Government of the Republic of the Philippines v Philippine International Air Terminals Co, Inc [2006] SGHC 206

Case Number : OM 3/2005

Decision Date : 17 November 2006

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Chandra Mohan, Celia Sia and Khoo Yuh Huey (Rajah & Tann) for the applicant; Loo Ngan Chor and Mervyn Foo (Lee & Lee) for the respondent

Parties : Government of the Republic of the Philippines — Philippine International Air Terminals Co, Inc

Arbitration – Award – Recourse against award – Setting aside – Application to set aside partial arbitral award under s 24 International Arbitration Act and Art 34 UNCITRAL Model Law – Whether award rendered in breach of natural justice – Whether award contemplating matters beyond its remit – When award may be set aside under Act – Section 24, First Schedule Art 34 International Arbitration Act (Cap 143A, 2002 Rev Ed)

17 November 2006 *Judgment reserved.*

Judith Prakash J:

1 This is a motion under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the Act") to set aside the "Partial Award on the Law Governing the Arbitration Proceedings and the Law Governing the Arbitration Agreement" ("the Award") made on 20 October 2004 in the arbitration between the Government of the Republic of the Philippines ("GOP" or "the applicant") and Philippine International Air Terminals Co, Inc ("PIATCO" or "the respondent").

Background

2 The dispute between the parties arises from a project involving the construction of a third terminal building at the Ninoy Aquino International Airport in Manila. There is a long history of the dealings between the parties that led up to this point but, for present purposes, it is not necessary to go too much into the backstory. These dealings resulted in the conclusion of various concession agreements, including a 1997 concession contract, an amended and restated concession agreement dated 26 November 1998 ("the ARCA") and various amendments and supplements. These are collectively referred to as "the Concession Contracts".

3 The ARCA contains the following arbitration clause ("the arbitration agreement"):

> Section 10.2 Arbitration
>
> All disputes, controversies or claims arising from or relating to the construction of the Terminal and/or Terminal Complex or in general relating to the prosecution of the Works shall be finally settled by arbitration in the Republic of the Philippines following the Philippine Arbitration Law or other relevant procedures. All disputes, controversies or claims arising in connection with this Agreement except as indicated above shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by three (3) arbitrators appointed in accordance with the said Rules. The place of arbitration shall be Singapore and the language of the arbitration shall be English.

4 By the Concession Contracts, PIATCO was awarded the right to build and operate the third airport terminal. It duly commenced construction and asserted that by November 2002, the terminal was practically ready and prepared to start operations. In January 2003, however, GOP advised PIATCO that the award of the project to PIATCO and the Concession Contracts were null and void *ab initio*.

5 In response to GOP's stand, on 13 January 2003, PIATCO issued a notice for arbitration. In its subsequent request for arbitration (lodged with the International Chamber of Commerce International Court of Arbitration ("ICC")), PIATCO alleged that GOP had failed to "fulfil, comply with and fully perform, in good faith, its obligations under its award to and contracts with [PIATCO]". PIATCO put forward a claim for not less than US$565m and GOP in turn put forward a counterclaim for not less than US$900m.

6 It is also important to note that between September 2002 and December 2002 several petitions seeking to enjoin enforcement of the Concession Contracts were filed with the Philippine Supreme Court. On 5 May 2003, the Philippine Supreme Court issued its decision on the petitions ("the *Agan* decision"). It held by a majority that there had been serious violations of the Philippine Constitution, certain statutes and rules and of fundamental public policy and that therefore the Concession Contracts were null and void *ab initio*.

The arbitration proceedings

7 From the beginning, GOP has taken the stand that the arbitration agreement is not valid and that an ICC arbitration tribunal has no jurisdiction to adjudicate any dispute between it and PIATCO.

8 In April 2003, GOP wrote to inform the ICC of the petitions that had been filed with the Philippine Supreme Court. It also told the ICC that it considered the Concession Contracts to be void and that since the question of their validity had been submitted for resolution before the Philippine Supreme Court, it would be prudent for the ICC to dismiss PIATCO's request for arbitration. On 20 June 2003, GOP raised further objections to the ICC's jurisdiction over the parties and their dispute. Subsequently, the ICC was informed of the *Agan* decision. GOP argued that in the light of the *Agan* decision, PIATCO's request for arbitration should be immediately dismissed for lack of jurisdiction. PIATCO filed submissions in reply to these arguments.

