John Holland Pty Ltd (fka John Holland Construction & Engineering Pty Ltd) v Toyo Engineering Corp (Japan)
[2001] SGHC 48

Case Number : OM 30/2000

Decision Date : 14 March 2001

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Michael Hwang SC, Tan Chuan Thye and Christopher Anand Daniel (Allen & Gledhill) for the applicant; Wong Meng Meng SC and Nishith Kumar Shetty (Wong Partnership) for the respondent

Parties : John Holland Pty Ltd (fka John Holland Construction & Engineering Pty Ltd) — Toyo Engineering Corp (Japan)

Arbitration – Award – Setting aside – Express selection of ICC Rules to govern arbitration – Whether parties elected to exclude application of Pt II and Model Law – s 15 International Arbitration Act (Cap 143A, 1995 Ed)

Arbitration – Award – Setting aside – Whether grounds for setting aside award established – s 24(b), Sch 1 Art 34 International Arbitration Act (Cap 143A, 1995 Ed)

Background

This was an application by John Holland Pty Ltd (`JHPL`) to set aside an arbitration award given in favour of the respondent Toyo Engineering Corp (`TEC`). JHPL is an Australian company with its principal place of business in Australia. Its main business lay in the provision of building construction and engineering services. TEC is a Japanese company carrying on the business of providing engineering services. TEC was awarded a contract to upgrade an oil refining facility in Melbourne, and they entered into a sub-contract with JHPL on 5 April 1996 to construct a `fluidised catalytic converter` for the upgrading project. Subsequently, a dispute arose between TEC and JHPL which they referred to arbitration as required under their contract. The arbitration clause stipulated that the arbitration was to be held in Singapore according to the laws of Singapore. By mutual agreement, however, the actual proceedings took place principally in Vancouver. The final submissions were, however, conducted in Singapore.

In the arbitration JHPL claimed a sum of A$43m (alternatively A$16m) on a quantum meruit basis or A$43.8m as damages for breach of contract. TEC, in turn, claimed A$44.9m against JHPL. The arbitrators were John Tackaberry QC (appointed by JHPL), Vivian Ramsey QC (appointed by TEC), and Edward Chaisson QC (as chairman). Thirty-three witnesses testified and 150,000 documents were delivered to the arbitrators. The proceedings took place over four weeks in October-November 1998, and the resulting labour was wrapped in the 322 pages of the award published on 12 October 2000. A reviewing court must be undaunted by the intensity of such a massive arbitration, but it will remind itself that the deficiencies or defects which it is asked to review must be apparent on the record, and be slow to inquire into the nuances and perceptions that can only be appreciated at first instance.

Mr Michael Hwang, Senior Counsel, appearing on behalf of JHPL, saw a conflict between the provisions of the ICC Rules, which the parties had chosen, and the Model Law set out in the First Schedule of the International Arbitration Act (Cap 143A, 1995 Ed) (`IAA`). Counsel, therefore, argued that by reason of the conflict, the ICC Rules and not the Model Law applied. I will refer to this issue as the `fundamental issue` for convenience. Counsel further argued that when the Model Law does not apply, this application to set aside must be governed by the Arbitration Act (Cap 10) (`AA`). Thus, counsel`s second submission was that the award must, accordingly, be set aside by virtue of s 17(2)

of the AA. Thirdly, counsel submitted that even if the Model Law is applicable for the purposes of setting aside the award, JHPL has satisfied the necessary requirements.

