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Contents

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Introduction

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Cases relating to the UNCITRAL Model Law on International Commercial Arbitration (MAL)

Case 1658: MAL 17(c)
Singapore: High Court
[2015] SGHC 311
Five Ocean Corporation v. Cingler Ship Pte Ltd (PT Commodities and Energy Resources, intervener)
4 December 2015
Original in English
Available at: http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law

[**Keywords**: *interim measures*]

A head voyage charter party contract was concluded between the plaintiff and defendant, which provided for a cargo of coal to be loaded onto a ship in Indonesia, for discharge in India. This contract contained a lien clause (allowing the plaintiff to make a legal claim against the defendant in the event of non-payment of freight costs) and an arbitration clause providing for arbitration in Singapore, with English law to apply.

The dispute arose principally because the defendant failed to pay freight costs. As a result, the plaintiff issued a notice of lien and indicated that the cargo would be detained until payment was received. The plaintiff then issued a notice of arbitration to the defendant, who did not respond to it, and at the time of the hearing an arbitral tribunal had not been constituted. Further, the ship was lying in international waters as the plaintiff received legal advice that it could not exercise its lien over the cargo in India. The lien was instead exercised on the cargo in international waters.

The plaintiff made an application in a Singapore court for the sale of the cargo as an interim measure to preserve assets under Section 12A of the International Arbitration Act (Singapore, hereinafter IAA) [consistent with Article 17(c) MAL]. The key issue was whether there was an asset to be preserved, and if so, whether that asset was capable of being preserved through an order for sale.

The Court found, having regard to previous precedent(s), that the plaintiff's right to detain possession, coupled with the owner's separate lien over the cargo, was an "asset". With regards to preserving the asset, the plaintiff argued that it was not seeking to preserve the cargo per se, but to preserve the value of the cargo. The Court agreed, indicating also that the plaintiff's right to detain possession is transferred or transformed into the ability to sell the cargo and that becomes the "asset".

A subsidiary issue was whether the Court had jurisdiction to preserve assets not in Singapore's jurisdiction. The plaintiff argued that the language of Section 12A of the IAA was wide enough to confer a power to protect or preserve assets and evidence situated outside Singapore. The Court agreed, and added that given the ship was in international waters, it was outside the jurisdiction of any other court. A sale order would not have interfered with the jurisdiction of any court, and further, the order for sale of cargo not situated within a country's jurisdiction was not without precedent.

The Court then turned to whether the order for sale was urgent and necessary. Regarding urgency, the plaintiff pointed to a range of factors, including that there was overheating of the cargo and a risk that the coal could self-ignite. Whilst there was contrary evidence put forward that the cargo was unlikely to ignite, the Court found a clear case of urgency.

As for necessity, an intervener had made an application for an adjournment of the proceedings so that they could negotiate the sale with a particular coal company. However, the Court considered that there were no other reasonably available alternatives and the order for sale was necessary in order to preserve the "asset" (the plaintiff's right to detain possession of the cargo).

The order for sale was granted by the Court and net proceeds were to paid into the Court pending further orders from an arbitral tribunal.

Case 1659: MAL 34(2)(a)(ii); 34(2)(a)(iii)
Singapore: High Court
[2015] SGHC 300
AYH v. AYI and another
23 November 2015
Original in English
Available at: http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law

[**Keywords:** *arbitrability; arbitral proceedings; setting aside; procedure*]

The case concerned the application to set aside an award dated 29 December 2014 under arbitration proceedings No. 225 of 2013 before the Singapore International Arbitration Centre. The dispute for arbitration related to the validity of a deed that regulated the relationship between the plaintiff and the defendants. In its reasoning, the arbitral tribunal considered an additional agreement that the plaintiff was not party to and that arose after the parties' submission to arbitration. The tribunal ultimately found against the plaintiff by holding that the deed was valid and not void by reason of common mistake.