9 On 28 July 2003, the ICC informed the parties that it had decided that the arbitration should proceed in accordance with Art 6(2) of the ICC Rules of Arbitration ("the ICC Rules") as it was *prima facie* satisfied that an ICC arbitration agreement might exist between the parties. It also indicated that the arbitral tribunal, when constituted, would have to decide on its own jurisdiction. The arbitral tribunal subsequently constituted ("the Tribunal") comprised three persons: Prof Michael Pryles (chairman), Justice Florenz D Regalado (nominated by the respondent) and Justice Bernardo P Pardo (nominated by the applicant).

10 On 30 January 2004, GOP reiterated its jurisdictional objections to the arbitration in a document entitled "Respondent's Answer, Jurisdictional Objections and Counterclaims". After PIATCO's reply was filed in April 2004, GOP took out a motion to bifurcate the arbitration proceedings into two phases – the jurisdiction/liability phase and the quantum phase. In this motion, it identified the four grounds on which it objected to the Tribunal's jurisdiction as being:

(a) First, the Philippine Supreme Court's nullification of the ARCA necessarily nullified the parties' reference to the ICC arbitration contained in that agreement.

(b) Second, the evidence establishes that PIATCO obtained its concession agreements – including the agreement to submit to ICC arbitration – by fraudulent and unlawful means, thus rendering those agreements null and void *ab initio.*

(c) Third, GOP entities that are alleged to have accepted the ARCA's reference to ICC arbitration did so without legal authority, and thus cannot bind GOP.

(d) Finally, the parties' agreement to arbitrate was procured by fraud, and thus it cannot be enforced as a matter of law and public policy.

11 PIATCO agreed to the bifurcation and on 5 August 2004, the Tribunal issued an order bifurcating the arbitration as requested.

12 In the meantime, the Tribunal held a preliminary conference. At it, GOP's lawyers proposed, and the Tribunal recognised, that parties would have to brief the Tribunal on the issues of the law governing the arbitration agreement and the law governing the arbitration proceedings. The determination of these issues was a necessary prerequisite to enable parties to make their submissions on jurisdiction and the validity of the arbitration agreement. On 28 June 2004, the Tribunal issued an order requiring the parties to, *inter alia*, provide their respective submissions on the law governing the arbitration agreement and the law governing the arbitration proceedings by 20 August 2004. The parties duly filed their respective submissions on that date.

13 On 3 September 2004, the Tribunal wrote to the parties informing them that it intended to render its decision in the form of a partial award. On 1 October 2004, the Tribunal informed them that it had prepared a draft partial award on the applicable law and that this draft had been sent to the ICC court for scrutiny on 24 September 2004. GOP's solicitors, M/s White & Case, thereafter sent two letters to the Tribunal (dated 3 October 2004 and 21 October 2004 respectively) objecting to the decision being issued in the form of a partial award. The objection was made on the basis that an award would, in contrast to an order, resolve disputed issues finally and definitely and, in this case, the Tribunal could not decide with finality, the issue of the *lex arbitri* until it had considered and decided certain related jurisdictional issues which would be adjudicated with the merits. The letters also reiterated the jurisdictional objections that GOP had raised in January 2004. The Tribunal did not reply to these letters.

The award

14 The parties received the Award on 27 October 2004. The Tribunal decided:

(a) that Singapore law was the law governing the arbitration proceedings; and

(b) that Singapore law was the law governing the arbitration agreement.

15 In the course of coming to its decision on the first point, the Tribunal observed that it was unlikely that Singapore was chosen as the place of arbitration for non-construction disputes for reasons of convenience. It observed that PIATCO had substantial foreign equity but then went on to state that whether or not there was foreign equity in PIATCO at the time when it entered into the ARCA, it appeared to the Tribunal that Singapore was designated as the place of arbitration in order to obtain a neutral venue for the resolution of disputes in view of the fact that PIATCO was contracting with the government of the Philippines with respect to a project in the Philippines. Singapore was not a more convenient venue than the Philippines. It followed, in the Tribunal's view, that the parties would have contemplated that the procedure of the arbitration would be governed by

the law of Singapore rather than the law of the Philippines because to provide for arbitration in Singapore but in accordance with Philippine procedural law would not have resulted in the selection of a neutral venue.

