Case Note

THE INTRICACIES INVOLVED IN THE PURSUIT OF NATURAL JUSTICE IN ARBITRATION

L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd [2013] 1 SLR 125

This case note explores the intricacies behind the Singapore Court of Appeal decision in *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125, where an additional arbitral award was set aside for breach of natural justice. The court's views of the level of prejudice required to set aside an award for breach of natural justice and its first ever pronouncement on s 43(4) of the Arbitration Act (Cap 10, 2002 Rev Ed) are carefully analysed. The case note also discusses two important, practical questions arising from the court's decision: (a) the consequences of an award being set aside; and (b) the applicability of the "remission" provision in s 48(3) of the Arbitration Act.

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I. Introduction and factual background

1 The case of *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* ("*Lim Chin San*")[1] presented yet another opportunity for the Singapore Court of Appeal to discuss the rules of natural justice in so far as they relate to arbitration, and specifically – for the first time – additional awards. It is also the first arbitration-related judgment delivered by the current Chief Justice Sundaresh Menon sitting in the Court of Appeal. Although the result – that parties must be given an opportunity to be heard before an additional award is made – is uncontroversial, a careful study of the judgment would reveal some

* The views expressed in this article are those of the authors and are not representative of the views of the Attorney-General's Chambers.

1 [2013] 1 SLR 125.

jurisprudential developments in: (a) the pursuit of natural justice in arbitration, and (b) the construction of the statutory provision governing additional awards in the Arbitration Act[2] in Singapore that are worth highlighting. The judgment also raises challenging and practical questions in relation to the consequences that follow upon a setting aside of an additional award and the possibility of remission in lieu of setting aside an award.

2 This case involved an arbitrator who issued an additional award on the application by one party, pursuant to s 43(4) of the Arbitration Act,[3] without giving the other party an opportunity to respond to the application. Section 43(4) of the Arbitration Act, which is "modelled" on Art 33(3) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), provides:[4] "Unless otherwise agreed by the parties, a party may, within 30 days of receipt of the award and upon notice to the other party, request the arbitral tribunal to make an additional award as to claims presented during the arbitral proceedings but omitted from the award." Having rendered an initial award providing only for post-award interest, the arbitrator was requested by the successful party ("the defendant") to award it pre-award interest as well. Three days passed. The other party ("the plaintiff") did not respond to the request. The arbitrator then decided to render the additional award providing for pre-award interest in favour of the defendant. The aggrieved plaintiff objected and subsequently sought, *inter alia*,[5] to set aside the additional award on the ground that it had been made in breach of natural justice.

3 The High Court judge set aside the additional award,[6] holding that the plaintiff's right to be heard had not been observed and that it was unreasonable for the arbitrator to have inferred from the inactivity during the three days that the plaintiff did not intend to object to the request for an additional award by the defendant. The judge found that the requisite prejudice had been made out because the plaintiff had

2 Cap 10, 2002 Rev Ed.

3 Cap 10, 2002 Rev Ed.

4 UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17 annex I and A/61/17 annex I) (adopted 21 June 1985; amended 7 July 2006) ("Model Law"). See *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [62]. The Court of Appeal also noted in the same paragraph that the materials which are relevant to the interpretation of Art 33(3) of the Model Law would also assist in the interpretation of s 43(4) of the Arbitration Act (Cap 10, 2002 Rev Ed). This follows from the court's observation that the Arbitration Act was passed to align domestic arbitration with the rules governing international arbitration.

5 The plaintiff also prayed for a declaration that the additional award be declared a nullity, but this was dismissed by both the High Court and the Court of Appeal.

6 *Lim Chin San Contractors Pte Ltd v L W Infrastructure Pte Ltd* [2012] 2 SLR 1040.

been denied the very opportunity to submit on the applicability of s 43(4).

4 The Court of Appeal dismissed the defendant's appeal and agreed with the judge that the short time given for the plaintiff to respond was unreasonable and a breach of natural justice had occurred.[7] In reaching its decision, the Court of Appeal drew a distinction between *two different questions* in respect of which the plaintiff was deprived of the opportunity to be heard:[8] (a) *the jurisdictional question*[9] – whether pre-award interest was a *presented* claim ("the first limb") which had been *omitted* from the initial award ("the second limb"); and (b) *the substantive question* – whether pre-award interest should be awarded, and if so, to what extent. The court eventually determined that the plaintiff was not given the opportunity to be heard on both the jurisdictional and substantive questions, and had suffered prejudice.[10] While dismissing the appeal, the Court of Appeal took the opportunity to set out its disagreements with the High Court judge's analysis, and also touched on various issues which are of general importance to counsel seeking to challenge awards on the ground of breach of natural justice.

