PT Garuda Indonesia v Birgen Air
[2001] SGHC 262

Case Number	: OM 600001/2001
Decision Date	: 11 September 2001
Tribunal/Court	: High Court
Coram	: Woo Bih Li JC
Counsel Name(s)	: K S Rajah SC, Lawrence Quahe and Michelle Elias (Harry Elias Partnership) for the plaintiffs; Vangat Ramayah (Wee Ramayah & Partners) for the defendants
Parties	: PT Garuda Indonesia — Birgen Air

Judgment:

BACKGROUND

1. In this application PT Garuda Indonesia ('Garuda'), a company organised under the laws of Indonesia, is the Plaintiff. Birgen Air, a company incorporated under the laws of the Republic of Turkey, is the Defendant.

2. By an Aircraft Lease Agreement dated 20 January 1996 between Birgen Air and Garuda, Birgen Air agreed to lease one DC10-30 aircraft to Garuda ('the Lease Agreement').

3. Subsequently, a dispute arose between the parties arising from Birgen Air's intention to substitute the aircraft that was to be leased to Garuda.

4. The dispute was referred to arbitration in which Garuda was the Claimant and Birgen Air was the Defendant.

5. The venue of the hearing of the arbitration was Singapore. The hearing was on 4, 5 and 6 August 1999.

6. Subsequently a final award called the Award Sentence dated 15 February 2000 was rendered ('the Award'). The Award was signed by two members of the tribunal i.e Dr Croft (from Australia) and Professor Inan (from Turkey). The third member, Dr Abdurrasyid (from Indonesia), declined to sign it.

7. Later, the majority of the tribunal rendered an Addendum to Final Award dated 18 May 2000 ('the Addendum').

8. The majority of the tribunal also rendered a Decision With Respect to Final Award on 21 November 2000 ('the Decision').

9. Garuda then filed a Notice of Originating Motion on 3 January 2001 in the High Court of the Republic of Singapore to set aside the Award and/or the Addendum and/or the Decision and for various relief.

10. On 27 March 2001, Garuda applied ex-parte for leave to serve the Notice of Originating Motion on Birgen Air out of Singapore and also for leave to serve by substituted service within Singapore.

11. The application was filed pursuant to O 69A r 4 read with O 11, and O 62 r 5 of the Rules of Court. I was informed that Garuda had dropped its reliance on Order 11 at the ex parte hearing of its application.

12. On 30 March 2001, an Order of Court was made by an assistant registrar in terms substantially, but not entirely, as prayed for in Garuda's application.

13. Paragraphs 3 and 4 of the Order state:

> '3. Leave be given to the Plaintiff to effect service of the Notice of Originating Motion on the Defendant, Birgen Air, by sending a copy of the Notice of Originating Motion together with a copy of the Order of Court dated this 30th day of March 2001, by express courier, to the Defendant's solicitors at:
>
> > Donald H. Bunker and Associates Suite 1606 Al Reem Tower Al Maktoum Road P.O. Box 29726 Dubai United Arab Emirates
>
> and also by posting similar copies of the Notice of Originating Motion and Order of Court on the Notice Board of this Honourable Court and such service shall be deemed good and sufficient service of the said Notice of Originating Motion on the Defendant; 4. Leave be given to the Plaintiff to effect service of the Notice of Originating Motion on the Defendant, Birgen Air, by serving a copy of the Notice of Originating Motion together with a copy of the Order of court dated this 30th day of March 200 (sic), on the Defendant's solicitors in Singapore at: M/s Wee Ramayah & Partners 5 Shenton Way #23-01 UIC Building Singapore 068808
>
> and such service shall be deemed good and sufficient service of the said Notice of Originating Motion on the Defendant.'

14. On 7 April 2001, Birgen Air applied, inter alia, to set aside the Order and all other subsequent proceedings including services of the Notice of Originating Motion and other documents.

15. On 26 July 2001, after hearing arguments, I set aside the Order and all other subsequent proceedings including services of the Notice of Originating Motion and other documents pursuant to the Order with costs.

16. Garuda has appealed against my decision.

17. In the application by Birgen Air, Mr Vangat Ramayah for Birgen Air raised various arguments.

18. As I was able to reach a decision without going into all of Mr Ramayah's arguments, my Grounds will be in respect of some of his arguments only.

MATERIAL NON-DISCLOSURE

19. Mr Ramayah submitted that Garuda had a duty to make full and frank disclosure in its application for leave under O 69A r 4. He relied on a decision by Kan Ting Chiu J in Transniko Pte Ltd v Communication Technology Sdn Bhd [1996] 1 SLR 580 for this proposition. That was a case for leave to serve a writ out of jurisdiction under O 11. Kan J said, at p 583G, 'The duty on the applicant is onerous, and if he fails to discharge it, the leave granted may be set aside even if the non-disclosure is innocent'.

20. Mr K S Rajah SC and Mr Lawrence Quahe who appeared for Garuda did not dispute the duty to

make full and frank disclosure nor that the leave granted could be set aside even if the non-disclosure is innocent. Neither was it disputed that this proposition equally applies to an ex parte application for leave to serve out of jurisdiction under O 69A r 4.