16 In relation to its decision on the second point, the Tribunal spent much time discussing the principle of severability of an arbitration clause from the contract in which it is contained. It found that the principle of severability applied in this case. Then, it discussed the rules for determining the law applicable to an arbitration agreement and adopted the approach taken in Michael Mustill & Stewart C Boyd, *The Law and Practice of International Commercial Arbitration in England* (Butterworths, 3rd Ed, 1998). It noted that the parties had not specifically chosen a law to govern the arbitration agreement and considered whether there had been an implied choice of law. The Tribunal observed that s 10.2 of the ARCA contained two separate and severable arbitration obligations. The first related to disputes concerning the construction of the terminal or prosecution of the works and these were to be settled by arbitration in the Philippines. The second related to all other disputes which were to be referred to ICC arbitration in Singapore. In the opinion of the Tribunal, each of these arbitration obligations was separate and distinct and not necessarily governed by the same law. The Tribunal considered it significant that the parties had in the section drawn a clear distinction between arbitration of construction disputes and all other disputes. The former were subjected to domestic arbitration in the Philippines while the latter were to be referred to international arbitration under the ICC Rules in a neutral venue, Singapore. The Tribunal then concluded at paras 84 and 85 of the Award:

> In the opinion of the arbitral tribunal a strong implication arises that the parties not only removed non-construction and Works disputes from the jurisdiction of the Philippines but also intended that the obligation to arbitrate these disputes should not be referred to the law of the Philippines. In other words, by designating Singapore and the ICC Rules in contrast to the other arbitration obligation appertaining to construction and Works disputes, the parties implied a choice of Singapore law to govern the arbitration agreement as well as the arbitral proceedings for non-construction and Works disputes.
>
> One further point can be made. Mustill and Boyd state that if the choice lies between two systems of law, one of which would uphold the arbitration agreement and the other would not, the former may be preferred. A question may arise in this case as to whether the arbitration agreement is valid under the law of the Philippines in view of the decision of the Supreme Court of the Philippines holding that the ARCA is void ab initio. This factor also inclines towards construing the agreement to arbitrate disputes in Singapore as governed by the law of Singapore.

The challenge

17 The grounds for setting aside an international arbitration award in Singapore are found in s 24 of the Act and in Art 34 of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") set out in the First Schedule to the Act. In the present case, GOP seeks to rely on various parts of each of these provisions.

18 The grounds of the application are:

(a) that the rules of natural justice have been breached in connection with the making of the Award and GOP's rights have been prejudiced thereby contrary to s 24(*b*) of the Act;

(b) GOP was unable to present its case contrary to Art 34(2)(a)(ii) of the Model Law;

(c) the Award deals with a dispute not contemplated by and/or not falling within the terms of the submission to arbitration and/or contains decisions on matters beyond the scope of the submission to arbitration contrary to Art 34(2)(a)(iii) of the Model Law; and

(d) the arbitration agreement is not valid under the law of the Republic of the Philippines or under the law of Singapore contrary to Art 34(2)(a)(i) of the Model Law.

I note here that, as counsel for GOP submitted, the ground for setting aside an award on the basis that the party applying was unable to present its case is the same as the ground arising from a breach of the rule of natural justice that parties must be given a fair opportunity to be heard, which rule is usually referred to by its Latin tag, *audi alteram partem*. In view of that, in this case, the first two grounds are really one ground. As for the last ground, GOP did not proceed with it in its submissions.

19 The two key findings of the Tribunal that GOP complained about were the finding that the principle of severability applied in this case and secondly, the finding that Singapore was chosen as a neutral place for the arbitration.

Severability

GOP's case

20 As far as the principle of severability is concerned, it is GOP's case that the decision on this issue was a breach of the *audi alteram partem* rule and also was beyond the scope of the submission to arbitration. The following summary of its arguments shows that GOP's attack here was based on grounds (a), (b) and (c) as set out in [18] above.