II. The level of "prejudice" recalibrated

5 What immediately strikes the reader of the judgment is how the test of requisite prejudice has been relooked in *Lim Chin San*. Prior to this case, the case of *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* ("*Soh Beng Tee*")[11] had set out the elements required for the setting aside of an award for breach of natural justice.[12] One of the elements was that the party challenging an arbitration award as having contravened the rules of natural justice must establish how the breach *prejudiced* its rights.[13] The court in *Soh Beng Tee* then articulated the requisite level of prejudice which had to be shown: it had to be one where the breach of natural justice "*must, at the very least*, have *actually altered* the final outcome of the arbitral proceedings in some meaningful

7 *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [76].

8 *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [58].

9 That is, two of the requirements of s 43(4) of the Arbitration Act (Cap 10, 2002 Rev Ed). See para 2 above.

10 *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [87]–[92].

11 [2007] 3 SLR(R) 86.

12 Affirming the formulation of the elements set out in *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443.

13 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [29].

way" [emphasis added].[14] The seeming need for an actual alteration in the final outcome before prejudice could be established can also be detected in an earlier paragraph of that judgment, where the court explained that "[i]t may well be that though a breach has preceded the making of an award, the *same result could ensue* even if the arbitrator had acted properly" [emphasis added].[15] This test of prejudice appears to allow for the argument that *no* prejudice can be said to result if the arbitral tribunal reaches a decision which *could have been reached*[16] if the breach of natural justice did not occur.[17]

6 With the decision in *Lim Chin San*, the required level of prejudice before an award can be set aside has been reconsidered. As the Court of Appeal stated in no uncertain terms:[18]

> These passages [at [86] and [91] of *Soh Beng Tee*] should not be understood as requiring the applicant for relief to demonstrate affirmatively that a *different outcome would have ensued* but for the breach of natural justice. Nor conversely do they mean that the application for relief is bound to fail if there is a possibility that the *same result* might have been arrived at even if the breach of natural justice had not occurred.
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> … the real inquiry is whether the breach of natural justice was *merely technical and inconsequential* or whether as a result of the breach, the arbitrator was denied the benefit of arguments or evidence that had a *real as opposed to a fanciful chance of making a difference to his deliberations* … Where it is evident that there is *no prospect whatsoever* that the material if presented would have made any difference because it *wholly lacked any legal or factual weight*, then it could not seriously be said that the complainant has suffered actual or real prejudice in not having had the opportunity to present this to the arbitrator.
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> [emphasis added]

7 From the passages above, it can be observed that the level of prejudice which has to be established has been "recalibrated" *in favour of the complainant*, as the complainant merely needs to show (to establish prejudice) that the argument it was deprived of making "*could reasonably* have made a difference to the arbitrator; rather than [that] it

14 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [91].

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

16 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [91].

17 See also *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [37].

18 *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [51] and [54].

would necessarily have done so".[19] This relatively bright line approach is helpful in so far as it provides a practical guideline for courts to ascertain whether a "prejudicial breach" has occurred without straying too far into the realm of assessing the merits of the case in the arbitration, which properly belongs in the domain of the arbitral tribunal.

8 While the Court of Appeal declared its willingness to hold that there can be prejudice suffered even if the complainant can only show that its argument "*could reasonably* have made a difference to the arbitrator", this requirement (of having to show "prejudice") continues to remain a robust gatekeeper against unmeritorious and inconsequential claims of breaches of natural justice. The Court of Appeal's approach to the question of prejudice in relation to the first limb of the jurisdictional question makes this clear when contrasted with the High Court's approach. At the High Court, the judge had determined that there was prejudice in the following manner:[20]

> The plaintiff argued strenuously on the issues of whether pre-award interest had been presented during the main arbitral proceedings and whether it had been omitted from the final award [that is, the two limbs of the jurisdictional question]. *The answers to those questions turned on the meaning of 'interest' as it had been presented by the parties before the arbitrator, and were not questions that I could decide.* Those were the two questions of fact which the arbitrator had to answer before he could decide if at law he was empowered to make an additional award. It bears repeating that judicial review of arbitral awards does not lie for alleged errors of law or fact made by the tribunal.
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> I shall now address the defendant's contention that the plaintiff had not suffered prejudice because the Arbitrator would have awarded pre-award interest to the defendant anyway, even if the plaintiff had been allowed to make submissions on s 43(4). … In my view, [the defendant's] contention was without merit, because *as a result of the breach of [natural justice], the plaintiff was denied an opportunity to submit on the applicability of s 43(4)*.
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> [emphasis added]

9 With respect, the approach by the High Court appears to have conceptually conflated the test of prejudice with the very breach of

19 *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [51] and [54].