The fundamental issue

Mr Hwang conceded at the outset that JHPL was not proceeding by way of an appeal. The preliminary question in an application to set aside an international arbitration award is whether Pt II and the Model Law of the IAA apply. It was not disputed that the arbitration in question was an international arbitration as defined by s 5 of the IAA. Section 5(1) and (2)(a) of the IAA provide as follows:

> *(1) This Part and the Model Law shall not apply to an arbitration which is not an international arbitration unless the parties agree in writing that this Part or the Model Law shall apply to that arbitration.*
>
> *(2) Notwithstanding Article 1(3) of the Model Law, an arbitration is international if -*
>
> *(a) at least one of the parties to an arbitration agreement, at the time of the conclusion of the agreement, has its place of business in any State other than Singapore;*

It is accepted that the parties to an international arbitration to which the IAA applies may, nonetheless, agree that Pt II or the Model Law shall not apply. The provision for this is found in s 15 of the IAA as follows:

> *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.*

It will now be appropriate to consider the relevant provisions in the arbitration agreement. First, General Condition 15.1 provides:

> *... if any dispute, difference of opinion or claim which the parties hereto are unable to resolve through amicable negotiation arises out of or in connection with the CONTRACT, either party may, after having the other party hereto so notified with a notice period of no less than one (1) month, refer the matter in question to arbitration for settlement under the rules of Conciliation and Arbitration of the International Chamber of Commerce.*

Secondly, Special Condition 11.3 provides that `... the AGREEMENT shall be governed by and interpreted in accordance with the laws of Singapore`.

Mr Hwang contended that a proper interpretation of the above provisions leads to the conclusion that the parties had implicitly `opted out` of the IAA and the Model Law. Mr Wong Meng Meng, Senior Counsel, submitted that the Model Law applies notwithstanding that the parties had expressly

selected the ICC Rules to govern the arbitration. There was no dispute that the AA will apply if the parties had excluded the IAA by agreement. Mr Hwang was not too concerned as to which of the two Acts apply because he was of the view that JHPL`s case satisfied both statutes. Mr Hwang submitted that should I find that the Model Law applies in this case, the relevant portions he would rely on are art 34(2)(a)(ii) and (iii) as well as (b)(ii), but if I should find that the Model Law does not apply, then he would rely on s 17(2) of the AA. Mr Wong, on the other hand, submitted that not only does the IAA apply, but that an application to set aside under the IAA is more onerous on the applicant than one under the AA because of the different philosophies of an international arbitration and a domestic one.

Mr Hwang drew my attention to two cases in which the court had taken the view that when the parties have chosen a set of arbitration rules the Model Law would consequently not apply notwithstanding that the parties had not expressly stipulated that the Model Law shall not apply. In the first of the two cases, namely, **Coop International v Ebel SA** [1998] 3 SLR 670 , 703, Chan Seng Onn JC held that:

> *... it is not necessary to have an explicit agreement stating that the Model Law or Part II will not apply, as counsel for the respondents had contended. Section 15 itself does not appear to require a clear express term of exclusion. On a plain and literal reading of that section, it can cover both express and implied exclusions. If the intention is to limit s 15 to an express ouster only, Parliament could easily have provided for it ([para] 144).*

In the other case, **Eisenwerk v Aust Granites** (Unreported) Australian case (No 5998 of 1998), Pincus JA of the Queensland Court of Appeal held (at para 12) that `the better view is that, by expressly opting for one well-known form of arbitration, the parties sufficiently showed an intention not to adopt or be bound by any quite different system of arbitration, such as the Model Law`. The judge also noted that it made little sense to agree to subject the arbitration to two different sets of rules (he was referring to the ICC Rules and the Model Law) which are irreconcilable in a number of aspects.