21 GOP asserted that pursuant to the directions agreed upon at the preliminary conference and the order of the Tribunal of 28 June 2004, parties were to provide submissions by 20 August 2004 on *only* (emphasis GOP's) the issues relating to the law governing the arbitration proceedings and the law governing the arbitration agreement. As a consequence, GOP limited its submissions to these two issues and was shocked when the Award contained a finding that the principle of severability applied. GOP argued that it was necessary for the Tribunal to first make a ruling on the choice of law before the parties could address the jurisdictional arguments, including whether the arbitration agreement was severable from the main contract. In GOP's view, the issue of severability was one of its four jurisdictional arguments, *ie*, the argument that the *Agan* decision which held that the Concession Contracts were null and void *ab initio* meant that the arbitration agreement in the ARCA was similarly null and void *ab initio*. It also contended that it could not reasonably have considered that this issue would be decided prior to the jurisdictional phase of the arbitration because it had filed a motion for bifurcation of the proceedings and this had been accepted by PIATCO and the Tribunal before parties' submissions on the applicable laws were handed in on 20 August 2004. The order issued by the Tribunal further included a procedural time table for the jurisdiction/liability phase. GOP submitted that, therefore, the Tribunal had misconducted itself in making an explicit decision on severability in the Award and thereby implicitly making a decision as to the arbitration agreement. It considered that the Tribunal had effectively determined a jurisdictional issue when the jurisdictional obligations had not even been submitted on. It was never agreed, said GOP, that the Tribunal would decide the issue of severability at this stage of the proceedings.

22 GOP asserted that a significant portion of PIATCO's submissions had been devoted to arguments related to the various jurisdictional arguments put forward by GOP such as:

(a) the severability of the arbitration agreement from the ARCA;

(b) the legal capacity of the government entities who signed the ARCA on behalf of GOP; and

(c) fraud and corruption relating to the ARCA and its arbitration agreement.

These fundamental matters, it said, were outside the scope of the issues referred to the Tribunal for a finding to be made at that time. Whilst PIATCO took the view that it had "put in issue the principle of severability" by submitting on the point in its submissions, this did not mean that the Tribunal was entitled to render a decision on that issue in the Award. In fact, that assertion was absurd. Taken to its logical conclusion, PIATCO's position meant that the Tribunal would be entitled to decide on any point raised in the terms of the reference as and when it felt like it and whether or not the parties had made submissions on it. Further, the Tribunal would have been entitled to render a decision on any of the other issues PIATCO had raised in its submissions irrespective of whether GOP was put on notice that the Tribunal was going to consider that point. This would also render any agreement between the parties on the issues to be referred to an arbitral tribunal nugatory.

23 GOP further argued that it was deprived of any opportunity to present its case on the issue of severability. The Tribunal had not given any indication prior to the issue of the Award that it would be making a decision on the issue of severability. If the Tribunal had felt it necessary to render a decision on this point, it should have given the parties prior notice of this and then given them an opportunity to make full submissions on this issue. As a consequence of the Tribunal's misconduct, GOP had made no submissions on the point.

24 In GOP's view, it had been seriously prejudiced by the Tribunal's premature determination that the principle of severability applied in the case because that meant that GOP had been effectively deprived of one of its jurisdictional objections. The issue of severability was critical to GOP's objections to the Tribunal's jurisdiction because of the effect of the *Agan* decision. Further, the Tribunal made its finding on the issue of severability in blatant disregard of GOP's statement that nothing in its submissions constituted a waiver of its defences, jurisdictional objections and counterclaims. The Tribunal had also misconstrued GOP's submissions by commenting that whilst GOP had initially contended that the principle of severability did not apply in the Philippines, it had not maintained this position in its submissions of 25 August 2004 and had instead conceded in those submissions that the law governing an arbitration agreement could differ from the law governing the substantive contract.

Discussion

25 From the foregoing summary of GOP's case, it can be seen that its complaint that the issue of severability was beyond the scope of the submission to arbitration is a mirror image of the complaint that it was not given a fair opportunity to make submissions on this point and was thus denied natural justice. If the issue of severability was within the scope of the submission of arbitration and GOP should have known that fact without it having to be pointed out expressly, then GOP, having been given the same opportunity to make submissions to the Tribunal as PIATCO was given, had the same opportunity that PIATCO had (and PIATCO took) to make submissions on severability.