20 *Lim Chin San Contractors Pte Ltd v L W Infrastructure Pte Ltd* [2012] 2 SLR 1040 at [45] and [53].

natural justice itself.[21] In contrast, the Court of Appeal engaged with the two limbs of the jurisdictional question *head-on* by carefully assessing what the plaintiff *might have submitted before the arbitrator* on these two limbs.[22] It then came to the view that there was no prejudice suffered by the plaintiff in relation to the first limb of the jurisdictional question.[23] The High Court was certainly correct that, when a party makes a request for an additional award pursuant to s 43(4), the arbitrator should be the one to decide on whether the requirements of s 43(4) are satisfied. However, the paradigm changes when a court is deciding if there has been *actual or real prejudice suffered* in a breach of natural justice. To assess the prejudice that has been caused to the plaintiff, the court necessarily has to assess "the arguments [the plaintiff] would have raised before the arbitrator"; not for the purposes of replacing the arbitrator's role, but only so as to possess an Archimedean point to determine the prejudice suffered by the plaintiff. It must be noted that the Court of Appeal was *not* undertaking the exercise to determine the answer to the jurisdictional question *conclusively*.[24] Rather, the exercise was undertaken simply to answer the question *of prejudice*; and the test of prejudice *necessitated* the court asking whether the argument(s) that were not submitted "*could reasonably* have made a difference to the arbitrator". The *conclusive findings* of whether the claim was presented yet omitted would have to be made *by the court* in a setting aside application under s 48(1)(*a*)(v) of the Arbitration Act,[25] but not in a case where the setting aside application is based on a breach of natural justice.

III. The Court of Appeal's construction of section 43(4) of the Arbitration Act

A. Was the claim for pre-award interest "presented" to the arbitrator?

10 On the first limb of the jurisdictional question, the Court of Appeal gave short shrift to the first possible argument raised by the

21 See *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [77]–[78].

22 See para 4 above.

23 *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [80]–[81]; see also para 4 above, and paras 10 and 11 below. The Court of Appeal, however, held that there was prejudice suffered in relation to the second limb of the jurisdictional question, see paras 13–16 below.

24 See *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [88].

25 Cap 10, 2002 Rev Ed. See *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [40] and also paras 17–20 below.

plaintiff that the claim for pre-award interest was "not presented" by the defendant. It did so in the following terms:[26]

> Given that the Defendant would automatically have been entitled to post-award interest even if it did not include a claim for 'interest' in its 'Points of Claims' by virtue of the previous s 35(2) of [the Arbitration Act], there can be no real basis for contending that the prayer for interest was not wide enough to cover pre-award interest. What else could it have meant? The claim for pre-award interest had therefore been presented to the Arbitrator.

11 Technical arguments rarely cut ice with the Singapore courts in setting aside applications. The broad reading of the "prayer for interest" in *Lim Chin San* might be compared to the "considerable measure of judicial deference" that is "accorded the arbitrators' interpretation of the scope of their mandate under the parties' submissions".[27] A relatively wide berth is also given to arbitrators in their interpretation of the scope of the submission to arbitration as well, as is evidenced in the earlier case of *PT Prima International Development v Kempinski Hotels SA*.[28]

12 An interesting parallel can also be drawn with the recent decision by the High Court of Justice in England ("English High Court") in *Cadogan Maritime Inc v Turner Shipping Inc* ("*Cadogan*").[29] In *Cadogan*, the respondent in the arbitration had sought to set aside an additional award issued in favour of the claimant in the arbitration for a sum of money ("the Accrued Interest") that was not specifically mentioned by the arbitral tribunal in the initial award. The respondent argued, before the English High Court, that the tribunal had acted in excess of its powers under s 57(3)(b) of the Arbitration Act 1996[30] (the equivalent of s 43(4) of the Arbitration Act)[31] by issuing the additional award. The English High Court similarly examined the two limbs of the jurisdictional question separately[32] (although it did so for the purpose of

26 *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [80].

27 Gary Born, *International Commercial Arbitration* vol II (Kluwer Law International, 2009) at p 2609. See also Georgios Petrochilos, *Procedural Law in International Arbitration* (Oxford University Press, 2004) at p 147: "where a specific type of relief has been prayed for even in general terms, the tribunal will be within its rights to grant it …".

28 [2012] 4 SLR 98 at [47].

29 [2013] 1 Lloyd's Rep 630.

30 c 23. Section 57(3)(b) states: "The tribunal may on its own initiative or on the application of a party … make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award."

31 Cap 10, 2002 Rev Ed.

32 The first limb being "whether a claim for the Accrued Interest was 'presented to the tribunal'"; and the second limb being "whether the claim was 'dealt with in the Award'".

determining conclusively whether s 57(3)(b) has been complied with, as opposed to determining merely if there was prejudice).[33] On the first limb of the jurisdictional question, the English High Court held that the claimant's claim for "all sums" in the account which contained the Accrued Interest was "literally sufficient to embrace a claim for the Accrued Interest".[34] Given the factual and commercial context surrounding the claimant's claim, the English High Court expressed that a "purposive construction" of the claim would also lead to the same conclusion.[35] The English High Court justified this holding on the basis – one which was certainly shared by the Singapore Court of Appeal in *Lim Chin San* – that "[a]rbitration is rightly a less formal process and concentrates on substance rather than form".[36]

B. Was the claim for pre-award interest "omitted" by the arbitrator?

13 With regards to the second limb of the jurisdictional question (whether pre-award interest was "omitted" by the arbitrator), the Court of Appeal held that the plaintiff's second possible argument (that pre-award interest was "not omitted" by the arbitrator) could reasonably have made a difference to the outcome in the arbitration. Accordingly, the court found that there was prejudice caused.[37]

