THE NATURAL JUSTICE FALLIBILITY IN SINGAPORE ARBITRATION PROCEEDINGS

Parties frequently envelop all types of arguments under the ambit of a breach of natural justice, in a bid to set arbitral awards aside. This article explores the elements constituting natural justice and the jurisprudence developed by the Singapore courts in approaching applications to set aside arbitral awards on the grounds of a breach of natural justice. In doing so, the author will also deal with the Singapore court's approach in discerning between genuine breaches of natural justice *vis-à-vis* attempts to challenge an arbitral award on its merits under the guise of natural justice and, attempt to consolidate this convoluted and easily abused arena of law. As a concluding point, the extent to which a breach of the natural justice rules constitutes a violation of the public policy of Singapore will also be explored.

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I. Introduction

1 The rules of natural justice take particular importance in arbitration as opposed to court litigation due to the former being characterised by flexibility and freedom from the technical rules of procedure that are ubiquitous in the latter.[1] This is especially in the light of the fact that in arbitration proceedings, adjudicators are chosen by the parties themselves or by the arbitral institution that the parties choose and the arbitral awards rendered are final, subject only to limited grounds for challenge in national courts.[2]

2 This article will focus on the approach of the courts in Singapore in discerning between genuine challenges to an arbitral award *vis-à-vis* attempts to challenge an arbitral award on its merits under the guise of a breach natural justice. In analysing the court's approach, the duty of arbitrators, in ensuring that they do not stray from the accepted

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1 Chan Leng Sun, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011) at para 6.198.

2 Gary B Born, *International Arbitration: Law and Practice* (Wolters Kluwer, 2012) at p 5.

parameters of the rules of natural justice in their adjudication process, will also be explored. In addition, the extent to which a breach of the natural justice rules constitutes a violation of the public policy of the State in applications to set aside arbitral awards will also be touched on.

3 For the purposes of this article, challenges invoked under both the domestic arbitration regime[3] and the International Arbitration Act[4] ("IAA") will be used interchangeably in the light of the Court of Appeal's *dicta* that "the same approach towards natural justice ought to be adopted for both international and domestic arbitrations in Singapore".[5] This point was also reiterated in *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd*[6] ("*L W Infrastructure*") where the Court of Appeal had stated that it was Parliament's intention that the Arbitration Act[7] ("AA") should be aligned with the Model Law to "narrow the differences between the two regimes".[8] In addition, although the provisions for setting aside arbitral awards and challenging enforcement or refusal of recognition of foreign arbitral awards may be similar, it should be noted that this article only focuses on the former. However, as and when the law for both is identical, they will be used interchangeably.

II. What is natural justice?

4 The concept of natural justice derives from the English common law tradition and is succinctly captured in the two Latin maxims: *nemo judex in causa sua* and *audi alteram partem*. These maxims have been accurately summarised by Marks J in *Gas & Fuel Corporations of Victoria v Wood Hall Ltd & Leonard Pipeline Contractors Ltd*[9] and affirmed by Singapore's Court of Appeal in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd*[10] ("*Soh Beng Tee*") as follows:[11]

> The first is that an adjudicator must be disinterested and unbiased. This is expressed in the Latin maxim – *nemo judez in causa sua. The second principle is that the parties must be given adequate notice and opportunity to be heard. This is in turn expressed in the familiar Latin*

3 Arbitration Act (Cap 10, 2002 Rev Ed) s 48(1)(*a*)(vii).
4 Cap 143A, 2002 Rev Ed.
5 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [5] and [62].
6 [2013] 1 SLR 125.
7 Cap 10, 2002 Rev Ed.
8 *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [33]–[34]. See *Singapore Parliamentary Debates, Official Report* (5 October 2001) vol 73 at col 2213 (Assoc Prof Ho Peng Kee, Minister of State).
9 [1978] VR 385 at [396].
10 [2007] 3 SLR(R) 86.
11 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [43].

> *maxim* – audi alteram partem. *In considering the evidence in this case, it is important to bear in mind that each of the two principles may be said to have sub-branches or amplifications. One amplification of the first rule is that justice must not only be done but appear to be done;* (Lord Hewart CJ in *R v Sussex Justices, ex parte McCarthy,* [1924] 1 KB 256 at 259; [1923] All ER Rep 233). *Sub-branches of the second principle are that each party must be given a fair hearing and a fair opportunity to present its case. Transcending both principles are the notions of fairness and judgment only after a full and fair hearing given to all parties.* [emphasis added by Court of Appeal in *Soh Beng Tee*]

5 Apart from these two principles, some jurisdictions have accepted a third limb of natural justice: the "no evidence rule" where awards "premised on findings of fact made without *any* evidential basis, *ie*, no rationally probative evidence capable of supporting the findings, are liable to be set aside for breach of natural justice" [emphasis in original].[12] This rule was explained more intricately by Lord Diplock in *R v Deputy Industrial Injuries Commissioner, ex parte Moore*[13] as follows:[14]

> The requirement that a person exercising quasi-judicial functions must base his decision based on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above. If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue.

