) Arts 2–3; London Court of International Arbitration Rules (1 January 1998) Art 15.
45 Rule 18 of the Singapore International Arbitration Centre ("SIAC") Rules (2nd Ed, 1997), which applied to the arbitration (currently r 17 of the SIAC Rules (4th Ed, 2010)). The word "pleading" is used in r 25(c) of the SIAC Rules (2nd Ed, 1997), which provides that a tribunal has the power to allow a party "to amend any pleading or submission". The word is used in r 35.3 of the SIAC Rules (4th Ed, 2010), which lists the "pleadings" among the "matters relating to the proceedings" that are confidential.
46 International Chamber of Commerce Rules (2012) Art 25. The word "pleading" is used in Art 3, which provides for the number of copies to be supplied for "any pleading or written communication".
47 As amended effective 10 April 2006.

© 2013 contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

33 If the word "pleading" was used to refer to all submissions to the tribunal, then the "extensive correspondence, written submissions and expert opinions … exchanged *vis-à-vis* the legal effect of the New Management Contract" would form part of the pleadings. However, the Court of Appeal did not consider all the submissions to the tribunal as part of the pleadings; otherwise, it would simply have held that the New Management Contract was "pleaded" in the course of the extensive written submissions. Indeed, the Court of Appeal could have taken into consideration the extensive written submissions (or both parties' conduct in making those submissions without any protest) in determining the scope of submission to arbitration. Had the court done so, the consideration of whether Kempinski suffered any prejudice would have been subsumed within the discussion of whether the legal effect of the New Management Contract was within the scope of the arbitrator's mandate. Instead, as will be explained below, the lack of prejudice to Kempinski appears to be *dicta*, even though this could have been the fact that determined the outcome of the case. It might be argued that because the Court of Appeal said that Art 23 of the Model Law provides for the "compulsory filing of pleadings", it is the statement of claim and statement of defence provided by Art 23 that are the pleadings. However, that could not have been what the Court of Appeal intended, as it went on to rely on the notice of arbitration as delineating the scope of submission to arbitration.

34 Second, regard must be had to the specific rules adopted by the parties in the particular arbitration. For example, the ICC Rules[48] and the SIAC Rules[49] adopt the practice of drawing up terms of reference or a memorandum of issues "defining the issues to be determined by the Tribunal in the arbitration".[50] These, too, must be considered as delimiting the scope of submission to arbitration.[51] However, these may in turn reserve the issues raised by the entirety of the parties' submissions. For example, the ICC suggests the following reservation for drafting terms of reference:[52]

> The issues to be determined shall be those resulting from the parties' submissions and which are relevant to adjudication of the parties' respective claims and defences. In particular, the Arbitral Tribunal may

48 International Chamber of Commerce ("ICC") Rules (1998) Arts 18–19; currently ICC Rules (2012) Art 23.
49 Singapore International Arbitration Centre Rules (3rd Ed, 2007) r 17.
50 Singapore International Arbitration Centre Rules (3rd Ed, 2007) r 17.
51 See, for example, *Louis Dreyfus SAS v Holding Tusculum BV* [2008] QCCS 5903 (SC, Quebec). Available at <http://canlii.ca/en/qc/qccs/doc/2008/2008qccs5903/2008qccs5903.html> (accessed 7 January 2013).
52 Terms of Reference under the 1988 International Chamber of Commerce Arbitration Rules: A Practical Guide (May 1992) cl 121. See W Laurence Craig, William W Park & Jan Paulsson, *International Chamber of Commerce Arbitration* (Oceanic, 3rd Ed, 2000) at p 276.

© 2013 contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

> have to consider the following issues (but not necessarily all of these, and only these and not in the following order …).

35 Accordingly, it would be dangerous to read the Court of Appeal as limiting the "pleadings" to the notice of arbitration, or the notice of arbitration and the statements or points of claim and defence.

XII. Was Prima prejudiced by an omission to plead the New Management Contract and its legal effect?

36 The Court of Appeal concluded that the legal effect of the New Management Contract was not outside the scope of submission to arbitration because "any new fact or change in the law arising in the course of the Arbitration which would affect Kempinski's right to these remedies must fall within the scope of the parties' submission to arbitration".[53] Nevertheless, the Court of Appeal, leaving aside the High Court's conclusion that Prima's failure to amend its points of re-amended defence and counterclaim resulted in the New Management Contract being outside the scope of submission to arbitration, went on to consider "whether Kempinski was prejudiced by Prima's omission to amend its pleadings to plead the New Management Contract and its legal effect".[54] The Court of Appeal's consideration of whether Kempinski was really prejudiced has been welcomed by arbitration practitioners, but technically it is *obiter dicta* because the court had already found that the award did not deal with matters beyond the scope of submission to arbitration. This raises an interesting question as to how this "no prejudice" argument can be invoked in the future.

37 It is submitted that an argument that there has been no prejudice from a failure to amend the pleadings need only be invoked to resist a setting aside on the basis of Art 34(2)(*a*)(iii) of the Model Law, where the award decides matters beyond the scope of submission to arbitration. If that were not the case, it would be the end of the matter.

38 The "no prejudice" argument was clearly borrowed from the principles of pleading that the court found to be common to both litigation and arbitration, but the statutory basis for this is not readily apparent. Consider that s 24(*b*) of the International Arbitration Act,[55] which provides that an award may be set aside if "a breach of natural justice occurred in connection with the making of the award", expressly qualifies that right with the words "by which the rights of any party have

53 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [48].
54 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [49].
55 Cap 143A, 2002 Rev Ed.

© 2013 contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

been prejudiced". There is no such qualification in Art 34(2)(*a*)(iii) of the Model Law.

39 Arguably, the basis for invoking the "no prejudice" argument may be found in the court's residual discretion to refuse a setting aside. In *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK*,[56] the Court of Appeal accepted that it might have, in its discretion, declined to set aside an arbitral award even though one of the prescribed grounds for setting aside has been made out, but noted that the discretion ought to be exercised only if no prejudice has been sustained by the aggrieved party. It is submitted that had the legal effect of the New Management Contract not been within the scope of submission to arbitration, the court might have refused to set aside the award, given its finding that Kempinski suffered no prejudice. Of course, on the facts of the case, the court did not need to invoke this argument. However, the influence in this case, of the fact that Kempinski suffered no prejudice, is evident because the court went on to make this point even after concluding that the legal effect of the New Management Contract was not outside the scope of submission to arbitration.

XIII. Conclusion

40 The Court of Appeal decision in *Kempinski* is not just another example of its pro-arbitration tendencies, but also the court's nuanced understanding of its role at the end of the arbitration process. The court astutely focused on the question of the tribunal's jurisdiction, taking a broad view of the dispute and avoided prescribing the procedure for pleading in arbitration even though that was where parties' arguments were focused.

56 [2011] 4 SLR 305.

© 2013 contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.