21. However, Mr Quahe submitted that I also had the discretion not to set aside the leave granted if there was material, but innocent, non-disclosure, citing Brink's-MAT Ltd v Elcombe & others [1988] 3 All ER 188 which was a case involving an ex parte application for a Mareva Injunction. In any event, Mr Ramayah did not dispute that I had the discretion not to set aside the leave granted even if there was material, but innocent, non-disclosure.

Was there material non-disclosure?

22. Order 69A r 4 states:

> 'Service out of jurisdiction of originating process (O.69A, r.4)
>
> > 4(1) Service out of the jurisdiction of the notice of an originating motion or the originating summons or of any order made on such motion or summons under this Order is permissible with leave of the Court whether or not the arbitration was held or the award was made within the jurisdiction.
> >
> > (2) An application for the grant of leave under this Rule must be supported by an affidavit stating the ground on which the application is made and showing in what place or country the person to be served is, or probably may be found; and no such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Rule.
> >
> > (3) ….' [Emphasis added.]

23. Mr Ramayah submitted that although the requirements under O 69A r 4(1) and (2) are not identical with O 11 r 2(1) and (2), they are similar and hence the case-law on what constitutes a proper case for service out of jurisdiction under O 11 r 2(2) should likewise apply to O 69A r 4(2).

24. Order 11 r 2(1) and (2) states:

> 'Manner of application (O.11, r.2)
>
> 2. (1) An application for the grant of leave under Rule 1 must be made by an ex parte summons in chambers supported by an affidavit in Form 12 stating -
> >
> > (a) the grounds on which the application is made;
> >
> > (b) that in the deponent's belief the plaintiff has a good cause of action;
> >
> > (c) in what place or country the defendant is, or probably may be found;

(d) where the application is made under Rule 1(c), the grounds for the deponent's belief that there is between the plaintiff and the person on whom an originating process has been served a real issue which the plaintiff may reasonably ask the Court to try; and (e) whether it is necessary to extend the validity of the writ.

(2) No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of Singapore under this Order.' [Emphasis added.]

25. As can be seen, the requirements of O 11 r 2(1)(a) and (c) are similar to those in O 69A r 4(1). More importantly, both O 11 r 2(2) and O 69A r 4(2) require the Court to be satisfied that the case is a proper one for service out of jurisdiction.

26. However, Mr Quahe disagreed with Mr Ramayah. Mr Quahe submitted that O 11 r 2(1) and (2) was prohibitive whereas O 69A r 4(1) and (2) was discretionary. Also, O 11 dealt with writs issued within Singapore unlike O 69A. He submitted that the authorities on a proper case under O 11 r 2(2) do not apply as regards a proper case under O 69A r 4(2).

27. Mr Quahe submitted that so long as the supporting affidavit contains the material mentioned in O 69A r 4(2), the application would be a proper case for service out of jurisdiction. That is why the supporting affidavit for Garuda sought to establish the address of Birgen Air only as that was the requirement under O 69A r 4(2). Mr Quahe cited Overseas Union Insurance Ltd v Incorporated General Insurance Ltd [1992] 1 Lloyd's Law Report 439 ('the OUI case') to support his submissions. However that is a case on the English equivalent of our O 11 and not O 69A. It seemed to me that Mr Quahe was blowing hot and cold.

28. Interestingly, the passage that Mr Quahe was relying on in the OUI case was also the passage which Mr Ramayah was relying on.

29. The passage is at p 447 to 448 of the report where Parker LJ said: 'Where then does all this lead? It leads in my view to this, that there is only one requirement, namely that it shall be made sufficiently to appear that the case is a proper one. There is one overall scheme of which the elements are a case on the merits, fulfilment of one or more of the qualifying conditions, and England being the most appropriate forum in the sense that England is the forum in which the case can most suitably be tried in the interests of all the parties and for the ends of justice. As to the last see Spiliada Maritime Corporation v Cansulex Ltd., [1987] 1 Lloyd's Rep. 1; [1987] A.C. 460.'

30. I was of the view that this passage did not support Mr Quahe's submissions. It did not say that so long as the other requirements in O 69A r 4(2) were satisfied, the Notice of Motion would be one that is a proper case for service out of jurisdiction.

31. Furthermore the sentence which states that there is only one requirement should be read in the context of the entire passage. The one requirement pertains to the requirement of a proper case. Fulfilment of one or more of the qualifying conditions, for an application under O 11, must still be satisfied and there must also be a case on the merits.

32. It seemed to be that the guide for a proper case under the Singapore O 11 r 2(2) was that the forum chosen must be the most appropriate forum in which the case can most suitably be tried in the interests of all the parties and for the ends of justice.

33. As Rajendran J put it succintly in Kishinchand Tiloomal Bhojwani v Sumil Kishninchand Bhojwani [1997] 2 SLR 682 at p 690, O 11 r 2(2) embodies the forum non conveniens rule.