6 The "no evidence rule" bears a high threshold with a significant hurdle to be crossed.[15] To successfully establish a breach of the "no evidence rule", it will not suffice to merely show that an adjudicator drew an inference by illogical reasoning.[16] Rather, it must be proven that there was no evidence that permitted this inference from being drawn by *any* process of reasoning.[17]

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12 Observation made by the High Court in *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [118].

13 [1965] 1 QB 456 at [488].

14 See also *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 at [83].

15 *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214 at [104].

16 *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214 at [108].

17 *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214 at [108], citing *Telstra Corp Ltd v Australian Competition and Consumer Commission* [2009] FCA 757 at [339].

7 However, it is debatable whether the "no evidence rule" forms the third limb of the natural justice rules in Singapore. This was touched upon briefly in the recent case of *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd*[18] ("*TMM*"). Unfortunately in *TMM*, the learned Chan Seng Onn J held that as counsel had not argued this point fully, no view could be expressed on whether this rule forms part of the Singapore jurisprudence.[19] Thus, it remains to be seen whether this third limb of the natural justice rules is accepted by the courts in Singapore.

8 Apart from the legal principles stemming from the concept of natural justice, Lord Morris's *dictum* provides a succinct, practical and to the point layman elucidation of natural justice: "Natural justice, it has been said, is only 'fair play in action'."[20]

III. Natural justice in Singapore

9 Natural justice is an integral part of Singapore's common law heritage[21] and is accorded due weight in Singapore's legislation. Section 24(*b*) of the IAA expressly provides for an award to be set aside if "a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced".

10 The United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration 1985[22] ("Model Law"), incorporated into Singapore's legislation by way of the First Sched to the IAA, provides six grounds for setting aside arbitral awards in Arts 34(2)(a) and 34(2)(b). Although breaches of the natural justice rules are not explicitly provided for, the grounds under Arts 34(2)(a) and 34(2)(b) encompass the procedural fairness element of the natural justice rules.[23] In particular, the inability to present one's

18 [2013] 4 SLR 972.

19 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [119].

20 *Wiseman v Bourneman* [1971] AC 297 at [309].

21 Judith Prakash J, "Challenging Arbitration Awards for Breach of the Rules of Natural Justice", speech delivered on at the CIArb 2013 International Arbitration Conference in Penang, Malaysia (24 August 2013) at para 1.

22 (UN Doc A/40/17) Annex I (21 June 1985).

23 Judith Prakash J, "Challenging Arbitration Awards for Breach of the Rules of Natural Justice", speech delivered at the CIArb 2013 International Arbitration Conference in Penang, Malaysia (24 August 2013) at para 1.

case[24] is recognised as a "mirror image" of a breach of the principle that parties must be given an opportunity to be heard.[25]

11 When a challenge is brought against an award, "the court has a duty to entertain and engage the challenge" as provided for in the IAA and the Model Law.[26] However, this does not mean that a court is *always* obliged to sift through, arduously, records of the arbitral proceedings with a fine-tooth comb.[27] Rather, "an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied".[28]

12 In an attempt to fit in all sorts of arguments which do not fall under other grounds for setting aside arbitral awards, parties frequently take a creative approach in arguing breaches of natural justice.[29] As fittingly cited by the Court of Appeal in *Soh Beng Tee*:[30]

> For a disappointed arbitral litigant, jurisdiction and natural justice are good pickings. Jurisdiction and natural justice invoke the primordial instinct of courts to second guess other tribunals and thus defeat the greatest benefit of arbitration, its finality.
>
> It is therefore important for the court to resist its natural tendency, faced with a clear and attractive argument on jurisdiction and natural justice, to plunge into the details of the arbitration and second-guess the arbitration not only on the result but also on the punctilio of the process.

13 This makes it a daunting feat for the courts to discern between genuine and disguised applications for setting aside arbitral awards while at the same time respecting the finality and autonomy of arbitral awards.

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24 United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985 (UN Doc A/40/17) Annex I (21 June 1985) Art 34(2)(a)(ii).

25 *Government of the Republic of the Philippines v Philippine International Air Terminals Co, Inc* [2007] 1 SLR(R) 278 at [18] and [25]; *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* at p 145.

26 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [42].

27 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [42].