14 On this note, it might be worth asking whether the defendant could have argued that the issue of whether the pre-award interest was omitted or not is one which lies *subjectively* in the mind of the arbitrator himself. Could the court not have granted the arbitrator the benefit of doubt? After all, the arbitrator had, in the impugned additional award, stated upfront that he had "overlooked and omitted to deal with the pre-award interest".[38] When challenged by the plaintiff, the arbitrator was quick to maintain his consistent position and even expressed surprise that the plaintiff could claim to have read his intention.[39] In these circumstances, since the arbitrator was of such great certainty that he *did omit* the pre-award interest, could it not be said that the plaintiff *could not* have convinced the arbitrator (even if the arbitrator had given the plaintiff its opportunity to be heard) that the pre-award interest was impliedly denied in the initial award?

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33 See para 9 above for the different paradigms involved.
34 *Cadogan Maritime Inc v Turner Shipping Inc* [2013] 1 Lloyd's Rep 630 at [33].
35 *Cadogan Maritime Inc v Turner Shipping Inc* [2013] 1 Lloyd's Rep 630 at [33].
36 *Cadogan Maritime Inc v Turner Shipping Inc* [2013] 1 Lloyd's Rep 630 at [32].
37 *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [88].
38 See *Lim Chin San Contractors Pte Ltd v L W Infrastructure Pte Ltd* [2012] 2 SLR 1040 at [9].
39 See *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [12].

15 This was not the route the Court of Appeal took. Focusing on the precise words used by the arbitrator in the initial award,[40] the court adopted a "straight-forward reading" and stated that it was *possible* to interpret the arbitrator as having confined his award to *post-award* interest only and the initial award accordingly as a "deliberate decision *not* to award pre-award interest" (that is, the claim for pre-award interest might not have been omitted, it was impliedly denied).[41] By recognising this very *possibility* in spite of the arbitrator's – albeit *ex post facto* – insistence that he did omit the claim, the court appeared to have eschewed a *subjective approach* (inquiring what might have been in the arbitrator's mind) in determining whether there had been "omission" under s 43(4) and embraced an *objective approach* (inquiring how a reasonable person might have interpreted the initial award based on how it was drafted and also taking into account the governing legislative framework[42]) instead. It is submitted that the objective approach can be justified on the basis that a supervisory court should not be mired in dealing with the speculative and post-hoc versions of what might have been in the minds of arbitrators when they rendered their decisions.

16 The question of whether or not there has indeed been an "omission" by an arbitrator under s 43(4) is ultimately a factual one,[43] as can be evidenced by the different conclusion reached by the English High Court on the second limb of the jurisdictional question in *Cadogan*. The English High Court conclusively determined that the claim for Accrued Interest which was presented was *not* "dealt with" (that is, it was omitted) by the arbitral tribunal. Having considered the nature and the level of detail (or lack thereof) in the initial award, the English High Court dismissed the contrary view suggested by the respondent that the claim was "implicitly determined" by the tribunal as "a result which cannot sensibly have been intended".[44]

40 *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [86] (the arbitrator having dealt with the interest rate, principle amount and exact date from which interest should accrue).

41 *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [87].

42 In particular, the principle of finality in arbitration reflected in s 44 of the Arbitration Act (Cap 10, 2002 Rev Ed), see *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [83]–[85].

43 This factual determination can, however, be heavily infused with norms as evidenced by the reliance of the Court of Appeal on the principle of finality in arbitration to determine whether or not the claim for pre-award interest was indeed omitted: see *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [83]–[85].

44 *Cadogan Maritime Inc v Turner Shipping Inc* [2013] 1 Lloyd's Rep 630 at [48].

C. The right to set aside an additional award for "non-adherence to procedure"

17 The Court of Appeal also provided some guidance as to how a party could set aside an additional award for *non-adherence to procedure*[45] when the elements of s 43(4) are not fulfilled:[46]

> The [word 'procedure' under s 48(1)(*a*)(v) of the Arbitration Act] *includes anything* in the legislative framework that is provided by the applicable governing law of the arbitration – in this case, [the Arbitration Act]. Thus the powers (or the lack thereof) of the Arbitrator are circumscribed by [the Arbitration Act] aside from anything else that might have been specifically agreed between the parties. If the Arbitrator was wrong to render the Additional Award because s 43(4) … did not in fact empower him to do so, *the 'arbitral procedure' leading to the issuance of the Additional Award would be contrary both to 'the agreement of the parties' and also 'the provisions of this Act'*. [emphasis added]

18 Despite its role as *dicta* in *Lim Chin San*, this useful guidance on s 48(1)(*a*)(v) of the Arbitration Act[47] (which is *in pari materia* with Art 34(2)(a)(iv) of the Model Law)[48] provides a rare discussion of the applicability of Art 34(2)(*a*)(iv). Prior to this judgment, there appears to be only four local decisions on Art 34(2)(*a*)(iv)[49] and in none of these four cases did the applications to set aside the award on Art 34(2)(*a*)(iv) succeed. What can be gained after the decision in *Lim Chin San* is that the word "procedure" in Art 34(2)(*a*)(iv) might refer to:

> (a) *any procedural rule* in the legislative framework that is provided by the applicable governing law of the arbitration; and
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> (b) *any procedural rule* that the parties have agreed on.