34. I was also of the view that case-law as to what constitutes a proper case under O 11 r 2(2) is persuasive as to what constitutes a proper case under O 69A r 4(2) as the requirement of a proper case is identical in both provisions and both provisions deal with the question of service out of jurisdiction.

35. It was common ground that the place of arbitration was an important factor in determining whether the Notice of Motion was a proper one for service out of jurisdiction.

36. It was also common ground that the place of arbitration was also important in respect of another factor i.e. whether Part I of the International Arbitration Act (Cap 143A) ("the Act") and the 1st Schedule thereto incorporating the Model Law was applicable in principle.

37. The 1st affidavit of Reggy Hadiwidjaja filed on 27 March 2001 was the supporting affidavit for Garuda's ex parte application for leave to serve out of jurisdiction.

38. Paragraphs 12 to 14 thereof state:

> '12. The arbitration was heard in Singapore. Singapore was the seat of the arbitration. The procedural aspect of the conduct of the arbitration (as distinguished from the substantive agreement to arbitrate) is determined by the law of the place or seat of the arbitration which is Singapore in this case. The parties hereby submitted themselves to the law of the place of the arbitration and to the supervisory jurisdiction of the High Court of the Republic of Singapore.
>
> 13. The parties stipulated that the arbitration between them will be conducted in accordance with the International Chamber of Commerce International Court of Arbitration 1988 Rules. The ICC Rules govern the conduct of the arbitration except insofar as they conflict with the mandatory requirements of the procedural law of the seat of the arbitration which is set out in the IAA.
>
> 14. The award in question, handed down by the International Chamber of Commerce International Court of Arbitration, is by its terms and implications governed by the law of Singapore. The Singapore High Court has jurisdiction in respect of procedural matters concerning the conduct of the arbitration.' [Emphasis added.]

39. It was clear to me that the deponent had assumed that because the hearing of the arbitration was in Singapore, Singapore was the place or seat of the arbitration. The deponent had also made a sweeping statement that the Award is "by its terms and implications" governed by the laws of Singapore.

40. The affidavit did not disclose Clauses 16.8 and 16.9 of the Lease Agreement. Clauses 16.8 and 16.9 state:

> '16.8 Governing Law. This Agreement shall in all respects be governed by, and construed in accordance with, the laws of the Republic of Indonesia, including all matters of construction, validity and performance.

16.9 Arbitration. In the event that a commercial controversy or claim between the parties exists at the time the Aircraft is redelivered to LESSOR at the expiration or termination of this… Agreement for the payment of money only (excluding casualty claims for physical injury, death or property damage arising out of accidents, occurrences or events whether or not such casualty claims are covered by insurance) arising out of or relating to this Agreement or any breach thereof, such controversy or claim shall be settled by arbitration held before a board of three qualified arbiters. The parties agree that such arbitration shall be held in Jakarta, Indonesia and conducted in the English language in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. Judgement upon any award rendered by such arbitration may be entered in any court having jurisdiction thereof.' [Emphasis added.] 41. Secondly, the affidavit did not disclose Clauses 6, 7 and 8 of the Terms of Reference. Clauses 6, 7 and 8 state:

> '6. Place of Arbitration
>
> 6.1 The place of arbitration is Jakarta, Indonesia.
>
> 6.2 The Arbitral Tribunal and the Parties may convene at any other location if necessary, for example, for a view.
>
> 6.3 …
>
> 7. Applicable Law
>
> 7.1 The law governing the contract, the Lease and the substantive rights of the parties is to be determined by the Arbitral Tribunal subject to the provisions of the Lease Agreement.
>
> 7.2 The law governing the arbitral procedure (if any) is to be determined by the Arbitral Tribunal.
>
> 8. Applicable Procedural Rules
>
> 8.1 The Rules governing the proceedings shall be those resulting from ICC Rules of Arbitration and, where those Rules are silent, any rules which the Parties, or failing them, the Arbitrators, may settle.
>
> 8.2 Without limitation to their other powers, the Arbitrators may make procedural orders from time to time and may vary, amend and revoke such procedural orders.
>
> 8.3 ….' [Emphasis added.]

41. It was clear from these provisions from the Lease Agreement and the Terms of Reference that, prima facie, the place of arbitration was Jakarta and the governing law of the substantive dispute is the law of Indonesia.

42. Before me, Garuda's case was that the place of arbitration was subsequently changed from Jakarta to Singapore and that this change was effected by faxes/correspondence of the parties and the arbitral tribunal.

43. However the faxes/correspondence was also not disclosed in the 1st affidavit of Mr Hadiwidjaja.

44. Fourthly, the last page of the Award states the following:

> 'This Award has been signed by a majority of the members of the Arbitral Tribunal by reason of the fact that Professor Dr H Priyatna Abdurrasyid declined to sign.'
>
> DATED: 15 February 2000
>
> Jakarta' [Emphasis added.]

45. It seemed to me that the last page of the Award had indicated Jakarta, as the place of arbitration, in accordance with Article 31(3) of the Model Law. However, the last page of the Award was also not disclosed.