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

29 Judith Prakash J, "Challenging Arbitration Awards for Breach of the Rules of Natural Justice", speech delivered at the CIArb 2013 International Arbitration Conference in Penang, Malaysia (24 August 2013) at para 3.

30 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [62], citing *Mungo v Saverino* [1995] OJ No 3021.

IV. Establishing natural justice in Singapore (the *Soh Beng Tee* checklist)

14 The starting point in any successful application to set aside arbitral awards for breach of natural justice in Singapore is the satisfaction of the test set out by Choo Han Teck J in the case of *John Holland Pty Ltd v Tokyo Engineering Corp (Japan)*,[31] duly affirmed by the Court of Appeal in *Soh Beng Tee*.[32] The party challenging the arbitrator as having contravened the rules of natural justice must 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 right.

15 As illuminated by the last sub-point of the above checklist, not every breach of the natural justice rules would suffice to set aside an arbitral award. The breach of natural justice must be so grave to amount to a "prejudice" for it to be successfully set aside by the court. Indeed, a reading of s 24(*b*) of the IAA reveals that the inclusion of the words "by which the rights of any party have been prejudiced" by Parliament was probably intended as a pre-emptive response to avoid situations where parties raise technical challenges to the natural justice rules, as a ground for setting aside arbitral awards, which have no direct effect or consequence on them.[33] Hence, a merit-worthy application must entail the applicant being prejudiced before curial intervention is warranted.[34] This requirement has been accurately labelled as the "*causal nexus*" requirement by the Court of Appeal in *Soh Beng Tee*.[35]

16 However, because the concept of "prejudice" is subjective, it entails a broad array of possibilities. Thus, the Court of Appeal in offering some guidance on the above *dicta* stated that "the breach of the rules of natural justice must, at the very least, have actually altered the final outcome of the arbitral proceedings in some meaningful way".[36]

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31 [2001] 1 SLR(R) 443 at [18].

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

33 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [84].

34 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [84].

35 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [73].

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

17 The Court of Appeal in *Soh Beng Tee* also helpfully summarised a set of applicable principles which should be borne in mind when dealing with challenges to arbitral awards on the grounds of breaches of natural justice as follows:[37]

> (a) Parties in arbitration proceedings have, in general, a right to be heard effectively on every issue that may be relevant to the resolution of a dispute.
>
> (b) It would be unfair for parties to raise technical challenges to arbitral awards in a bid to get a second bite of the cherry.
>
> (c) Fairness justifies a policy of minimal curial intervention which is underpinned by two principal considerations: autonomy of the arbitration proceedings and the concomitant effect of this in allowing a limited right of recourse to the courts.
>
> (d) There must be a real basis for alleging that the arbitrator has conducted the arbitral process either irrationally or capriciously.
>
> (e) The arbitrator is entitled to embrace an approach not proposed by the parties, as long as it is based on evidence that is placed before him.
>
> (f) An arbitral award should be read generously to remedy only meaningful breaches of the rules of natural justice without the courts having to assiduously comb an arbitral award microscopically.

V. The *L W Infrastructure* approach

18 In 2012, the Court of Appeal took the liberty in *L W Infrastructure* to revisit the jurisprudence and recalibrate the level of prejudice required in approaching natural justice arguments.

19 *L W Infrastructure* is a case where a party successfully relied on the ground of a breach of natural justice in challenging an arbitral award. The Court of Appeal held that the arbitrator's decision to issue an additional award of pre-award interest in favour of the defendant, just three days after the defendant had submitted its request and before receiving any response from the plaintiff was "made without affording

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

the plaintiff the opportunity to be heard".[38] The short time given for the plaintiff to respond after the defendant had submitted its request for an additional award was found to be unreasonable and, consequently, a breach of the plaintiff's right to be heard. In the same vein, the Court of Appeal also held that the plaintiff had been prejudiced in being denied the opportunity to present arguments opposing the defendant's said request.

20 In relation to ascertaining the "test of prejudice in determining whether an arbitral award should be set aside" the court had held that this test:[39]

> … 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.

21 Instead:[40]

> … it becomes evident that 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 fanciful chance of making a difference to his deliberations. Put another way, the issue is whether the material *could reasonably* have made a difference to the arbitrator, rather than whether it *would necessarily* have done so. [emphasis in original]

22 In a nutshell, the Court of Appeal essentially lowered the test of prejudice in favour of the party alleging the breach of natural justice. Before *L W Infrastructure*, the plaintiff had to prove that the argument it was deprived of raising in the arbitration would have *necessarily* made a difference to the outcome. After *L W Infrastructure*, all that a party needs to now demonstrate is that the argument that it was deprived of making *could have reasonably made a difference to the outcome*.