The plaintiff argued that the award must be set aside for two reasons. Firstly, that by considering the additional agreement, the award focussed on an issue that did not fall within the terms of the submission to arbitration and/or was a matter beyond the scope of the arbitration under Article 34(2)(a)(iii) MAL. Secondly, that there was a breach of natural justice as the tribunal did not afford him reasonable opportunity to be heard on the matter under Article 34(2)(a)(ii) MAL and Section 24(b) International Arbitration Act (2002 Revised Edition).

The Court held first that Article 34(2)(a)(iii) MAL is a two-stage enquiry as the Court must decide: (1) what matters were within the scope of the submission to arbitration; and (2) whether the award involves matters outside that scope. The Court accepted that the award considered a new fact which arose after the original claim was filed (the agreement). However, it held that failing to include the new fact in the pleadings or agreed list of issues does not mean that it is outside the scope of the arbitration. The Court relied on *PT Prima International Development v. Kempinski Hotels SA and other appeals [2012] 4 SLR 98*, in which the Singapore Court of Appeal found that any new fact which arises after the submission to arbitration need not be specifically pleaded provided that it is ancillary to the dispute submitted for arbitration, it is known to all the parties and the opposing party has had the opportunity to respond to the new fact. Applying this test, the Court found that the new fact was evidence in support of the defendant's original submission and therefore ancillary to the dispute. In addition, the plaintiff had been informed of the existence of the evidence and had sufficient opportunity to respond to the evidence. Therefore, the new fact fell within the submission to arbitration.

Subsequently, the Court rejected the plaintiff's second submission under Article 34(2)(a)(ii) MAL on the basis that the plaintiff was aware of the new fact and had the opportunity to be heard on it before, during and after the arbitral hearings. The Court considered that the fact that the plaintiff did not utilise this opportunity at the time did not mean the plaintiff could later allege a denial of natural justice. The Court therefore dismissed the application to set aside.

Case 1660: MAL 18; 34(2)(a)(ii), 34(2)(a)(iii); 34(2)(a)(iv); [NYC V(I)(d)]
Singapore: High Court
[2015] SGHC 283
AMZ v. AXX
30 October 2015
Original in English
Available at: http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law

[**Keywords:** *arbitrability; equal treatment; setting aside*]

The case concerned an application to set aside an arbitral award made on 21 January 2014 under Article 34(2)(a) MAL and Section 24(b) of the International Arbitration Act (2002 Revised Edition, hereinafter IAA). The plaintiff (seller) and the defendant (buyer) had entered into a supply contract for the sale of oil. Simultaneously, the parties entered into a buy-back contract, which obliged the plaintiff to buy back the oil in the event that the defendant could not secure an oil import license. The plaintiff commenced arbitral proceedings against the defendant, claiming that the defendant had breached three clauses of the supply contract which amounted to a fundamental breach. The tribunal found that only one of the three clauses had been breached, and held that this was not sufficient to constitute a fundamental breach of the supply contract. As the plaintiff had premised its entire case on proving there had been a fundamental breach, the plaintiff's claim failed in its entirety.

The plaintiff applied to set aside the award on three grounds. First, that the tribunal had breached rules of natural justice under Section 24(b) IAA, Article 34(2)(a)(ii) MAL and Article 18 MAL because the plaintiff was unable to present his case and/or the arbitrator was biased against the plaintiff, and that this breach caused actual prejudice. Second, that the tribunal had dealt with a dispute outside the submission to arbitration and/or decided matters beyond the scope of the submission to arbitration (Article 34(2)(a)(iii) MAL) by considering the buy-back contract. Third, that the arbitral procedure was not in accordance with the parties' agreement (Article 34(2)(a)(iv) MAL) as the tribunal accorded more weight to the evidence of one witness over another.

With regards to the plaintiff's first submission, the Court held that Section 24(b) IAA and Article 34(2)(a)(ii) along with Article 18 MAL prescribe the same principles on a breach of natural justice. To set aside an award on this basis, the plaintiff must establish: (1) which rule of natural justice was breached; (2) how it was breached; (3) how the breach was connected to making the award; and (4) how the breach prejudiced the party's rights.