46. Fifthly, para 39 of the Award states:

> 'What law governs the Arbitral procedure (if any and to be determined)?
>
> 39. It was not suggested otherwise by the parties and it is the Arbitral Tribunal's view that the procedural rules applicable to this arbitration are contained in the ICC Rules.
>
> At this point it is noted that although the place of the arbitration was originally agreed as being Jakarta the parties agreed, for convenience, to hold a hearing on 4, 5 and 6 August 1999 in Singapore. It had not been suggested by either of the parties, nor is it the view of the Arbitral Tribunal, that the use of Singapore as a convenient place for the hearing had any substantive or procedural impact on the proceedings.' [Emphasis added.]

47. This was also not disclosed. 49. All the omitted information had a material bearing as to whether the place of arbitration was Singapore or not. At the very least, it demonstrated that the original place of arbitration was not Singapore. There was material non-disclosure by Garuda.

48. Whether the leave to serve out of jurisdiction should remain notwithstanding material non-disclosure

49. I was of the view that the supporting affidavit had given the impression that all along the place of arbitration was Singapore. The application for leave had proceeded on the wrong premise.

50. In such circumstances, I did not think that I should exercise my discretion in favour of Garuda. I was of the view that the leave should be set aside on the ground of material non-disclosure alone. However, my Grounds will also cover some more substantive arguments.

WHETHER THIS WAS A PROPER CASE FOR LEAVE AND WHETHER THERE WAS ANY JURISDICTIONAL BASIS FOR THE ORIGINATING MOTION

51. Mr Ramayah submitted that the place of arbitration was not Singapore.

52. He submitted that, if he was correct, then, (a) this was not a proper case for leave and (b) there was no jurisdictional basis for the Originating Motion. He did not go into the substantive merits of the Originating Motion.

53. Both these points involve overlapping considerations and I will deal with them together.

54. As I have said, Garuda is a company organised under the laws of Indonesia. Birgen Air is a company incorporated under the laws of Turkey.

55. The aircraft was leased for the Hajj Term, as defined in the Lease Agreement. The American currency was the currency of payment.

56. Therefore neither the parties nor the purpose of the lease of the aircraft nor the currency of payment had any substantial connection with Singapore.

57. The only alleged substantive connection with Singapore was that the hearing of the arbitration took place in Singapore.

58. As I have mentioned, it was alleged before me that the place of arbitration was changed to Singapore by agreement and that this change was effected by faxes/ correspondence of the parties and the arbitral tribunal. I will now come to the faxes/ correspondence.

59. By a fax dated 24 February 1999, Dr Croft (the Chairman of the arbitral tribunal) wrote to the solicitors of the parties. The last paragraph states:

> 'Consequently the Tribunal orders that the Plaintiff produce the documents in accordance with the Defendant's Application for an Order for Discovery of Documents dated 14 December 1998 on or before 15 March 1999. The Tribunal otherwise confirms its Orders as set out in my letter of 27 April 1998. Accordingly, the Tribunal proposes to fix a hearing date and arrangements for the hearing in late July or early August 1999. Would the parties please indicate suitable dates between 26 July and 3 September 1999. As to the place of the hearing the Tribunal is of the view that Jakarta is not an appropriate place given the current situation in Indonesia and proposes to sit in Zurich instead.' [Emphasis added.]

60. The reply from Donald H Bunker & Associates ('Bunker & Associates'), the solicitors for Birgen Air on 11 March 1999 did not comment on the proposed change of the venue of the hearing.

61. The reply from Gani Djemat & Partners ('Gani & Partners'), the solicitors for Garuda, on 12 March 1999, stated, inter alia,

> 'As regards the venue of arbitration and the proposed fixed date thereof the Claimant's comments will follow.' [Emphasis added.]

62. On 30 March 1999, Dr Croft wrote to the solicitors for the parties. The last sentence of his fax states:

> '…. The Arbitral Tribunal otherwise reaffirms the Orders as set out in my letter of

24 February 1999 save that as a result of correspondence between members of the Arbitral Tribunal is (sic) now proposed to hold the hearing in Singapore rather than Zurich.' [Emphasis added.]

63. On 7 April 1999, Bunker & Associates replied. The material part of their reply states:

'2. In the event that the Tribunal does not grant Birgenair's request for a decision based on the documents, Birgenair requests that the hearing take place from September 1, 1999 to September 3, 1999 and confirms that it is in agreement with the view of the Tribunal that Jakarta is not an appropriate place for the hearing and accepts the Tribunal's proposal to sit in Singapore.' [Emphasis added.]

64. By a fax dated 21 May 1999 to the solicitors of the parties, Dr Croft stated, inter alia:

'…. In this respect I formally notify the parties that the Arbitral Tribunal has decided that this matter will be heard on 4, 5 and 6 August 1999 in Singapore and the parties should proceed in accordance with procedural orders already made for a hearing on those dates.' [Emphasis added.]

65. On 10 June 1999, Gani & Partners replied to state, inter alia:

'The Position of the Claimant is as follows:

1. The Claimant agrees that the hearing to take place on 4, 5 and 6 August 1999 in Singapore. 2. …. 3. …. 4. ….' [Emphasis added.]