Mr Wong submitted on behalf of TEC that there is no room for an implied exclusion of the Model Law by the mere adoption of another set of rules. He submitted, and on this point Mr Hwang agrees, that JC Chan`s decision in respect of an implied exclusion of s 15 was purely obiter. Mr Wong argued, with characteristic candour, that Judge Pinckus` decision was not supported by sound reasons. I am of the contrary view, but for reasons which I shall explain shortly, that case is not quite helpful. Mr Wong also argued that art 19 of the Model Law permits the parties to choose their own procedure and they have done so by choosing the ICC Rules, but that does not mean, in his submission, that the entire Model Law does not apply. This is an attractive argument, but unfortunately it does not resolve the root problem, namely, that if the ICC Rules have ousted the Model Law, art 19 (indeed, any provision in the Model Law) cannot even be considered. It is only when the parties have not selected another set of rules that the Model Law applies, and with it art 19 which permits the parties to use any other set of rules at the arbitration if they believe will conveniently assist them. Mr Wong further hoped to persuade me by drawing my attention to the proposition, in the Hong Kong case of **Sol International v Guangzhou Dong-Jun Real Estate Interest Co** [1998] 3 HKC 493, that an unequivocal election is required to satisfy a statutory provision such as s 15 of the IAA. As a matter of general principle I am in agreement with the ***Sol*** case, but we must note that the court there was considering a differently worded provision - as was the ***Eisenwerk*** case (supra) in which the corresponding provision refers only to the Model Law and not `Part II and the Model Law`.

It will be helpful to begin by considering some general principles, and perhaps, take into account the philosophies of the domestic and international arbitration that both counsel believe have a material bearing on the way the statutory provisions are to be interpreted. It is obvious from the Singapore Hansard reports, which both counsel referred to, that the IAA was enacted to provide expediency and flexibility to parties who wish to conduct an international arbitration in Singapore or have Singapore law apply. Thus, s 15 permits the parties to exclude Pt II or the Model Law (or both) by agreement. It is also common ground that there are material differences between the ICC Rules and the Model Law. But in spite of these differences, the two sets of rules purport to perform the same function, which is, to provide the procedural structure for the arbitration. In any form of dispute resolution, the function of the procedural structure is to facilitate the resolution process by freeing the parties to concentrate on the real and substantive issues of fact and law. If one shares this view, then it becomes plain that the adoption of two different codes only serves as a distraction and will dissipate the energy and time of the protagonists in unnecessary clarification of conflicting rules.

Mr Hwang and Mr Wong used the term `implied opting out` as a convenient way of expressing whether the adoption of the ICC Rules had that effect on the Model Law. That is one way of looking at it, but on my part, I am not comfortable with the term `implied opting out` in the context of s 15. In my judgment, s 15 requires the parties to be clear in selecting another set of rules if they do not wish the Model Law to apply by default. I think that it may not be the correct approach to argue that there was an implied opting out (as Mr Hwang did), or that the entire circumstances and facts must be scrutinized to see whether an opting-out may be implied (as Mr Wong suggested). I should add that Mr Wong wishes me to take into account the fact that counsel for JHPL actually made submissions on two occasions (one in the final submissions here in Singapore) in reliance on the provisions of the Model Law. Thus, he said that the reliance militates against any implicit opting-out. Counsel may well have in mind that this might be an instance where thought comes too late after reality, or as Hegel more famously declared in his preface to ***The Philosophy of Right*** , `When philosophy paints its grey on grey, then has a shape of life grown old; and with grey on grey it cannot be rejuvenated, but only known. The Owl of Minerva spreads its wings with twilight closing in.` It is an attractive proposition. However, the circumstances reveal a different picture to me altogether. By agreeing to have the arbitration conducted in accordance with the ICC Rules, the parties have thereby, in my view, agreed that the Model Law will not apply, or in the words of s 15, `that the arbitration be settled or resolved otherwise than in accordance with the Model Law`. If they should subsequently at the proceedings itself, by consent or without objection, rely on the Model Law (or any other set of rules) at the arbitration they will be regarded as having agreed to do so on an ad hoc basis. That arrangement will end when either party wishes to revert to the chosen rules; and any dispute as to whether they would be permitted to do so will be determined by the arbitrator. The arbitrator is perfectly entitled to determine whether any issue of estoppel arises and whether there is a need to revert to the contractually chosen rules in writing. Therefore, in this case, the ICC Rules remain the governing rules to the exclusion of the Model Law. There are two ancillary points which I ought to deal with. The first concerns the question whether Pt II of the IAA must be applied in tandem with the Model Law such that both are excluded whenever the parties have excluded either of them. The second concerns the question whether the AA applies, as the default legislation as it were, whenever the IAA has been excluded.