The Court held that there are two rules of natural justice. The first requires that the tribunal be impartial in appearance and in reality. However, the Court found that there had not been a breach of natural justice on the basis of impartiality as there was no evidence to support this claim.

The second rule of natural justice is *audi alteram partem*, and the Court outlined several aspects of this rule. First, tribunals must give parties a chance to be heard on all issues. Second, tribunals cannot disregard a submission without directing its judicial mind to it. Third, tribunals do not need to refer every issue which falls for decision to the parties for submissions. Fourth, a tribunal's decision will only be unfair when a reasonable litigant in the position of the party challenging the award could not have foreseen the possibility of the tribunal's actual reasoning in the award. Finally, tribunals can legitimately arrive at a decision that falls between the parties' submissions provided its finding is supported by evidence and is not a dramatic departure from the parties' positions.

Applying these principles, the Court held that there had not been a breach of the *audi alteram partem* rule as the tribunal had applied its mind to the plaintiffs arguments. It found that the tribunal had actually considered some of the plaintiff's arguments when it was not necessary for it to do so to come to its decision. The Court also pointed out that it was not the tribunal's duty to advise plaintiffs on how

to best frame their own arguments. Therefore, the Court rejected the plaintiff's first submission in its entirety.

On the plaintiff's second submission, the Court considered that Article 34(2)(a)(iii) requires a two-stage enquiry into: (1) what matters were within the scope of the submission arbitration; and (2) whether the award strayed outside the scope of the submission to arbitration. The tribunal held that the buy-back contract was not beyond the scope as "the tribunal determined no issues arising in respect of the buy-back contract. The tribunal merely relied on the existence and effect of the buy-back contract as support for its findings" on (1) whether the defendant had an obligation to obtain a crude oil import licence and whether it breached this obligation, and (2) whether the plaintiff suffered loss and damage. In addition, the plaintiff had actually addressed the tribunal on the relevance of the buy-back contract.

The Court accepted the plaintiff's argument that Article 34(2)(a)(iv) MAL is similar to Article V(I)(d) New York Convention, and therefore the elements of Article V(I)(d) New York Convention are equally applicable to Article 34(2)(a)(iv) MAL. The elements are that: (1) there was an agreement between the parties on a particular arbitral procedure; (2) the tribunal failed to adhere to that procedure; (3) the failure was casually related to the tribunal's decision in the sense that the decision could have been different if the tribunal had adhered to the parties' agreement on procedure; and (4) the party mounting the challenge cannot rely on this if it failed to raise an objection during the proceedings. The Court held that the tribunal had not deviated from agreed procedure in according more weight to one witness' evidence over another's because their evidence was conflicting and it was therefore necessary for the tribunal to decide which was more credible.

In addition to demonstrating there was a procedural breach under Article 34(2)(a)(ii), Article 34(2)(a)(iii), and/or Article 34(2)(a)(iv) MAL, the Court held that the plaintiff must also have demonstrated that the breach caused actual prejudice. The test is whether the tribunal could have reasonably arrived at a different result had it not been for the breach. The Court held that there had been no such breach under any of the provisions and therefore no actual prejudice had been caused. In the alternative if there were procedural defects, the Court held that these defects did not cause actual prejudice as they touched on findings that were not necessary for the tribunal's decision against the plaintiff. The Court therefore dismissed the plaintiff's application to set aside and the plaintiff has appealed to the Court of Appeal.

Case 1661: MAL 8(2); 16
Singapore: Court of Appeal
[2015] SGCA 57
Tomolugen Holdings Ltd and another v. Silica Investors Ltd and other appeals
26 October 2015
Original in English
Available at: http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law

[**Keywords:** *arbitration agreement; kompetenz-kompetenz; procedure*]

The proceedings concerned a dispute between a minority shareholder, the respondent, and several sisters/subsidiaries companies and directors, the claimants.

The respondent agreed to buy shares of a Singapore based company pursuant to an agreement with one of the company's shareholders. The share sale agreement contained a broad arbitration clause that was intended to cover any dispute arising out of or in connection with the agreement.