26 In this connection, the issue before the Tribunal was which system of law governed the arbitration agreement. PIATCO's submission was that the issue of severability was a necessary part of the reasoning process that led the Tribunal to its conclusion that Singapore law was the proper law of

the arbitration clause. GOP, on the other hand, considered that the Tribunal could have decided on the applicable law by applying principles relating to choice of the proper law and not going into the issue of severability at all.

27 What is the principle of severability or separability as it is sometimes called? As the Tribunal puts it in para 49 of the Award:

> The principle is that the arbitration agreement is separate [from] the substantive contract and therefore can survive the termination of the substantive contract. Thus an allegation that the substantive contract has been terminated or is void does not ipso facto spell the end of the arbitration agreement and deprive an arbitral tribunal of jurisdiction.

28 The situation that existed in this case was that there had been several petitions in the Philippine Supreme Court challenging the validity of the ARCA and that the Philippine Supreme Court had come to a decision that the ARCA was null and void. One of GOP's grounds for challenging the jurisdiction of the Tribunal was that the ARCA being void, nothing remained and no arbitral tribunal could be constituted to consider disputes of parties arising from a non-existent contract. In its motion to bifurcate proceedings into two phases filed on 26 May 2004, GOP had made it clear that its stand was that the *Agan* decision "necessarily nullified the parties' reference to ICC Arbitration contained in that agreement". Thus, the Tribunal was faced with a classic challenge to its jurisdiction, *ie*, that there was no basis for such jurisdiction since the jurisdiction clause had allegedly died with the main contract. Yet at the same time the Tribunal was being asked to consider what law governed the arbitration agreement and what law governed the procedure of the Tribunal. In this situation, it appears to me that it was a prerequisite for the Tribunal to consider whether the arbitration agreement could be separated from the main contract and survive despite the alleged nullity of the main contract, or whether it had been extinguished with its parent. If the principle of severability was not available to the Tribunal then it would have been pointless for the Tribunal to go on to consider the two questions that it had been asked to determine. I therefore agree with the submission made by PIATCO that consideration of this principle was a necessary ingredient in the Tribunal's reasoning. It was also necessary for the Tribunal in its deliberations to consider whether the arbitration clause was severable in the sense that it could be governed by a law that was different from that which governed the main contract. There is no doubt that that aspect of severability was in GOP's contemplation because it did address arguments aimed at establishing that the parties could not in any event have intended the arbitration agreement to be governed by Singapore law.

29 PIATCO argued that in its submissions before the Tribunal, GOP had dealt with severability in substance even if it had not used that precise word. First, there was the wording in the 26 May 2004 submission that I have already cited. Then, in paras 8 to 14 of its submissions of 20 August 2004, GOP, in giving various reasons why Philippine law properly governed both the arbitration agreement and the arbitration proceedings, had argued in substance that the arbitration clause was so much at one with the contract struck down that it had to die with it. It had also recognised in those submissions that there were six discrete choice of law issues that could arise in an international arbitration and, in that connection, had identified three of these issues as being the proper law of the contract, the proper law of the arbitration agreement and the law governing the arbitral procedure. In these circumstances, PIATCO said that there could be no serious doubt that the issue of severability was not lost on GOP when it made its submissions. Indeed, the contrary was true and GOP was actually arguing against severability. The submissions of 20 August 2004 were replete with an implicit acceptance that the arbitration agreement was severable from the main contract. The thrust of GOP's submissions was to argue that Philippine law applied to both.