Pt II and the Model Law as one

In the ***Coop*** case (supra), the judge assumed that when the parties have selected a set of rules other than the Model Law, they have thereby implicitly opted out not only of the Model Law but the IAA as well. The issue whether the two are conjoined did not appear to have been argued before the court in that case. The court`s assumption elicited the following commentary by the editors of

Halsbury`s Laws of Singapore . They say at p 18 of vol 2 ([20.012] note 14):

> *Often contractual rules of arbitration are confused with the applicable law of the arbitration (**lex arbitri**). While parties may adopt certain rules of arbitration, the law of the arbitration is normally determined by the law of the situs or the seat of the arbitration. For this reason, rules of international arbitral institutions do not normally specify the applicable law of arbitration (**lex arbitri**). Many arbitrations in Singapore are conducted in accordance with institutional rules of arbitration such as the International Chamber of Commerce (ICC) and the UNCITRAL Rules. Whether or not the law of the arbitration is the Arbitration Act or the International Arbitration Act should be decided upon the factors set out in the International Arbitration Act s 5(2). In **Coop International Pte Ltd v Ebel SA** [1998] 3 SLR 670 , Chan Seng Onn JC said at [para] 142-146, in relation to a hypothetical situation where if the parties had chosen Singapore as the place of arbitration and adopted the Rules of the Chamber of Commerce and Industry of Geneva, then the parties would have successfully opted out of the International Arbitration Act by implication. He illustrated his view with the example that under the Geneva Rules, the arbitrators are to be appointed by the Chamber of Commerce and Industry of Geneva, whereas under the International Arbitration Act, the Chairman of the Singapore International Arbitration Centre is the appointing authority. It is submitted that the court`s view on this point is erroneous and the illustration inappropriate. Choice of institutional rules of arbitration has been confused with the application of **lex arbitri**.*

The express wording of s 15 permits the parties to exclude either Pt II or the Model Law (or both). That is the principal right that the IAA confers on them. It will not stand to reason to interpret the word `and` (in `... this Part and the Model Law shall not apply ...`) in the second part of s 15 literally because that would have castrated what was intended to be a potent right of choice, without so much as the intervention of a semi-colon. If, for example, the parties had elected to apply Pt II but not the Model Law, it cannot follow that consequently, both - Pt II and the Model Law - become inapplicable. In my view, one must naturally read the words `as the case may be` in ellipsis before the words `shall not apply`. In arriving at this conclusion, I gathered support from the wording of s 5 of the IAA which has a reversed image of s 15. Section 5 allows parties to a domestic arbitration to adopt Pt II of the IAA or the Model Law. When one looks at the wording of s 5, it will at once be clear that the legislature could not have intended the domestic AA to be substituted by the IAA if the parties had chosen the Model Law without choosing Pt II. Section 5 reads:

> *This Part and the Model Law shall not apply to an arbitration which is not an international arbitration unless the parties agree in writing that this Part or the Model Law shall apply to that arbitration.*

The words `as the case may be` should similarly be incorporated after `this Part or the Model Law`. It will also be seen that all the provisions of Pt II are capable of application on their own without the Model Law. Section 5(4) emphasizes the point. `Notwithstanding anything to the contrary in the Arbitration Act, that Act shall not apply to any arbitration to which this Part applies.` The omission of `the Model Law` provides the emphasis.

I would state an obvious point at the risk of appearing tautologous, but I think that it is important to do so in this case. The point is this. When parties select Pt II of the IAA, without specifying the Model Law as well, the Model law is naturally included because it is part of Pt II, as it is by means of the First Schedule to the IAA. However, the converse is not so. When parties select the Model Law

without specifying Pt II of the IAA, the latter does not apply. When the beast is slain, its tail is slain; when its tail is slain, the beast is not.