19 What was *not* considered by the Court of Appeal, however, is whether this broad reading of the word "procedure" in Art 34(2)(*a*)(iv) would open the gates to unmeritorious challenges against arbitration awards in the Singapore courts for minor and inconsequential breaches of procedure. Fortunately, the need for the complainant to show that it

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45 This is as opposed to setting aside the award based on a breach of natural justice (s 48(1)(a)(vii) of the Arbitration Act (Cap 10, 2002 Rev Ed)) as in *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125.

46 *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [40].

47 Cap 10, 2002 Rev Ed.

48 UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17 annex I and A/61/17 annex I) (adopted 21 June 1985; amended 7 July 2006).

49 *Luzon Hydro Corp v Transfield Philippines Inc* [2004] 4 SLR(R) 705; *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] 4 SLR 672; *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305; *Quarella SpA v Scelta Marble Australia Pty Ltd* [2012] 4 SLR 1057.

had *suffered real or actual prejudice*, as when the complaint is made that there has been a breach of natural justice, exists as well in Singapore for *all* statutory grounds of setting aside.[50] The court can exercise its discretion to decline to set aside an arbitral award even though one of the prescribed grounds for setting aside has been made out if no prejudice has been sustained by the complainant. This can be seen from *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK*,[51] where the Court of Appeal stated as follows:[52]

> Before us, CRW raised a new argument that was not canvassed in the court below, namely, that the court had a residual discretion to refuse to set aside an arbitral award even though one or more of the prescribed grounds for setting aside had been made out.
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> *We accept that the court may, in its discretion, decline to set aside an arbitral award even though one of the prescribed grounds for setting aside has been made out. However, in our view, the court ought to exercise this residual discretion only if no prejudice has been sustained by the aggrieved party.* In the present case … PGN has suffered real prejudice as a result of the Majority Members acting in excess of their jurisdiction and also in breach of the rules of natural justice. Given the prevailing circumstances, there is simply no basis for this court to invoke its residual discretion to refuse to set aside the Final Award.
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> [emphasis added]

20 It still remains to be seen, however, how this general test of "prejudice" is to be *formulated* in relation to each of the respective statutory grounds of setting aside under Art 34(2)(a) of the Model Law.[53] After all, the formulation of the "prejudice" test in *Lim Chin San*[54] is quite specific to the "breach of natural justice" ground and may not be easily applicable to all the other grounds of setting aside.

IV. Whither the "remission" provision?

21 At the end of the judgment, the Court of Appeal mentioned that counsel for the parties were invited to submit on the consequential orders that should be ordered. The court made a passing reference to the

50 See *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [34].

51 *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305.

52 *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [98]–[100].

53 UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17 annex I and A/61/17 annex I) (adopted 21 June 1985; amended 7 July 2006).

54 See para 6 above.

possibility of the matter being remitted back to the arbitrator,[55] but given that the arguments in relation to remission were not fully argued, the court decided to confine itself to the setting aside of the additional award and made no special consequential orders.[56] It is humbly submitted that the legal positions on whether an issue can be "remitted" back to an arbitrator and, more importantly, the effect of an award which has been set aside, are relatively undeveloped in Singapore and would benefit from fuller arguments from counsel when the next opportunity arises.

22 On the issue of the *consequences* resulting from an arbitral award being set aside, it should first be noted that that the Working Group behind the Model Law appeared to have been ambiguous. This is reflected in the following observation by Holtzmann and Neuhaus:[57]

> The Secretariat suggested that, except where the award has been set aside because the arbitration agreement was invalid, there might be two solutions: to conclude that 'arbitration did not work' and refer parties to court litigation, or to 're-activate the original arbitration agreement' on the ground that the final award had been set aside and thus could not be said to terminate the agreement. Neither the Working Group nor the Commission dealt with the question, and thus it is not directly addressed in the final text.

23 However, despite this ambiguity, the following proposition can be observed in both the writings of academics[58] and the practice of the courts of various jurisdictions today: upon an arbitral award being set aside on grounds that *does not affect the arbitral tribunal's jurisdiction as a whole*,[59] the parties retain the right to re-arbitrate their disputes pursuant to their arbitration agreement.

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55 *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [93].

56 *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [93].

57 Howard M Holtzmann & Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law, 1989) at p 921.

58 See Chan Leng Sun, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011) at para 6.226 ("the mandate of the tribunal should not be considered terminated where the award is set aside by the court"); Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 10.90 and Gary Born, *International Commercial Arbitration* vol II (Kluwer Law International, 2009) at pp 2699–2700.