VI. Aftermath of *L W Infrastructure*

23 Following on from *L W Infrastructure*, the recent case of *TMM* allowed the Singapore court to provide further guidance on the duties

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

39 *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 at [50]–[51].

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

of arbitrators in ensuring that they act within the accepted boundaries of the natural justice rules to avoid any allegations of breaching the same. This guidance was offered in the form of four "sub-rules" following the plaintiff's submissions in *TMM*.

A. Duty not to look beyond submissions

24 The court was of the view that an arbitrator would not be in breach of the natural justice rules if it relied on premises which were not raised or argued by the parties *per se*, but were "reasonably connected to arguments canvassed by the parties" in its adjudication process.[41]

25 This principle fits nicely with Art 19 of the Model Law which accords a wide latitude of discretion to arbitrators in conducting their arbitration proceedings. Many institutional rules also provide for the same such as r 16.1 of the Singapore International Arbitration Centre Rules 2013 and Art 17 of the UNCITRAL Arbitration Rules 2010.[42] The main reason for this seems obvious. Arbitrators are, quite often, chosen for their particular expertise and experience in the subject matter of the dispute, which can be extremely technical and intricate.[43] As aptly cited by the Court of Appeal in *Soh Beng Tee*:[44]

> When the parties appoint an experienced merchant as arbitrator in a quality dispute, they do not expect him to behave as if he were a High Court Judge. Their wish is that he shall use skill and diligence in finding out the facts as quickly and cheaply as possible …

As such, some leeway must be conferred on arbitrators, in their adjudication process, who ultimately have been chosen by the parties themselves.[45]

41 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [65] and [70].

42 See also Art 14(2) of the London Court of International Arbitration Rules 1998 and Art 16(1) of the American Arbitration Association/International Centre for Dispute Resolution Rules 2010.

43 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [63]; *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [47].

44 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [63], citing Michael J Mustill & Steward C Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) at p 299.

45 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [65].

B. Duty to deal with every argument present

26 The court in *TMM* distinguished between arguments that are raised by parties from the essential issues that arise in a case.[46] In discerning between them, Chan J cited Prakash J's judgment in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd*[47] where she had held that "[n]atural justice requires that the parties should be heard; it does not require that they be given responses on all submissions made".[48] Thus, while an arbitrator is under no duty to deal with each point canvassed by a party, it most certainly should deal with the essential issues.[49] Although Chan J conceded that it was not easy to define what should be considered "essential" to include in this latter category, he went on to state that the distinction between arguments and issues was not too fine and could be discerned by the following:[50]

> An argument is a proposition that inclines towards a specific conclusion. It typically contains reasons or premises, either factual or legal or both, which are presented as driving one towards a particular conclusion. An issue, on the other hand, is a topic which is non-prescriptive and usually expressed as a question.

Moreover, according a wide discretion to arbitrators to decide which issues merit due and full consideration *vis-à-vis* issues not worthy of further pursuit will make the arbitrator's task to discern the issues that should be considered "essential" easier.[51]

C. Duty to attempt to understand submissions

27 The court found no difficulty in agreeing with the plaintiff's submission that arbitrators must have at least demonstrably attempted to comprehend the parties' arguments on essential issues, to avoid breaching the natural justice rules as to the parties' right to be heard.[52] In support of this, Chan J cited[53] Andrew Ang J's *dicta* in *Front Row*

46 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [72]–[73].
47 [2010] 1 SLR 733 at [60].
48 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [76].
49 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [73].
50 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [74]–[75].
51 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [74].
52 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [89].
53 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [89].

Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd ("*Front Row*"):[54]

> [T]he court will look at the face of the documents and the tribunal's decision to determine whether the tribunal has in fact fulfilled its duty to apply its mind to the issues placed by the parties before it and considered the arguments raised.

28 Saying that, the court in *TMM* did acknowledge that the distinction between an arbitrator making a decision without any attempt to comprehend parties' submissions on the one hand and an arbitrator who relentlessly attempted to understand parties' arguments but failed is a fine one.[55] While an arbitrator in the former scenario would be in clear breach of the natural justice rules, an arbitrator in the latter would not.[56] As aptly put by Chan J in *TMM*:[57]

> Natural justice only protects the parties' right to be heard … However, that right does not extend to functioning as a guarantee that the arbitral tribunal will comprehend, or appreciate the parties' submission and endorse the reasonableness, cogency and appeal of any party's arguments.

Therefore, referring to the final outcome in an arbitral award is neither a helpful nor an accurate gauge of an arbitrator's compliance with his or her duty to attempt to understand the parties' submissions.