Some time later, the respondent brought a claim in the Singapore High Court against the company selling the shares and other sister/subsidiary companies and directors alleging four separate issues. First, that a separate issuance of shares around the time of the share sale agreement had the effect of diluting its ownership by more

than 50 per cent. Second, that the respondent had a legitimate expectation that they would participate in the management of the Singaporean company. Thirdly, the respondent alleged that the company took on liabilities that were not in the interest of the company. Fourthly, the respondent alleged that the company incurred financial liabilities for the benefit of its majority shareholder. This was, in essence, a claim for relief under section 216 of the Companies Act, for oppressive or unfairly prejudicial conduct towards a minority shareholder.

The claimants applied to have the claim stayed in favour of arbitration (section 6 of the Singapore International Arbitration Act), given the arbitration clause contained in the share sale agreement. The High Court refused to stay the proceedings considering the dispute non-arbitrable because the arbitral tribunal would not have the full range of remedies that are available to courts under Section 216(2) of the Companies Act and the dispute involved parties who were not bound by the arbitration clause in the share sale agreement.

The Court of Appeal considered that the key matter for consideration was the arbitrability of the dispute, and in particular, whether part of the dispute fell within the scope of the arbitration clause in the share sale agreement, and therefore whether aspects of the dispute should be stayed pending resolution of the arbitration. In doing so, the Court interpreted Section 6 of the International Arbitration Act (hereinafter, IAA), which provides that a dispute concerning a matter contained in an arbitration agreement is to be resolved by arbitration (consistent with Article 8(2) of the MAL).

The Court also examined the *travaux préparatoires* of the MAL, and case law from jurisdictions in England, Australia, Hong Kong and Canada and concluded that the appropriate standard of review in a stay application was the "prima facie" approach. That is, that a Court should look "prima facie" only at the existence and scope of the arbitration clause to decide whether it should stay a proceeding, rather than pronouncing more fully and with finality on the arbitral tribunal's jurisdiction in the first instance (full merits approach).

The Court reasoned that the advantage of the prima facie approach is that if the Court is satisfied that there exists an arbitration clause which is valid and which covers the dispute at hand, it should grant the stay and defer to the arbitral tribunal. Further, using the full merits approach would significantly hollow the kompetenz-kompetenz principle (i.e. "The arbitral tribunal's jurisdiction to determine its own jurisdiction"). This is because the claimant could strategically choose to bring its claim to court, and have the court first undergo a full merits approach to determine an arbitral tribunal's jurisdiction, rather than have the parties go directly to arbitration.

The Court then turned to the specifics of whether a dispute over minority oppression is arbitrable and discussing Section 216 of the Companies Act held that that Section "…is concerned with protecting the commercial expectations of the parties [and that]… There is, in general, no public element in disputes of this nature which mandate the conclusion that it would be contrary to public policy for them to be determined by an arbitral tribunal rather than by a court".

With regard to the fact that an arbitral tribunal would not have the full range of remedies that are available to the court under Section 216, the Court did not consider it relevant for the question of arbitrability. According to the Court, the parties are free to determine how their disputes are to be resolved and if there are "jurisdictional limitations on the powers that are conferred on an arbitral tribunal" the parties "[remain] free to apply to the court for the grant of any specific relief which might be beyond the power of the arbitral tribunal […] In so far as any findings have been made in the arbitration in such a case, the parties would be bound by such findings and would, at least as a general rule, be prevented from re-litigating those matters before the court". In this regard, the Court also held that having to submit parts of the dispute to two different fora did not "render the dispute not arbitrable" per se and that the dispute would be not arbitrable only if

"the obligation to arbitrate would be contrary to public policy in view of the subject matter of the dispute in question".