59 Grounds which affect the arbitral tribunal's jurisdiction would be when there is an invalid arbitration agreement, or if the subject matter was not arbitrable (see Chan Leng Sun, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011) at para 6.220).

24 In *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* ("*Front Row*"),[60] the High Court ordered "the part of the Award dealing with Front Row's counterclaim" to be set aside due to a breach of natural justice having been made out by the complainant. The High Court then "ordered that the part of the Award so set aside be tried afresh by a newly appointed" arbitrator,[61] although it was rightly observed by Chan that "[n]o reference was made to any statutory provision for the remission or to the appointment of a new arbitrator."[62] It is respectfully submitted that there may have been no need for the court in *Front Row* to have *ordered* the parties to re-commence arbitration. This is because, as suggested above, once the award (or part of the award) has been set aside by the court, the parties are free to re-commence arbitration for any unresolved claim pursuant to their arbitration agreement (subject to any time bar), rather than have to rely on a court order to do so. In fact, it has been observed that the court has "no general power of remission" under the Arbitration Act.[63] If the parties are unable to re-arbitrate their unresolved dispute(s) because of the time bars under the Limitation Act,[64] s 11(2) of the Arbitration Act[65] specifically grants the court the power to order that the *period between* the commencement of the arbitration and the date of the setting aside of the award to be excluded. Accordingly, s 11(2) has been cited as evidence to support the proposition that a setting aside of an award *revives the arbitral tribunal's jurisdiction*, for if not "there would be no point protecting against this time bar".[66] *If*, for instance, in the case of *Front Row*, there was ambiguity as to whether the parties were in time to re-commence arbitration over Front Row's counterclaim, the court could have ordered that the time bar be waived under s 11(2) of the Arbitration Act.

25 The view that parties retain the automatic right to re-arbitrate their dispute after an award has been set aside is also reflected in foreign case law. It has been observed that "German law also provides that absent any indication to the contrary, the setting aside of the award will 'result in the arbitration agreement becoming operative again in respect of the subject-matter of the dispute'".[67] Similarly, the English courts also

60 [2010] SGHC 80.

61 *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 at [54].

62 Chan Leng Sun, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011) at para 6.221.

63 Chan Leng Sun, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011) at para 6.215.

64 Cap 163, 1996 Rev Ed.

65 Cap 10, 2002 Rev Ed.

66 Chan Leng Sun, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011) at para 6.230.

67 Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2012) at p 210.

appear to be of the view that "setting aside the award under the Arbitration Act 1996, s 68(3)(a) does not affect the validity of the original agreement between the parties to submit their agreement to arbitration".[68]

26 However, *on the present facts* of *Lim Chin San*, what was set aside was not the *original* award, but an *additional* award. Crucially, the additional award finds its juristic source not just in the parties' arbitration agreement, but the *jurisdictional requirements of s 43(4)*[69] being satisfied as well. In the present case, the 30-day deadline for a request for the arbitrator to render a fresh additional award would have long passed. Unfortunately for the defendant, s 11(2) of the Arbitration Act[70] applies only to *time bars under the Limitation Act* and there does not appear to be any provision allowing the court to waive "*time bars* *which are mandated within the provisions of the Arbitration Act itself*.[71] With the additional award being set aside, the defendant might have just reached the end of the road with regards to its attempt to recover its pre-award interest.

27 Understandably, the defendant might feel aggrieved at this outcome. After all, it was not the party who perpetuated the breach of natural justice, yet it ended up being deprived of its substantive right to a significant sum of pre-award interest.[72] At this point, a novel legal question arises as to whether the Court of Appeal could have, had the parties "fully argued"[73] the applicability of s 48(3) of the Arbitration Act,[74] *suspended the setting aside proceedings* for the arbitrator to "eliminate the grounds for setting aside [the] award" instead. Section 48(3) states that:

> When a party applies to the court to set aside an award under this section, the court may, where appropriate and so requested by a party, suspend the proceedings for setting aside an award, for such period of time as it may determine, to allow the arbitral tribunal to resume the arbitral proceedings or take such other action as may eliminate the grounds for setting aside an award.

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68 Robert Merkin, *Arbitration Law* (LLP, 2004) at para 20.34; see also *Hussmann (Europe) Ltd v Ahmed Pharaon* [2003] EWCA Civ 266.

69 The jurisdictional requirements are as follows: (a) The request for an additional award must be made *within 30 days after receipt of the original award*; (b) notice must be given to the other party; (c) the claim must have been presented during the arbitration proceedings, and (d) the claim was omitted from the award.

70 Cap 10, 2002 Rev Ed.

71 For example, the 30-day deadline in s 43(4) of the Arbitration Act (Cap 10, 2002 Rev Ed).

72 A sum which amounted to $274,114.61 (see *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [10]).

73 *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [93].