D. Duty to give reasons and explanations

29 The duty of an arbitrator to give reasons and explanations is widely established. Article 31(2) of the Model Law provides for this, albeit silent on the exact scope of this duty.[58] In this regard, Chan J observed that inadequate provision of reasoning by an arbitrator constitutes an error of law.[59] Since it is trite that errors of law do not suffice to attract the court's intervention in an arbitral award under the IAA,[60] allegations of inadequate reasoning and explanation are not,

54 [2010] SGHC 80 at [39].
55 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [91].
56 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [91].
57 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [96].
58 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [97].
59 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [98]. See also *Prestige Marine Services Pte Ltd v Marubeni International Petroleum (S) Pte Ltd* [2012] 1 SLR 917 at [39].
60 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [98].

therefore, compelling enough reasons for courts to set aside arbitral awards.[61] Having said that, the concept of adequacy opens up a precarious whirlpool, entailing the notion of a spectrum.[62] This begs the question, as put by Chan J, of "how much reasons and explanations are required after which any further criticism of inadequate reasons and explanation will not warrant curial intervention".[63]

30 While expressing some apprehension in pegging an arbitrator's duty to give reasons to judicial standards, Chan J went on to provide some general guidance on the standards that are applicable to judges as set out in the case of *Thong Ah Fat v Public Prosecutor*[64] ("*Thong Ah Fat*") which also serve as *assistive indicia* to arbitrators.[65]

31 In a nutshell, the following principles from *Thong Ah Fat* were reiterated by the court in *TMM*:[66]

> (a) The standard of explanation in every case must correspond to the specific requirements of the case with particular attention being drawn to the cost of and delay surrounding the case.
>
> (b) In straightforward legal issues, the court may dispense with reasons, where its conclusions suffice to draw the necessary inference.
>
> (c) Decisions or findings which do not bear directly on the substance or final resolution may not require detailed reasoning. As a rule of thumb, the more profound the consequences of a specific decision, the greater the necessity for detailed reasoning.
>
> (d) The parties' opposing stances and the judge's finding of fact on material issues should be set out even though the judge does not have to make an explicit ruling on each and every factual issue.
>
> (e) The decision should demonstrate an examination of the relevant evidence and the facts found with a view to explaining the final outcome of each material issue.

61 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [98].

62 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [99].

63 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [99].

64 [2012] 1 SLR 676.

65 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [102]–[103].

66 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [103].

32 As a concluding remark, Chan J noted that there is plainly no requirement for an arbitrator to touch on "each and every point in dispute" in its grounds of decision.[67]

VII. Successful challenges for breaches of natural justice in Singapore

33 The above *dicta* of the High Court in *TMM* is not only helpful in aiding arbitrators to avoid any allegations of breaching the natural justice rules; it also provides litigants seeking to set aside arbitral awards on the above provisions with an indication of the likelihood of a successful challenge.

34 Although it cannot be emphasised enough that the concept of natural justice is far "easier to understand than to apply",[68] the below cases where the Singapore court was of the opinion that the challenges to the arbitral award were merit worthy, provides some prognostic of when potential challenges to arbitral awards on the grounds of natural justice would be successful.

35 In the High Court case of *Koh Bros Building and Civil Engineering Contractor Pte Ltd v Scotts Development (Saraca) Pte Ltd*[69] ("*Koh Bros*"), the applicant applied for an interim award, which the respondent objected to on the ground of *res judicata*. At the preliminary hearing, the respondent raised new objections to the application on the grounds that the matter was not an appropriate one for summary disposal. The arbitrator had agreed with the respondent's additional argument, without giving the applicant a chance to respond to the same, and wrote to the parties to notify them of this. Prakash J agreed with the plaintiff and held that the arbitrator had acted in breach of the rules of natural justice in going beyond the boundaries of the reference and in failing to afford the party an opportunity to present its case.[70]

36 In *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK*[71] ("*CRW*"), the Court of Appeal overruled the High Court's judgment and held that the rules of natural justice were breached in that the majority members of the arbitral tribunal ("Majority Members")

67 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [105], citing *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84 at [48].

68 Chan Leng Sun, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011) at para 6.199.

69 [2002] 2 SLR(R) 1063.

70 *Koh Bros Building and Civil Engineering Contractor Pte Ltd v Scotts Development (Saraca) Pte Ltd* [2002] 2 SLR(R) 1063 at [44].