66. On 23 July 1999, Dr Croft wrote to the solicitors of the parties stating, inter alia:

'The Arbitral Tribunal has considered the submissions on behalf of the parties on the question whether or not to hold a hearing and has decided that a hearing should be held because in all the circumstances it will provide the most expeditious and effective means for the parties to present their cases to respond to each other's case. It would also, in all the circumstances, provide the Arbitral Tribunal with the most effective means of questioning and clarifying issues with the parties with respect to aspects of their cases. Finally, the Arbitral Tribunal is of the view that it would be necessary for its members to meet in any event to discuss issues raised in these proceedings which means that the expense of arrangements for such a meeting would be incurred in any event. Accordingly, a hearing will take place in Singapore for up to three days on 4, 5 and 6 August 1999. As indicated in the Orders for Directions contained in my letter of 22 April 1998 it is envisaged that the parties will have equal time to present their cases and a draft agenda is set out below. This draft agenda is subject to the further orders as set out in this letter with respect to the attendance of witnesses and other arrangements with respect to witnesses. Arrangements for the hearing are now being made by the Singapore representative of the ICC. Details of the location of the hearing room and the times of the hearing will be provided within the next few days.' [Emphasis added.]

67. On 30 July 1999, Dr Croft wrote again stating, inter alia:

> 'I refer to previous correspondence and now attach a copy of a letter from Mrs Sim Jee Kim, Assistant Executive Secretary of the Singapore National Committee of the ICC noting arrangements that have been made for the hearing of this matter on 4, 5 and 6 August 1999 in Singapore. ….' [Emphasis added.]

68. In Naviera Amazonica Peruana S.A. v Compania Internacional De Seguros Del Peru [1988] 1 Lloyd's Rep 116 (the Peruvian Insurance case), Kerr LJ said at p 120 and 121:

> 'Finally, as I mentioned at the outset, it seems clear that the submissions advanced below confused the legal "seat" etc. of an arbitration with the geographically convenient place or places for holding hearings. This distinction is nowadays a common feature of international arbitrations and is helpfully explained in Redfern and Hunter at p. 69 in the following passage under the heading "The Place for Arbitration":

The preceding discussion has been on the basis that there is only one "place" of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other way as the place or "seat" of the arbitration. This does not mean, however, that the arbitral tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an arbitral tribunal to hold meetings or even hearings in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses…. It may be more convenient for an arbitral tribunal sitting in one country to conduct a hearing in another country for instance, for the purpose of taking evidence …. In such circumstances each move of the arbitral tribunal does not of itself mean that the seat of the arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties.' [Emphasis added.]

69. A similar passage is found in p 86 and 87 of the 3rd Edition, 1999, of Redfern and Hunter and, contrary to paragraph 88 of Garuda's Reply Submissions, the last sentence cited above does appear in the 3rd Edition as well.

70. Mr Rajah informed me that England has not adopted the Model Law. However, this did not mean that the observation from Kerr LJ had ceased to apply.

71. Indeed, the possibility of conducting an arbitration in different venues while retaining the place of arbitration is recognised in Article 20(2) of the Model Law. For completeness, I state below Article 20(1) and (2) of the Model Law:

> 'Article 20. Place of arbitration
>
> (1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.
>
> (2) Notwithstanding the provisions of paragraph (1) of this Article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.'

72. I would add that Mr Rajah placed some emphasis on Article 20(1) and (2) of the Model Law. I will try to summarise his arguments as I understand them.

73. First, he stressed that under Article 20(1), the parties could agree to change the place of arbitration. However, this was never in dispute.

74. Secondly, he suggested that under Article 20(2), the arbitral tribunal could meet at different places. However, this was also never in issue.

75. The point before me was whether the place of arbitration had changed just because the venue of the hearing had changed. According to Kerr LJ and Article 20(2), this was not necessarily so.

76. The question before me was whether the parties had agreed to change the place of arbitration.

77. After considering the faxes/correspondence referred to above, I concluded that the parties had not changed the place of arbitration. Singapore became the venue of the hearing but the place of arbitration remained Jakarta.

78. I was aware that the initiating fax dated 24 February 1999 from Dr Croft had referred to 'the place of the hearing' but in my view this referred to the venue of the hearing and not the place of arbitration.

79. Neither the parties nor the arbitral tribunal had contemplated changing the place of arbitration with the legal consequences which follow from such a change. They were concerned only with a different aspect of the hearing i.e. the venue of the hearing.

80. Garuda's counsel had wrongly assumed in the application for leave, and even in the hearing before me, that the venue of the hearing means the same thing as the place of arbitration. While this may be linguistically acceptable, it is not acceptable in the law of international commercial arbitration under which the expression 'the place of arbitration' has a certain legal meaning and consequence.

81. The place of arbitration determines which law governs the arbitration. This is known as the lex arbitri or curial law and is not the same as the law governing the substantive dispute or what is known as the proper law of the contract.