30 I find merit in those submissions by PIATCO and do not accept GOP's response that all it had

been doing was to urge the Tribunal to find that a proper application of the choice of law principles in this case meant that the arbitration agreement was governed by Philippine law. The Tribunal, when it considered the six discrete choice of law issues put forward by GOP, commented that these paragraphs of GOP's submissions reflected a change in GOP's original position that the principle of severability did not apply in the Philippines because, under Philippine law, a clause in a contract in which the parties expressed their consent to submit their disputes to arbitration was akin to every other clause in the contract and was not considered severable. There was no basis, GOP had said, under Philippine law to conclude that Philippine law governed all of the ARCA except for its s 10.02. The Tribunal said that the categorisation of the six discrete choice of law issues in an international arbitration and the conclusion of GOP that "these laws may be the same or they may differ" showed that GOP had changed its position on the severability of the arbitration agreement. Before me, counsel for GOP strongly criticised this conclusion as, at first, being a fabrication of an alleged concession and then, when I indicated disagreement with such a characterisation, as being a "misguided finding that the Government had made this concession". Having now been able to consider this matter further, I agree that, in recognising that potentially any international arbitration can involve three different choices of law in relation to the main contract, the arbitration agreement and the arbitration procedure and that not all these choices would have to be of the same law, GOP was implicitly (perhaps subconsciously) admitting that the principle of severability would necessarily be involved when the issue of the governing law of any of these matters arose.

31 Whilst GOP might not have wanted the severability issue to be decided at the choice of law stage, this was not a matter that it could control if the Tribunal considered that determination of this issue was a necessary part of determining the governing law. I can appreciate GOP's argument that the issue of severability affects one of its four jurisdictional objections but that consequence cannot change the legal necessity (as held by the Tribunal) for the Tribunal to consider severability before going onto the substantive hearing on jurisdiction. During the course of argument, I suggested to Mr Chandra Mohan, counsel for GOP, that to avoid problems resulting from severability being considered before GOP's jurisdictional arguments, parties should have agreed to the choice of law being decided at the same time as the jurisdictional points. Mr Chandra Mohan indicated that this could not be done because the jurisdictional points could not be determined if one did not know what law had to be applied in determining them and therefore that the determination of the proper law of the arbitration agreement was a necessary prerequisite to the substantive determination on jurisdiction. I accept the logic of that argument. That being the case, however, whilst GOP may have dearly wanted to exclude severability from the Tribunal's consideration during this phase of the arbitration, it could not do so and should not have expected that it would be so excluded simply because GOP had emphasised that it would make submissions on the jurisdictional points later.

32 Since severability was within the scope of the matters submitted to the Tribunal for determination, I cannot agree that GOP was not given the opportunity to deal with this issue. From 10 June 2004, it was agreed that the parties would submit on the arbitral procedure and the law governing the arbitration agreement. They were told their submissions on these points were to be in by 20 August 2004. An order to this effect was issued on 28 June 2004. GOP had, at the latest, from 28 June 2004 to prepare its submissions and to deal with severabilty if it saw fit to do so. On 20 August 2004, or soon thereafter, GOP received a copy of PIATCO's submission. It must have noted the frequent references to severability in the submission. It did not write to the Tribunal either to say that the references to severability were misplaced in view of the issues to be decided or to ask for time to answer those submissions. On 3 September 2004, the Tribunal told the parties that the issues would be decided as a partial award. Between then and 1 October 2004 when it was informed that the draft partial award was ready, GOP did not make any request to put in further submissions either orally or in writing.

33 One of the complaints that GOP made against the Tribunal was that it had not asked the parties to make presentations at an oral hearing. This point was misconceived. As PIATCO pointed out, r 20(2) of the ICC Rules states, in reference to the main fact-finding aspect of the arbitration, that an oral hearing is not a must unless the parties call for it or the Tribunal so decides of its own motion. This clearly implies that an oral hearing is not envisaged as a must in the preliminary stages of an ICC arbitration. Similarly, Art 24(1) of the Model Law does not require an oral hearing unless either the parties or the Tribunal require one.

34 In my judgment, GOP had ample opportunity to address the issue of severability both before 20 August 2004 and thereafter up to 1 October 2004. It was not denied any opportunity to put its case. It was not shut out in any material way. If it misconceived the situation and the arguments required, it had an opportunity after 20 August 2004 to correct such a misimpression and make up for any omission in its submissions. It did not do so. I do not think it can complain about the situation now.