71 [2011] 4 SLR 305.

rendered a final decision without reviewing the adjudicator's decision.[72] The Court of Appeal was of the view that the failure of the Majority Members to consider the merits of the adjudicator's decision on the basis that the respondent had not filed a counterclaim resulted in the respondent not being given "a real opportunity" to defend its position and consequently caused real prejudice to the defendant.[73]

37 In *Front Row*, the plaintiff had argued that the arbitrator had breached the rule of natural justice expressed in the Latin maxim *audi alteram paterm*, in considering only one of the three submissions put forth by the plaintiff.[74] The High Court held that the arbitrator had dismissed the plaintiff's counterclaims without due consideration because he was under the misapprehension that the plaintiff had abandoned them and, in doing so, breached the rules of natural justice and caused sufficient prejudice to the plaintiff.[75] Notably, Ang J stated that it was not necessary for the plaintiff to satisfy the court that it *would* have succeeded in its counterclaim had the arbitrator not mistakenly concluded that it had abandoned its submissions.[76] Rather, the plaintiff's rights had been sufficiently prejudiced by the arbitrator not even getting round to *considering* the plaintiff's claims.[77]

38 Ang J's *dictum* that "an arbitrator's failure to consider material arguments or submissions is a breach of natural justice" in that "[t]he failure to allow a party to address the tribunal on a key issue is the corollary to allowing the submission but then ignoring it altogether whether deliberately or otherwise"[78] in *Front Row* was clarified by Prakash J in *Kempinski Hotels SA v PT Prima International Development*[79] ("*Kempinski Hotels*"). Prakash J here clarified that what Ang J must have meant was that "both parties should be given the opportunity to address the tribunal and that the tribunal should at least consider those submissions (rather than ignoring them outright)".[80]

72 *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [92]–[93].

73 *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [76], [85], [88], [93] and [96].

74 *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 at [2].

75 *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 at [52]–[53].

76 *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 at [52].

77 *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 at [52].

78 *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 at [35] and [53].

79 [2011] 4 SLR 633.

80 *Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 633 at [102].

39 In the case of *BLB v BLC*,[81] the High Court duly held that the arbitrators, in failing to deal with an "entire head of counterclaim" that was specifically pleaded and referred to by the plaintiff, had breached the principle of natural justice reflected in the Latin maxim *audi alteram paterm*.[82] This breach had also met the second threshold of satisfying the requisite test of prejudice, that is, it could have reasonably resulted in prejudice to the plaintiff.[83] However, reversing the High Court's judgment, the Court of Appeal found in *BLC v BLB* that the "arbitrator *did* in fact address his mind to the Disputed Counterclaim and had duly rendered a decision in respect of that particular claim" [emphasis in original].[84] As such, there was "no breach of natural justice in this situation".[85] Notably in this regard, the court was of the view that even taking the respondent's case at its highest would constitute this as a serious error of law and/or fact which did not entail a breach of natural justice.[86] Interestingly, the Court of Appeal had noted here that even assuming this case was an appropriate one for remission, it had to be remitted to the same tribunal rather than a new one.[87]

VIII. Natural justice *versus* public policy

40 Apart from these aforementioned specific grounds which can be relied on to allege breach of natural justice, there is also a wild card that exists by way of the public policy ground under Art 34(2)(b)(ii) of the Model Law which provides for arbitral awards in conflict with the public policy of Singapore to be set aside. This public policy ground has been proverbially termed a "very unruly horse",[88] as will be demonstrated below.

41 As a preface, it bears noting that the public policy test for setting aside an arbitral award under the aforementioned provision is no different from the enforcement regime under s 31(4)(*b*) of the IAA as clarified by the Court of Appeal in *AJU v AJT*.[89]

42 It is widely accepted that an arbitral award is contrary to public policy if it offends the fundamental notions of procedural justice and

81 [2013] 4 SLR 1169.
82 *BLB v BLC* [2013] 4 SLR 1169 at [85] and [88].
83 *BLB v BLC* [2013] 4 SLR 1169 at [91]–[94].
84 *BLC v BLB* [2014] SGCA 40 at [88].
85 *BLC v BLB* [2014] SGCA 40 at [98].
86 *BLC v BLB* [2014] SGCA 40 at [102].
87 *BLC v BLB* [2014] SGCA 40 at [119]–[120].
88 *Richardson v Mellish* (1824) 2 Bing 229; 130 ER 294 at [252].
89 [2011] 4 SLR 739 at [37]–[38].

fairness.[90] As public policy varies from country to country, drafters of the Model Law chose not to prescribe a universal standard of public policy.[91] However, a breach of the rules of natural justice was cited as an example of a violation of the generic "procedural public policy" category in the report by the International Law Association's Committee on International Commercial Arbitration.[92]

43 In Singapore, the threshold for setting aside arbitral awards on the grounds of public policy is generally a high one.[93] The Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*[94] ("*PT Asuransi*") agreed with Judith Prakash J in the High Court judgment, where she resisted an expansive interpretation of public policy and held that not:[95]

> … every law has to be regarded as public policy so that if it can be shown that any finding in an arbitration award constitutes a breach of such law, that arbitration award would have to be set aside on the ground of public policy.