82. According to Redfern & Hunter 3rd Edition at p 83, 'It is sometimes said that the lex arbitri is a law of procedure'. However, the authors suggest that it includes matters more than just procedural law, although not the law governing the substantive dispute.

83. My conclusion that the place of arbitration remained Jakarta is reinforced by para 39 of the Award, which I have cited in para 47 above, and the fact that the Award indicates the place of arbitration as Jakarta, see paras 45 and 46 above.

84. As regards the submission for Garuda that the use of the Singapore representative of the ICC demonstrated that the arbitral tribunal was looking to Singapore for administrative and legal support and hence the place of arbitration had changed, I did not agree.

85. The arbitral tribunal was looking to the Singapore representative of the ICC in Singapore for administrative support but there is nothing to suggest that this included legal support. Furthermore, it is only logical that administrative support would be provided at the venue of the hearing. It does not mean that whenever this is done, the venue of the hearing becomes the place of arbitration.

86. In addition, the adoption of ICC Rules does not mean that the place of arbitration must be Singapore. The ICC Rules were already adopted under Clause 16.9 of the Lease Agreement and Clause 8.1 of the Terms of Reference (see paras 40 and 41 above). I would add that the adoption of the ICC Rules does not displace the curial law. If the ICC Rules do not cover a point, then the parties may look to the curial law.

87. Accordingly, in respect of another argument for Garuda, the fact that Bunker & Associates had relied on Article 14.3 of the ICC Rules to seek an arbitration on the basis of documents is neither here nor there.

88. However, Mr Rajah raised yet another point. He submitted that if Singapore was not the place of arbitration, then difficulties could have arisen. For example, if the arbitral tribunal had to seek the assistance of the court on a procedural matter like the issue of a subpoena, which court should it turn to? As the hearing was in Singapore, a subpoena by a court in Jakarta would not be effective. On the other hand, s 12(6) read with s 12(1) of the Act provides that the Singapore High Court has the power to make various orders or give directions to assist the arbitral tribunal (although I note that the power to issue a subpoena is not specifically mentioned).

89. In my view, the possibility of difficulties arising only means that the parties should have considered whether to change the place of arbitration from Jakarta to Singapore. It does not mean that the place of arbitration must be changed. If the parties have not agreed to change it, the place of arbitration remains Jakarta with all the difficulties which this might have given rise to.

90. In any event, the hearing of the arbitration has been concluded.

91. As I have determined that the place of arbitration remained at Jakarta, Singapore's connection with the arbitration became more tenuous. It was clear to me that Singapore was not the most appropriate forum to challenge and set aside the Award and/or the Addendum and/or the Decision. The most appropriate forum was Jakarta. Even Turkey was a more appropriate forum than Singapore, provided Turkey has jurisdiction to hear the challenge.

92. In addition, Garuda was intending to rely on a ground stated in Article 34(iv) of the Model Law, as incorporated by Part I of the Act, to make its challenge. The Model Law applies as the First Schedule to the Act. However, before Article 34(1) can apply, Garuda had to satisfy first the requirement in Article 1(2) of the Model Law which states:

> '(2) The provisions of this law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.' [Emphasis added.]

93. As the place of arbitration is not Singapore, neither Article 34 of the Model Law nor, for that matter, Part I of the Act, will apply. Whether the Model Law would apply by virtue of some other foreign legislation is another matter.

94. Counsel for Garuda had assumed that because the arbitration was heard in Singapore, Part I of the Act must apply. This is not so. Part I of the Act applies only if (a) the arbitration is an international arbitration within the meaning of s 5 of the Act, (b) the place of arbitration is Singapore, and (c) the parties have not excluded its application by agreement.

95. Alternatively, Part I can apply if the parties agree that it should.

96. I come now to s 15 of the Act which states:

> '15. If the parties to an arbitration agreement have (whether in the arbitration agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled or resolved otherwise than in accordance with this Part or the Model Law, this Part and the Model Law shall not apply in relation to the settlement or resolution of that dispute.'

97. Mr Rajah submitted that under s 15 of the Act, the parties could agree to exclude Part I of the Act or the Model Law and since they had not done so, the Model Law would apply. Consequently, this would mean that Garuda could make its application in Singapore to set aside the Award, the Addendum and the Decision. I did not agree.

98. As I have stated, Part I of the Act and the Model Law apply only if, in the first place, the place of arbitration is Singapore. It is then open to the parties to exclude the application of Part I and the Model Law by agreement.

99. Section 15 did not allow either party to circumvent the concept of the place of arbitration or Article 1(2) of the Model Law.

100. I next refer to s 24 of the Act. It states:

> '24. Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if -
>
> > (a) the making of the award was induced or affected by fraud or corruption; or (b) 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.' [Emphasis added.]

101. It was submitted for Garuda that the High Court of Singapore could set aside the Award, and the Addendum and the Decision under s 24(b) of the Act even if Article 34 of the Model Law does not apply. 103. I disagreed. In view of the words in s 24 which I have emphasized, I was of the view that s 24 is linked to Article 34(1) in that if Article 34(1) is not applicable because the place of arbitration was not Singapore, then, s 24 also would likewise not be applicable.