The finding that Singapore was a neutral venue

GOP's case

35 Another of GOP's jurisdictional objections is that the agreement to arbitrate was procured by fraud and corruption and therefore cannot be enforced as a matter of law and public policy. In this regard, GOP contended that the Tribunal's finding that Singapore was chosen as the seat of the arbitration because it was a neutral seat implicitly deemed the arbitration agreement and the selection of Singapore as the seat to be valid. In making this finding, the Tribunal contravened s 24(*b*) of the Act and Art 34(2)(a)(ii) of the Model Law.

36 First, it was not open to the Tribunal to decide that Singapore was chosen as a neutral place for arbitration because it had not informed parties that it would be making a determination on the neutrality of Singapore as a venue for arbitration and neither party made any submission on this point. GOP was thus not afforded an opportunity to address this issue at all.

37 Next, given the critical link between such a finding and one of GOP's jurisdictional arguments, it was incumbent upon the Tribunal to have alerted parties to its intention so that they could address this issue in their submissions. Instead, the Tribunal proceeded to make a finding which was not based on any evidence tendered by the parties but on pure supposition. The finding caused grave prejudice to GOP because it was tantamount to a pre-determination of pre-judgment of one of GOP's jurisdictional objections. These objections were only supposed to have been addressed during the jurisdictional/liability phase.

Discussion

38 I find little merit in the above submissions. As PIATCO pointed out, an arbitral award is not liable to be struck down on application in the courts because of allegations that it was premised on incorrect grounds whether of fact or of law. An application to set aside an award made in an international arbitration is not an appeal on the merits and cannot be considered in the same way as the court would consider the findings of a body over whom it had appellate jurisdiction. PIATCO also contended that GOP's complaint in relation to the Tribunal's making a finding that the *lex arbitri* was Singapore law when this was in fact an issue entwined with the jurisdictional issue was really an appeal on the merits against this part of the Tribunal's decision. I agree.

39 The Tribunal was faced with the task of deciding what law governed the arbitration

procedure and had to undertake this task as a pure question of construction of the contract before it, bearing in mind the factual matrix in which the contract was set. The Tribunal did not have before it any evidence as to the actual circumstances in which the contract was concluded. It had to approach its task in the time-honoured way taken by persons who construe commercial contracts, *ie*, to understand the words as they would be understood objectively by a reasonable person. For what it is worth, it is my view that in undertaking this matter of interpretation, the Tribunal proceeded perfectly properly and logically having regard to the document before it and the arbitration agreement in the context of the document as a whole and the surrounding circumstances as they were made known to the Tribunal. I do not, however, have to agree or disagree with the Tribunal's conclusions in order to decide that the process was properly undertaken. I do not understand the argument that GOP did not have a full opportunity to put forward its case simply because it did not anticipate the way that the Tribunal would think in determining the issue. GOP had a battery of lawyers and full freedom to put its case any way that it chose.

40 It is not for me to decide whether the Tribunal came to the right decision. I do not agree, however, that in determining on the basis of the document alone that Singapore was chosen as the arbitration venue for reasons of neutrality, the Tribunal has predetermined GOP's complaint that the arbitration agreement was the result of fraud. As I have stated above, the Tribunal at this stage could only take an objective approach since it had not yet received any evidence. The conclusion that it came to on the basis of the document alone cannot estop or prevent it in any way, after hearing the evidence, from deciding that the choice of Singapore as the arbitral venue was in point of fact a *mala fide* choice procured by fraud and corruption and cannot be upheld. In my judgment, the Tribunal has not fettered its ability to freely decide the jurisdictional arguments on the basis of the evidence that is put forward and the submissions that are made by the parties after the evidence has been taken. No prejudgment of the issue has been made.

41 The fact that the Tribunal issued its decision by way of a partial award instead of by way of an order does not in my view alter the situation. GOP pointed out that it is well known that an award once made is binding and final and the arbitrator cannot revisit the decision made save to correct clerical mistakes: see *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue) at para 20.096 and also s 19B of the Act. However, that principle would not have an impact on the present position bearing in mind that the Award was made on the basis of assumed facts objectively gleaned from the document alone whilst when the jurisdictional objections are fully heard and determined, the subsequent decision would be made on the basis of the actual facts that led to the conclusion of the ARCA.

Conclusion

42 For the reasons given above, the application fails and must be dismissed with costs.