Prakash J also stated that holding otherwise would "prove such a fertile basis for attacking arbitration awards as to completely negate the general rule".[96]

44 The Court of Appeal in *PT Asuransi* also provided a very good summary of the concept of public policy as follows:[97]

> Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would 'shock the conscience' (see *Downer Connect* ([58] *supra*) at [136]), or is 'clearly injurious to the public good or … wholly offensive to the ordinary reasonable and

90 *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214 at [30]; *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* at p 139.

91 The International Law Association's Committee on International Commercial Arbitration, "Final Report on Public Policy as a Bar to Enforcement of International Arbitral Award" (adopted at the New Delhi Conference 2002) at para 21.

92 These recommendations were only intended to apply to arbitration proceedings which included a material foreign element, see The International Law Association's Committee on International Commercial Arbitration, "Final Report on Public Policy as a Bar to Enforcement of International Arbitral Award" (adopted at the New Delhi Conference 2002) at para 8.

93 Chan Leng Sun, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011) at para 6.166.

94 [2007] 1 SLR(R) 597.

95 *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [54].

96 *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [54].

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

fully informed member of the public' (see *Deutsche Schachbau v Shell International Petroleum Co Ltd* [1987] 2 Lloyds' Rep 246 at 254, *per* Sir John Donaldson MR), or where it violates the forum's most basic notion of morality and justice: see *Parsons & Whittemore Overseas Co Inc v Societe Generale de L'Industrie du Papier (RAKTA)* 508 F 2d 969 (2nd Cir, 1974) at 974. This would be consistent with the concept of public policy that can be ascertained from the preparatory materials to the Model Law. As was highlighted in the Commission Report (A/40/17), at para 297 (referred to in *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* by Howard M Holtzmann and Joseph E Neuhaus (Kluwer, 1989) at p 914):

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

45 Interestingly, the Court of Appeal in the more recent case of *AJT v AJU*[98] held that the public policy objections are limited to narrows grounds of curial intervention and "cannot be reopened except where there is fraud, breach of natural justice or some other recognised vitiating factor".[99] By this, the court expressly brought the natural justice grounds under the ambit of public policy in Singapore.

46 In contrast to Singapore, the corresponding legislation in Australia explicitly provides that arbitral awards are contrary to the public policy of the State where a breach of natural justice occurs in the making of the arbitral award. The same provisions of the Model Law apply in Australia due to its incorporation by way of the Second Sch to the recently revised International Arbitration Amendment Act.[100] In addition, s 19(b) of the Australian legislation provides that an award is in conflict with or contrary to the public policy of Australia if "a breach of the rules of natural justice occurred in connection with the making of the interim measure or award".

47 This ground was discussed at length by the Federal Court of Australia in *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan)*

98 [2011] 4 SLR 739.
99 *AJU v AJT* [2011] 4 SLR 739 at [65].
100 No 97 of 2010 (Cth).

Co Ltd (No 2).[101] Here, the court emphasised that *any* breach of natural justice which occurs in connection with the making of the arbitral award is in conflict with the public policy of Australia.[102] However, discretion is accorded to courts in setting aside arbitral awards which "should be sparingly applied. If not, the certainty and finality of awards as well as the facilitation of award enforcement may be undermined".[103]

48 In New Zealand, Art 34(6)(b) of the First Sch to the Arbitration Act 1996, which for most part corresponds to the provisions of the Model Law, also expressly provides for an arbitral award to be set aside if a breach of the rules of natural justice occurred either during the arbitral proceedings or in connection with the making of the award. The Court of Appeal in *Amaltal Corp Ltd v Maruha (NZ) Corp Ltd*[104] ("*Amaltal*") held that a breach of natural justice would suffice to be in conflict with public policy where "it is obvious" that a "fundamental principle of law and justice" has been breached.[105]

49 In the more recent case of *Ironsands Investments Ltd v Toward Industries Ltd*[106] ("*Ironsands*"), Courtney J clarified that although the:[107]

> … clear and unambiguous meaning of Article 34(6) is that a breach of natural justice, in itself, constitutes a conflict with the public policy of New Zealand for the purposes of Article 34(2) … It would, of course, be very unsatisfactory if the effect of Article 34(6) inevitably resulted in arbitral awards being set aside for what might, in the relevant context, be quite minor breaches of natural justice or breaches that have no effect on the eventual outcome.

Thus, the learned judge held that it was incumbent on the court to exercise its discretion to prevent the public policy ground being abused, that is, invoked for trifling reasons.[108]

101 [2012] FCA 1214.

102 *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214 at [29].

103 *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214 at [33]–[34].