102. In other words, s 24 is applicable in principle only if Article 34 is applicable in principle. When Article 34 is applicable in principle, an applicant may rely on the grounds stated in Article 34(1) or in s 24.

103. Accordingly I was of the view that there was no jurisdictional basis for the Originating Motion to be filed in Singapore. However, this does not mean that there is no substantive merit in the challenge by Garuda. As I have said, Mr Ramayah did not address me on the substantive merits of the challenge which will have to be dealt with in some other jurisdiction.

Other Submissions

104. Counsel for Garuda also referred me to Articles 12 and 26 of the ICC Rules and various passages from International Commercial Arbitration in UNCITRAL Model Law Jurisdictions, First Edition, by Peter Binder. It was also submitted that under s 4(1) of the Act, reference may be made to certain documents to interpret the Model Law. With respect, I did not find these submissions to be of

assistance.

SUBSTITUTED SERVICE IN SINGAPORE

105. There is one other argument I should deal with. The earlier Order by the assistant registrar had also granted leave to effect service of the Notice of Originating Motion by substituted service on Birgen Air by serving a copy of the said Notice and of the Order on Birgen Air's Singapore solicitors, Wee Ramayah & Partners.

106. Mr Ramayah submitted that if Garuda fails to make out a case for leave to serve out of jurisdiction under O 69A r 4, then it cannot apply for substituted service whether within or outside the jurisdiction of Singapore. He referred to two cases.

107. The first case, in chronological order, was Fry v Moore [1889] 23 QBD 395. The head-note states:

> 'A writ was issued in the general form, without the leave of the Court, against a person who at the date of the writ was out of the jurisdiction. The plaintiff obtained an order for substituted service of the writ within the jurisdiction, and, having served the writ in accordance with the order, signed judgment against the defendant for default of appearance. The defendant took out a summons asking that the judgment might be set aside, and that the plaintiff might be ordered to deliver a statement of claim.'

108. Lindley LJ said at p 396 to p 397:

> '... But then the plaintiff obtained an order for substituted service on the defendant's brother, who had been acting for him in some matters, and the writ was served on the brother. Was this right or wrong? Looking at the various rules relating to service out of the jurisdiction, I do not think this precise case has been provided for. But there are certain principles which govern the rules, and in Field v. Bennett (6) the Queen's Bench Division laid down the principle, that, if a writ could not be served personally at the time when it is issued, there cannot be substituted service. That is a sound principle. You cannot affect a principal through an agent when you could not affect the principal himself. If in such a case an order for substituted service could be made, the process might very easily be abused. Nothing could be easier than to issue an ordinary writ against a foreigner who was residing out of the jurisdiction, and then to obtain an order for substituted service, and thus the very mischief at which the rules relating to service out of the jurisdiction are directed would be brought back. Both principle and authority are against such a practice. I think, therefore, that the order for substituted service of the writ was a bad order.'

109. The judge then went on to hold that the order for substituted service was an irregularity and not a nullity and was waived by the steps the defendant there had subsequently taken.

110. Mr Ramayah also referred to Lyon v. Syed Mahomed [1902-3] VII SSLR 1. In that case Leach J said:

> 'The writ of summons in this action is a writ for service out of the jurisdiction and is in the form prescribed, with this exception, viz.: that the words "by leave of

the Court" have been accidentally omitted from the printed portion.

111. On the ex parte application of the Plaintiff, I made an order for substituted service of this writ on the Defendant's Attorney in Singapore. The Defendant is a British subject, he left Europe about March last, and his address is unknown.

112. No leave was obtained to serve the writ out of the jurisdiction, and it is contended that this was necessary before substituted service could be permitted. It is not necessary in Singapore, as in England, to obtain leave to issue a writ for service out of the jurisdiction.

113. As I understand the practice as laid down in the cases cited in the Annual Practice, 1901, pp. 62 and 63, and especially Wilding v. Bean (2) (per Lord Esher), substituted service will only be allowed when (if there are no obstacles in fact) personal service in law could be effected and in the case of substituted service out of the jurisdiction in England, leave to issue a writ for service out of the jurisdiction (a step that is unnecessary in Singapore) and to serve it, or notice on [sic] lieu, out of the jurisdiction, must first be obtained before an order for substituted service will be made. It must then be shown that circumstances render the leave you have obtained ineffectual: then, as the law permits you to serve out of the jurisdiction, but the circumstances prevent such service, the Court will allow substituted service either within or without the jurisdiction.'

114. On the other hand, Mr Quahe submitted that the decision in Ng Swee Hong v Singmarine Shipyard Pte Ltd [1991] 2 MLJ 499 suggests that the purpose for ordering substituted service of a document would be to bring the document to the notice of the person to be served and this purpose had been achieved.