In the view of the Court, S 6 of the IAA "clearly recognizes that the court, when faced with a stay application, is not presented with a binary choice which confines it to either staying the proceedings entirely and so forcing the parties to arbitrate, or refusing the stay and allowing the court proceedings in their entirety to continue. Instead, s 6(2) contemplates that the court is to stay the proceedings '*so far as* [they] relate to [the] matter'". Further, the Court indicated that it would not be appropriate to take an "excessively broad view of what constitutes a 'matter'" and it suggested that while for the most part, a "matter" would encompass the claims made in the proceedings, this was not an absolute or inflexible rule. Consistent with this reasoning, the Court separated out the four individual issues of the dispute at hand, rather than treating the case as a whole indivisible "matter". Therefore the Court held that the respondent expectation to participate in the management of the Singaporean company fell within the scope of the arbitration clause in the share sale agreement and for this reason it was subject to a mandatory stay under s 6(1) of the IAA, while the remaining issues would proceed in court.

In concluding, the Court presented the respondent with two options: (i) pursue the claim that it had been denied the possibility to participate in the company management or (ii) abandon the claim and proceed in court against all defendants in respect of the other three allegations. In regard to option (i), the Court further clarified that if the respondent decided to pursue the claim two scenarios were possible. In the first scenario, the proceeding against the claimant in respect of that allegation would be stayed in favour of arbitration pursuant to s 6 of the IAA, while the remaining proceedings would be stayed in the interest of case management. In the second scenario, the respondent could decide to offer to arbitrate the Management Participation Allegation also with the remaining defendants, which were to respond to this offer within a given time span.

Case 1662: MAL 16(3); 35; 36; 36(1); 36(1)(a)(i); 36(1)(a)(iii); [NYC V(I)(a)]
Singapore: Court of Appeal
[2013] SGCA 57
PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara International BV and others and another appeal
31 October 2013
Original in English
Available at: http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law

[**Keywords:** *arbitration agreement; arbitral award; enforcement; jurisdiction; procedure; recognition of award; setting aside*]

An appeal was brought against the High Court for its decision in *Astro Nusantara International BV v. PT Aunda Prima Mitra* (see [2013] 1 SLR 636), in which it had dismissed the plaintiff's application to set aside the enforcement orders of four arbitral awards under Section 19 of the International Arbitration Act (2002 Revised Edition, hereinafter IAA) and Article 36(1) MAL.

The dispute arose out of a joint venture between an Indonesian conglomerate and a Malaysian media group. The plaintiff was a subsidiary of the Indonesian conglomerate, and the 8 respondents were part of the Malaysian media group. The Indonesian conglomerate (including the plaintiff) and Respondents 1-5 entered into an agreement to arbitrate in the event of a dispute arising out of their joint venture. Following a disagreement, Respondents 1-5 issued a notice of arbitration. Although Respondents 6-8 were not party to the arbitration agreement, they nevertheless wanted to be party to the arbitration and consequently the 8 respondents filed a Joinder Application. In its Award on Preliminary Issues dated 7 May 2009, the tribunal granted the respondents' Joinder Application on the basis of Rule 24(b) of the Singapore International Arbitration Centre Rules 2007. The plaintiff did not appeal and the tribunal subsequently issued four awards on the merits of the dispute

between 3 October 2009 and 3 August 2010. Two enforcement orders for these awards were then issued on 5 August 2010 and 3 September 2010 respectively.

The plaintiff applied to set aside the enforcement orders on the basis that the tribunal did not have the power to make awards with respect to Respondents 6-8 as Respondents 6-8 were not party to the arbitration agreement. Therefore, the plaintiff argued that the awards had been made in excess of jurisdiction and should not be enforced. The High Court dismissed the plaintiff's application on the basis that the plaintiff was not permitted to resist enforcement of the awards. Firstly, because Article 36(1) MAL does not apply to "domestic international disputes" in Singapore by virtue of Section 3(1) International Arbitration Act (hereinafter IAA). Secondly, because the plaintiff was precluded from raising the same jurisdictional objections which formed the subject-matter of the Award on Preliminary Issues as it had not challenged that award within the prescribed time under Article 16(3) MAL and Article 16(3) MAL was the exclusive route through which this preliminary decision could be challenged.