104 [2004] NZCA 17; [2004] 2 NZLR 614; (2004) 11 TCLR 63.

105 *Amaltal Corp Ltd v Maruha (NZ) Corp Ltd* [2004] NZCA 17; [2004] 2 NZLR 614; (2004) 11 TCLR 63 at [47].

106 HC AK CIV-2010-404-004879 (8 July 2011). See also Daniel Kaldermis & Chapman Tripp, *Arbitration and Administrative Law – When Two Worlds Collide* (Kluwer Law International, 2012) <http://kluwer.practicesource.com/blog/2012> (accessed 26 May 2014).

107 *Ironsands Investments Ltd v Toward Industries Ltd* HC AK CIV-2010-404-004879 (8 July 2011) at [19]–[20].

108 *Ironsands Investments Ltd v Toward Industries Ltd* HC AK CIV-2010-404-004879 (8 July 2011) at [19]–[20].

50 Although the corresponding Australian and New Zealand legislation expressly provide that breaches of natural justice come under the ambit of being contrary to the public policy of the State, it is noteworthy that no legislation akin to s 24(*b*) of our IAA exists, which provides for arbitral awards to be set aside on the grounds of natural justice alone. As such, the public policy ground may well be their way of providing for this. Further, with the discretion that the Australian and New Zealand jurisprudence have accorded to the courts, the natural justice ground is effectively controlled to ensure that arbitral awards are successfully set aside only where there have been substantial breaches of the same.

IX. Conclusion

51 Upon analysing the cases where the applicant's breach of natural justice argument was upheld, Prakash J's observation is fitting:[109]

> Admittedly, the line between permissible and impermissible decision-making is a fine one. I am sceptical that a one-size-fits-all test can be more fashioned to address the multitude of cases concerning natural justice. In most cases, whether the arbitrator had applied his mind to the parties' submissions is a question the answer to which will never be adequately reflected in the awards. It is in many respects 'essentially an intuitive judgment' …

52 As demonstrated above, it is not an easy feat for our courts to accord recourse for legitimate complaints against arbitrators whilst maintaining confidence in the arbitral system by preventing arbitral awards from being easily undermined.

53 In upholding the efficacy of the final arbitral award, counsel should avoid bringing forth arid, hollow, technical or procedural objections that have not caused parties any prejudice or even affected them at all.[110] It is only where the alleged breach of natural justice has surpassed the boundaries of legitimate expectation and propriety, culminating in actual prejudice to a party, should curial recourse be made available.[111] This will ensure that the purpose of arbitration, to be

109 Judith Prakash J, "Challenging Arbitration Awards for Breach of the Rules of Natural Justice", speech delivered at the CIArb 2013 International Arbitration Conference in Penang, Malaysia (24 August 2013) at para 14.

110 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [98].

111 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [98].

an efficient and expedient alternative dispute resolution mechanism to court litigation, is maintained.[112]

54 The recent Court of Appeal's *dicta* in *AJT v AJU* suggest that there may be two routes available to parties seeking to rely on the natural justice ground: the Art 34(2)(a) of the Model Law and s 24(*b*) of the IAA natural justice ground and the Art 34(2)(b)(ii) of the Model Law public policy ground. Singapore could well be moving in the same direction as Australia and New Zealand, where natural justice breaches can be invoked under the ambit of a violation of the public policy of the State. This would, in effect, allow the Singapore courts to take cognisance of a breach of natural justice without having to automatically set aside the arbitral award. However, it is argued that this has already been catered for in Singapore's natural justice jurisprudence by way of the requirement that the natural justice breach must meet the requisite threshold of causing prejudice to the applicant before an arbitral award can be successfully set aside. Moreover, such an expansion of the public policy ground would also contribute in augmenting the "inherent tension between judicial approaches which emphasise party autonomy, and those which emphasise public law principles".[113]

55 It remains to be seen how the Singapore courts will decide future cases where parties allege breaches of natural justice rules under the ambit of public policy and, at the same time, control the parameters of public policy to ensure that "with a good man in the saddle, the unruly horse can be kept in control, it can jump over obstacles".[114]

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112 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [125].

113 Daniel Kaldermis & Chapman Tripp, "Arbitration and Administrative Law – When Two Worlds Collide" *Kluwer Arbitration Blog* (20 December 2012) <http://kluwerarbitrationblog.com/blog/2012/12/20/arbitration-and-administrative-law-when-two-worlds-collide> (accessed 26 May 2014).

114 *Enderby Town Football Club Ltd v Football Association Ltd* [1971] Ch 591 at [606], referred to in *Ngiam Kong Seng v Lim Chiew Hock* [2008] 3 SLR(R) 674 at [40].