Thus, the only issue in the case before me, was whether the ICC Rules fall into the same genus as the Model Law. It may not be disputed that the ICC Rules are different from legislative provisions such as Pt II of the IAA, but ought we to hold that the Model Law being part of a statute be similarly regarded? In the present context I think not. The Model Law was created as an optional set of rules to be utilised like any other set of contractual rules such as the ICC Rules. It follows, therefore, that the parties had elected to apply the ICC Rules in place of the Model Law, thereby excluding the Model Law only. The election did not include Pt II of the IAA. It may be helpful if I issue the reminder that parties ought to express their intention without ambiguity. Parliament enacted the IAA to govern international arbitration, but confers upon the parties the liberty of choice. When the parties make their election, they must remember that by excluding the IAA they may have invoked the AA by default (if the choice of law clause specifies Singapore law, as in this case). There is no reason why the AA cannot apply to an international arbitration, but parties ought to be sure and clear as to what they want when making a s 15 election.

The approach I had taken in coming to this finding is based on the principle that statutory provisions must be read plainly, and interpreted strictly and faithfully; but when parties have, by sheer ingenuity or fortuity, created a set of circumstances not envisaged by the draftsman, then the court ought to apply the law with sufficient latitude to give effect as closely as possible to the agreement of the parties. This is especially so in matters concerning international arbitration in which the attractiveness of resolving commercial disputes between international parties according to the manner and law of their choice, by arbitrators of their choice, and unfettered by domestic rules (designed in part, to cater to domestic needs) are some of the factors that have led to the ascendancy of international arbitration in recent times.

Section 24 of the IAA

In the result of my finding that the parties had chosen the ICC Rules in place of the Model Law, but had not excluded the IAA itself, the only provision under which JHPL may apply to set aside the award is s 24 of the IAA. The ICC Rules make no provision for setting aside an award. The relevant portion of s 24 which Mr Hwang relied on reads as follows:

> *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) ...*
>
> *(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.*

I invited counsel to submit arguments, if any, as to whether the election of ICC Rules amounts to a rejection of the Model Law as well as Pt II. Counsel for JHPL filed a further submission on 7 March which is, in my humble view, of little persuasion. Mr Hwang continues to maintain that the applicable provision is s 17(2) of the AA, and likewise, Mr Wong reiterated his previous submission that the IAA as well as the Model Law applied.

I shall now consider the substance of JHPL`s grievance against the award in the context of s 24 of the IAA. It is necessary to begin with the observation that the various provisions which allow a party to apply to set aside an arbitration award are all worded differently. Section 24 of the IAA is different from s 17(2) of the AA, and the two differ from art 34 of the Model Law. Under Pt II as well as the Model Law, an application to set aside the award is the exclusive recourse against the award. In the case of the AA, the parties have a right to set aside the award under s 17(2) on the ground of misconduct, as well as the right under s 28(2) to appeal on a point of law. In the case of the ICC Rules, the award is deemed to be final and no provision is made for appeal or setting aside. Privacy, autonomy, and expediency with certainty are the watchwords in the orb of international arbitration. The freedom to choose the arbitrator, however, carries the necessity of abiding his authority and decision. Parties will accept that no tribunal is infallible, and therefore, mistakes of fact and law (or both) may occur. The grounds and opportunities for correcting an error are determined by the legislature.

To succeed under s 24(b) of the IAA, one has to consider whether `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`. It is incumbent upon the applicant to first, establish which rule of natural justice was breached; secondly, how it was breached; thirdly, in what way was the breach connected with the making of the award; and fourthly, how the breach had prejudiced the rights of the party concerned. None of these features were specifically addressed by Mr Hwang in detail other than the point in relation to the misinterpretation of the letter of intent by the arbitrators which he said was `plucked out of nowhere` without giving JHPL`s counsel an opportunity to address it. This point was put up in some detail and with great force by Mr Hwang in the proceedings before me but on the basis that that amounted to misconduct under s 17(2) of the AA. Mr Hwang also submitted (but not with as much force) that it also applies to an application under s 24(b) of the IAA. The point itself is a straightforward one.