The primary issue before the Court of Appeal was whether a party to an international arbitration had the right to apply to set aside the enforcement orders in Singapore pursuant to Section 19 IAA on the grounds of an alleged lack of jurisdiction when that party had failed to challenge the tribunal's findings on jurisdiction at an earlier stage. The plaintiff submitted that the IAA must be interpreted in line with MAL, which advocates for a "choice of remedies", both active and passive. The plaintiff argued that its failure to utilize the active remedy available pursuant to Article 16(3) MAL cannot preclude it from seeking passive remedies under the jurisdictional grounds in Article 36(1) MAL. In contrast, the respondents argued that all preliminary rulings must be challenged within the specified time frame prescribed in Article 16(3) MAL, and Article 16(3) MAL is the exclusive remedy through which to challenge these preliminary rulings. In the alternative, the respondents argued that Section 3(1) IAA precludes the plaintiff from relying on the jurisdictional grounds to refuse enforcement contained in Article 36(1) MAL.

First, the Court considered whether courts have the power to refuse enforcement of an award under Section 19 IAA, and what the scope of this power is. Holding that courts do have such a power, the Court considered that the scope of the power is delimitated by the grounds laid out in MAL. In its reasoning, the Court held that Section 19 IAA must be constructed in a way that is compatible with the underlying philosophy of MAL. This philosophy, it found, is to de-emphasize the importance of the seat of arbitration and facilitate the uniform treatment of awards. In addition, it agreed with the plaintiff that a fundamental aspect of MAL is choice of remedies. Section 19 IAA should therefore be interpreted to retain the courts power to refuse enforcement of awards under Article 36(1) MAL.

Second, the Court held that Section 3(1) IAA did not, and was never intended to, derogate from the philosophy of "choice of remedies". The exclusion of Articles 35 and 36 MAL by Section 3(1) IAA does not constrain a court's power to refuse enforcement of awards under Section 19 IAA and does not preclude the possibility of a plaintiff seeking a passive remedy under Article 36(1) MAL. It considered that the purpose of Section 3(1) IAA was instead to avoid conflict with the New York Convention 1958 regarding the enforcement of foreign awards.

Third, the Court resolved that due to the philosophy of "choice of remedies", Article 16(3) MAL is not an exclusive or "one-shot" remedy to challenge preliminary rulings on jurisdiction. Article 16(3) MAL therefore did not affect the availability of passive remedies under Article 36(1) MAL; passive remedies will remain available even if the plaintiff had not utilized available active remedies. Consequently, the plaintiff was permitted to apply to set aside the enforcement orders under Article 36(1) MAL.

Finally, the Court considered whether the plaintiff's objection fell within Article 36(1) MAL grounds for refusing enforcement of an award. After holding that Article 36(1)(a)(iii) MAL only permits a party to seek the setting aside of an

enforcement order on the basis of the scope of an arbitration agreement, the Court found that the plaintiff could rely on Article 36(1)(a)(i) MAL (or Article V(1)(a) of the New York Convention 1958) to set aside the enforcement orders. Article 36(1)(a)(i) allows the setting aside of an enforcement order when the arbitration agreement is not valid, and the Court considered that non-existence of such an agreement falls within the ambit of validity.

Consequently, the Court held that the tribunal lacked jurisdiction to render arbitral awards for Respondents 6-8. It found that there was not an agreement to arbitrate between the plaintiff and Respondents 6-8. In addition, it considered that Rule 24(b) of the SIAC Rules did not permit a forced joinder of third-parties to an arbitration, and therefore found that the tribunal was wrong to have permitted the Joinder Application.

The Court also held that the plaintiff was not estopped from raising its objection to the Joinder Application at this stage, nor had the plaintiff waived its right to object on this basis. Therefore, the Court of Appeal set aside the enforcement orders as they applied to Respondents 6-8, but granted enforcement of the awards with respect to Respondents 1-5.

Case 1663: MAL 34(2)(a)(iii); 36(1)(b)(ii)
Singapore: Court of Appeal
[2012] SGCA 35
PT Prima International Development v. Kempinski Hotels SA and other appeals
9 July 2012
Original in English
Available at: http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law

[**Keywords:** *award-setting aside; equal treatment; procedure; public policy*]

One of the central issues in these proceedings is the role of pleadings in arbitration, and whether facts are required to be formally pleaded in order to be taken into consideration in a decision.