74 Cap 10, 2002 Rev Ed.

28 This naturally raises the question as to whether s 48(3) of the Arbitration Act (or Art 34(4) of the Model Law)[75] is *indeed* a "remission" provision which allows the court to "remit" the matter back to an arbitrator in lieu of setting aside the award. From a historical perspective, the Working Group behind the Model Law clearly envisioned Art 34(4) to be a "remission" provision, as it was observed that "[what was ultimately adopted] … was the concept of having the *remission be an alternative to immediately setting aside the award*, rather than a possible consequence of setting aside" [emphasis added].[76] This was despite the earlier concern raised by some that remission was "a procedure which was of limited practical relevance and known only in certain legal systems".[77] However, the prevailing view was that the provision might prove "useful and beneficial" and "where found appropriate by the court, would enable the arbitral tribunal to cure certain defects which otherwise would necessarily lead to the setting aside of the award".[78]

29 Given the historical background above, commentators have noted that Art 34(4) is in fact "an equivalent provision to that of remitting the award to the tribunal for reconsideration",[79] and that "[r]emission is now codified in the Model Law".[80] However, this is not an ordinary "remission" provision[81] because "[t]he scope of this power [of

75 UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17 annex I and A/61/17 annex I) (adopted 21 June 1985; amended 7 July 2006).

76 Howard M Holtzmann & Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law, 1989) at p 920. See also Chan Leng Sun, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011) at para 4.39: "Although the word 'remission' is not used in Article 34(4) of the Model Law … the [Working Group] indicate that it was intended to preserve a national court's option to remit an award where it deems appropriate".

77 *Report of UNCITRAL Commission on International Trade Law* (18th Session, UN Doc A/40/17) (3–21 June 1985) at para 305. The concept of remission has been said to be "relatively new in most civil law countries", and that "[g]enerally, remissions is a main remedy in common law jurisdictions; it is of lesser significance in Model Law jurisdictions": see Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at paras 25-64 and 25-65.

78 *Report of UNCITRAL Commission on International Trade Law* (18th Session, UN Doc A/40/17) (3–21 June 1985) at para 306. See also *Analytical Commentary on Draft Texts of a Model Law on International Commercial Arbitration, Report of the Secretary-General* (UN Doc A/CN.9/264) (25 March 1985) at paras 13 and 14.

79 Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 10.34.

80 Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at para 25-64.

81 See the substantive differences between Art 34(4) of the UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17 annex I and A/61/17 annex I) (adopted 21 June 1985; amended 7 July 2006) and the "remission" provisions of other statutes in Jean-François Poudret & Sébastien Besson (*cont'd on the next page*)

remission] is necessarily limited to such of those matters that could be remedied by some act on the part of the tribunal".[82] No remission is also allowed if "remitting the case back to the arbitrator will not eliminate the problem",[83] but only:[84]

> … where the award [was to be] set aside in circumstances that do not *impugn the arbitration itself* … [for example] if the award is not set aside on jurisdictional ground, but for, say, breach of natural justice … there is no reason why parties cannot revert to arbitration to re-determine their dispute. [emphasis added]

30 The critical question that remains, however, is whether the Court of Appeal *in the present case* could have "remitted" the matter back to the arbitrator under s 48(3) of the Arbitration Act[85] to "eliminate" the breach of natural justice, by having the arbitrator grant the plaintiff a fair hearing so that it could be decided afresh whether an additional award granting the defendant pre-award interest should indeed be issued. Strictly speaking, there is nothing in the wording of s 48(3) which prohibits this outcome.

31 In commenting on the international arbitration law of Singapore, Merkin and Hjalmarsson observed that:[86]

> In a case where breach of natural justice has been argued on the basis that the arbitrator had made a decision on a point that had been neither pleaded nor argued, the appropriate remedy is therefore to remit the matter to the arbitrator for him to receive further evidence rather than setting aside the whole award.

The reference at the end of the observation made by Merkin and Hjalmarsson above was to the decision of the Court of Appeal in *Soh Beng Tee*. In *Soh Beng Tee*, the court mentioned by way of *obiter dicta* that:[87]

> … had there been a breach of Fairmount's right to be heard, *the appropriate remedy would have been to remit the matter to the*

Comparative Law of International Arbitration (Stephen V Berti & Annette Ponti trans) (Sweet & Maxwell, 2nd Ed, 2007) at pp 773–779.

82 Law Reform and Revision Division, Attorney-General's Chambers, *Review of Arbitration Laws* (2001) at p 33.

83 See *Tang Boon Jek Jeffrey v Tan Poh Leng Stanley* [2001] 2 SLR (R) 273 at [14], where the second award was alleged to be a nullity because the arbitrator was already *functus*.

84 Chan Leng Sun, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011) at para 6.220.

85 Cap 10, 2002 Rev Ed.

86 Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (Informa Law, 2009) at p 66.

87 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [92].

> *Arbitrator* for him to receive further evidence on the Disputed Issue. This is because setting aside the whole Award would have forced the parties to re-arbitrate the entire case when the Disputed Issue was only one among several other severable issues that the Arbitrator had decided, and which were not challenged by either Fairmount or SBT. [emphasis added]

It is interesting that the court in *Soh Beng Tee* had justified its view on the appropriateness of remission based on:[88]

> … the policy of minimal curial intervention [which] implies that the court's focus should be on the proportionality between the harm caused by the breach and how that can be remedied: see also the statutory directive in s 49(9) of [the Arbitration Act].