115. While this may be so, the facts in Ng Swee Hong were different from those before me.

116. In that case, the appellant was a co-guarantor to the plaintiffs who were ship-builders and ship-repairers. He was resident in Singapore. After the Writ of Summons was filed and while attempts were being made to serve it on him, his solicitors informed the plaintiffs' solicitors that he had left Singapore. It was not alleged that he had left Singapore for good but that he was travelling extensively. His residential address was admittedly still in Singapore. He was in contact with his family who were residing at the same address in Singapore.

117. He then instructed local solicitors to act for him to apply to set aside the order for substituted service at his residential address in Singapore.

118. It was in such circumstances that his application failed.

119. According to the White Book 1999 para 65/4/17:

> '... If, however, the defendant goes abroad after the issue of the writ, and goes with knowledge of its issue, whether or not he goes with intent to evade service, an order for substituted service of the writ may be made (Jay v. Budd [1898] 1 Q.B.D. 12, and see Trent Cycle Co. v. Beattie [1899] 17 T.L.R. 176, CA); and, semble, even if he goes abroad before the issue of the writ, but goes with intent to avoid service, an order may be made (Wilding v. Bean [1891] 1 Q.B. 100, CA).'

120. However, the situation is different if a defendant was never within the jurisdiction in the first place. I agree that in such a situation, leave must first be obtained to serve the writ out of

jurisdiction, before an application for substituted service is made. Otherwise it would be easy to circumvent O 11 rr 1 and 2 or, as in this case, O 69A r 4.

121. There is also another point. Order 62 r 5(1) on substituted service states:

> ' 5. - (1) If, in the case of any document which by virtue of any provision of these Rules is required to be served personally on any person, it appears to the Court that it is impracticable for any reason to serve that document personally on that person, the Court may make an order in Form 135 for substituted service of that document.' [Emphasis added.]

122. As Birgen Air is a foreign company, s 376(c) of the Companies Act (Cap 50) read together with O 69A r 4 should be considered. Section 376(c) of the Companies Act states:

> '376. Any document required to be served on a foreign company shall be sufficiently served -
>
> (a) …
>
> (b) …
>
> (c) in the case of a foreign company which has ceased to maintain a place of business in Singapore, if addressed to the foreign company and left at or sent by post to its registered office in the place of its incorporation.'

123. However, s 376(c) Companies Act probably does not apply because Birgen Air did not have a place of business in Singapore in the first place and so it has not ceased to maintain a place of business in Singapore.

124. Coming back to O 62 r 5(1), it was for Garuda to show why it was impracticable to serve the Notice of Originating Motion personally on Birgen Air outside Singapore before it was entitled to obtain an order for substituted service.

125. The supporting affidavit for Garuda i.e. the 1st affidavit of Mr Hadiwidjaja had a long discourse on the alleged attempts at personal service of the Notice of Originating Motion on Birgen Air.

126. First, the supporting affidavit alleged that Bunker & Associates had agreed to accept service but had changed their position. It did not elaborate how this was relevant to demonstrate impracticality in serving Birgen Air personally. I would mention that this allegation was denied in a subsequent affidavit by Mr Bunker but it was not necessary for me to rule on it.

127. The supporting affidavit also mentioned that a cover letter dated 18 January 2001 with a copy of the Notice of Originating Motion was sent to Bunker & Associates and copied to Birgen Air at its last known address. The cover letter asked whether Birgen Air would appoint Singapore solicitors to accept service. The copy to Birgen Air was returned to Garuda's Singapore solicitors with the address on the envelope crossed out.

128. Likewise, as regards another letter from Garuda's solicitors to Bunker & Associates dated 26 January 2001 and copied to Birgen Air, the copy to Birgen Air was returned with the last known address of Birgen Air on the envelope crossed out.

129. The supporting affidavit also relied on certain notice provisions in Article 16.1 of the Lease

Agreement and para 2.1 of the Terms of Reference but in my view, those provisions did not apply to the service of court documents. In any event, those provisions were relied on by Garuda only for the purpose of establishing the address of Birgen Air.

130. I also noted that even though letters sent to Birgen Air's last known address had been returned with the address crossed out, no attempt was made by Garuda to ascertain the registered address of Birgen Air in Turkey or some other more current address there.

131. The supporting affidavit ended with Garuda's allegation that no instructions had been given to Birgen Air's Singapore solicitors Wee Ramayah & Partners to accept service and that Birgen Air was attempting to evade and/or delay service. However, it did not say specifically that it was impracticable to effect personal service on Birgen Air.

132. It was clear to me that Garuda had been relying more on its frustrations than in trying to establish that it was impracticable to effect personal service on Birgen Air. It had failed to establish such impracticability. 132. It was also clear to me that the leave to serve by substituted service in Singapore was granted as an ancillary relief to the main part of the Order granting leave to effect service out of Singapore by sending a copy of the Notice of Originating Motion and of the Order by express courier to Bunker & Associates in the United Arab Emirates. Had the application for substituted service in Singapore been made alone, it would have failed.

SUMMARY

133. Accordingly, I set aside the Order granting leave and all other subsequent proceedings including all services of the Notice of Originating Motion and other documents pursuant to the Order with costs.

WOO BIH LI
JUDICIAL COMMISSIONER
SINGAPORE

Date: 11 September 2001