A Swiss hotel management company applied to the High Court of Singapore to set aside a third, fourth and costs awards pursuant to the International Arbitration Act of Singapore (consistent with MAL). The proceedings concerned a contract for the management of an Indonesian hotel between the Swiss hotel management company and an Indonesian hotel owner company. In February 2002, the owner purported to terminate the contract on the grounds that the management company had failed to perform its obligations. The management company commenced arbitration in Singapore seeking damages for wrongful termination or, alternatively, specific performance to continue with the contract.

The first two interim awards explored whether it was possible for damages to be claimed by the management company. In its defence, the hotel owner initially pleaded only that the termination was valid. However later on, the owner amended the defence to plead that the contract had become illegal further to decisions that the Indonesian Ministry of Tourism had made between 1996 and 2000 and that required the management company to restructure its entity, something which the management company had not yet done. The arbitrator confirmed that it was nonetheless still possible for the management company to make a claim for damages from the date of termination of the contract, despite having not complied yet with these government decisions.

The owner then discovered a new fact after the second interim award; that the management company had entered into another contract to manage a different hotel in Indonesia, in breach of an exclusivity clause of the contract between the parties. After the second award, the hotel owner raised the issue of the new contract by asking the arbitrator for clarification of the second award, instead of amending pleadings to take this into account in the third award. The arbitrator then wrote to

the parties asking for explanation about this new information and the parties had an opportunity to respond to this request.

The arbitrator issued a third award, indicating that the new contract was inconsistent with obligations under the existing contract between the parties. Therefore, the period for which the management company could make a damages claim was reduced to the intervening period between the date of the termination of the existing contract and the date of the new contract.

The arbitrator further issued a fourth award indicating that any damages for the intervening period would be against the public policy of Indonesia due to the three government decisions requiring the management company to restructure its entity. Therefore, the management company could no longer claim any damages relating to the termination of contract at all.

At first instance, before the High Court, the owner's arguments were that pleadings were not essential in arbitration and therefore the three awards should be restored. The management company's view was, among other, that the arbitrator in deciding issues not formally pleaded had acted beyond the scope of his authority. The High Court set aside the third, fourth and costs awards because the new fact (i.e. the new contract of the management company) had not been canvassed in formal pleadings and consequently could not be submitted to arbitration (Article 34(2)(a)(iii) MAL). Therefore, "the arbitrator had no jurisdiction to decide that issue and had acted in excess of its jurisdiction in making the third award".

Both parties appealed and cross-appealed the decision of the High Court. The management company argued that the third, fourth and costs awards should be set aside on three additional grounds in addition to the existing ground, that the new contract had not been included in formal pleadings. The owner repeated its assertion that pleadings were not essential in international arbitration, as well as that the essence of procedural fairness lies in Article 18 MAL and subject to it, the arbitrator is allowed to determine the arbitration procedure to be followed. Further, the new contract and its legal effect on the management company's claim for damages in general was an issue within the arbitrator's mandate.

In its judgment, the Court of Appeal agreed with the owner and found that the High Court applied too narrow an approach to the role of pleadings in arbitration and the three awards were restored. The Court indicated that the correct approach was that any new fact or change in law affecting the management company's right to remedies must fall within the submission to arbitration. That is, the fact (that the management company entered into another contract and therefore breached the exclusivity clause in its contract) had a bearing on whether the management company could then make a claim for damages. Further, the Court found that the management company had ample notice of the owner's case and had ample opportunity to address it, so they did not suffer any prejudice as a result of the issue not being contained in the pleadings.

Finally, the Court confirmed that the arbitrator was correct in holding that damages could not be awarded to the management company at all because it would be contrary to the public policy of Indonesia [consistent with 36(1)(b)(ii) MAL]. Therefore, the Court ordered that the third, fourth and costs awards be restored.