32 With respect, s 49(9)[89] relates to the court's powers when there is *an appeal against an award*.[90] As the complainants in both *Soh Beng Tee* and the present case had chosen to *set aside the award* (as opposed to having appealed against it), the proper provision which would empower the court to "*remit the matter back to the Arbitrator*" should have been found in s 48(3) instead. Regrettably, the use of the remission procedure found in s 48(3) or Art 34(4) does not appear to be argued with any frequency by counsel in setting aside applications. It might be that some counsel perceive what is untested as what might ultimately be unsuccessful as it has been perceptively noted that:[91]

> … the true nature of article 34(4) [of the Model Law] remains *somewhat obscure*. The grounds for recourse as provided are limited and for the most part their use will be confined to cases involving some element of procedural unfairness or impropriety during an arbitral hearing. [emphasis added]

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88 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [92].

89 Section 49(9) of the Arbitration Act (Cap 10, 2002 Rev Ed) states: "The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the arbitral tribunal for reconsideration."

90 See *Halsbury's Laws of Singapore* vol 1(2) (LexisNexis, 2011 Reissue) at para 20.128: "Unlike an appeal against an award, in an application for setting aside, the court has no power to vary or remit the award to the tribunal for consideration."

91 David Williams, "Recent Developments in Arbitration and Dispute Resolution in New Zealand" (2001) 4(2) Int ALR 41 at 43. See also Leila Anglade, "Challenge, Recognition and Enforcement of Irish and Foreign International Arbitral Awards under the Irish 1997 Arbitration (International Commercial) Bill" (1998) 9(5) ICCLR 128 at 129: "It is the experience in other Model Law countries that [Art 34(4)] is not used very often"; Gary Born, *International Commercial Arbitration* vol II (Kluwer Law International, 2009) at p 2545: "The powers under Article 34(4) are rarely invoked with there apparently being no reported decisions applying the provision" and Pieter Sanders, "What May Still be Done in the World of Arbitration?" (1999) 65(4) *Arbitration* 260 at 262.

33 It is humbly submitted that, should the court ever have to decide on the applicability of Art 34(4), the reminder in *Soh Beng Tee* of the importance of "proportionality" between the alleged breach and the remedial option to be adopted should be closely heeded. This reminder actually finds statutory support in the very provision of Art 34(4) itself; for the language used – "the court may, *where appropriate* …" – suggests that a careful, discretionary consideration of the remedial option that will lead to the fairest consequential outcome between the parties[92] cannot be too far off from the intention of the drafters of Art 34(4) of the Model Law.[93] Lastly, another open question that the authors submit merit consideration might be whether the test to be applied for remission differs in proceedings under s 48(3) of the Arbitration Act[94] as opposed to Art 34(4) of the Model Law, given a slight difference in the wording of the provisions.[95] As it currently remains unclear what the exact scope of the applicability of Art 34(4) or s 48(3) is, the law of arbitration in Singapore would certainly be enhanced if, in a future case, counsel pay closer attention to and consider this "remedial option" before the Singapore courts.

V. Conclusion

34 This important Court of Appeal decision in *Lim Chin San* suggests that while the Singapore courts remain *pro-arbitration*, this should not be confused with them being *pro-arbitrator*. The recalibrated test for prejudice – in favour of the complainant of a breach of natural justice – and the objective approach adopted in construing the jurisdictional requirements of s 43(4) of the Arbitration Act[96] serve as a timely reminder to all arbitrators of the importance of being familiar with – and faithfully *applying* – the rules of natural justice in all stages

92 See David Williams & Amokura Kawharu, *Williams and Kawharu on Arbitration* (LexisNexis, 2011) at para 17.3.6: "The court may take into account the conduct of the tribunal when deciding whether remission [under Art 34(4)] will be appropriate".

93 UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17 annex I and A/61/17 annex I) (adopted 21 June 1985; amended 7 July 2006).

94 Cap 10, 2002 Rev Ed.

95 Section 48(3) of the Arbitration Act (Cap 10, 2002 Rev Ed) states: "… to allow the arbitral tribunal to resume the arbitral proceedings or take such other action as *may* eliminate the grounds for setting aside an award" [emphasis added]; while Art 34(4) of the UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17 annex I and A/61/17 annex I) (adopted 21 June 1985; amended 7 July 2006) states: "… to give the arbitral tribunal an opportunity 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" [emphasis added]. The phrasing in Art 34(4) appears to require the court to consider (or even consult) "the arbitral tribunal's opinion" as compared to s 48(3) where such a requirement appears to be absent.

96 Cap 10, 2002 Rev Ed.

of arbitral proceedings. In developing the jurisprudence on the rules of natural justice and additional awards in arbitration, the Court of Appeal has also left some important legal questions (the applicability of s 48(3) of the Arbitration Act) open to be answered in a more appropriate case in the future.