In a letter of intent dated 6 March 1995 TEC agreed with JHPL that the said letter was subject to contract with the contents of the letter incorporated into the contract. The contract was executed on 5 April 1995. Article 5 of the contract provided as follows:

> *TEC shall, after all the requirements for effectuation of the CONTRACT set forth in Clause 1.4 "EFFECTUATION OF CONTRACT" of the GENERAL TERMS AND CONDITIONS shall have been fulfilled yet subject to the relevant proviso therein, issue to the [JHPL] the NOTICE OF EFFECTUATION OF CONTRACT, and upon issuance by TEC to [JHPL] thereof, the CONTRACT shall be made effective and valid and come into force.*

Mr Hwang contended that there was no notice of effectuation (a point not disputed by Mr Wong) and, therefore, the arbitrators misconducted themselves in finding that the contract was binding when made on 5 April 1995. The thrust of his submission was that JHPL was not permitted to argue that there was no contract by reason of the omission in issuing the notice of effectuation. Mr Hwang pressed his point that this was such a basic error which experienced arbitrators, such as the members concerned, ought not to have made. From the record, it seems clear that the arbitrators had in fact considered the issue as to the formation of the contract. Mr Hwang`s point was that they were clearly off the mark. Distilling the argument of counsel as I have, I find that there is no room whatsoever to manoeuvre JHPL`s case within any of the features required under s 24(b) of the IAA. The complaint, if valid, reveals no more than a plain error of law, or of a mixed fact and law. That is not only outside the ambit of s 24(b) of the IAA, but also outside the ambit of s 17(2) of the AA. I am

of the view that an error of this nature does not amount to misconduct. It is also my view that although the misconduct envisaged under s 17(2) is not necessarily conduct of the wilful sort, it must nonetheless, be of a serious nature that one can plainly see that justice was not done. That section provides that where `an arbitrator, or umpire had misconducted himself or the proceedings` the court may set aside the award. Mr Hwang, who must have been acutely aware of the immense task before him, prefaced his submission with the declaration that JHPL was not seeking `loser`s justice` in this court. I need only refer to **Moran v Lloyd`s** [1983] QB 542[1983] 1 Lloyd`s Rep 472 to show why that was so. That case went to the English Court of Appeal and concerned, among other issues, the definition of `misconduct` in the English equivalent of our s 17(2). Sir John Donaldson MR held ([1983] QB 542 at p 550; [1983] 1 Lloyd`s Rep 472 at p 475):

> *Returning to the complaint of inconsistency, we doubt whether, as such, inconsistency between one part of an award and another could ever constitute or evidence misconduct on the part of the arbitrator. The overwhelming likelihood is that it would merely constitute or evidence error of law or of fact or of both and these do not amount to misconduct.*

The judge also held that:

> *[A] distinction has to be drawn between the award itself - the operative or decisive part of the award - and the reasons for that award. Inconsistency of reasoning may betray an error of fact, but it is in the nature of arbitral proceedings that this must be accepted by the parties. Alternatively, it may betray an error of law. That may give rise to a right of appeal, but it has no other effect. Inconsistency or ambiguity in the operative parts of the award - the parts which would "be enforced in the same manner as a judgment or order to the same effect" ... may be another matter.*

In respect of the latter part of that passage, I find that there is nothing to suggest any defect in the operative parts of the award in question. Although my ruling on the interpretation of s 15 of the IAA has rendered counsel`s submission on art 34 of the Model Law irrelevant, I would like to say, for the sake of completeness, that I had considered their submissions, but for the same reasons I give in respect of s 17(2) of the AA and s 24 of the IAA, I am of the view that the errors and deficiencies in the award complained of by Mr Hwang fall far short of the requirements in the parts of art 34 which counsel rely. My views on the applicability of art 34 are set out below.

Reverting to s 24 of the IAA and s 17(2) of the AA, I think that the legislature intended that it will require more than an error of law or fact (or both) to set aside an arbitration award. In their attempt to describe what extra features were contemplated by the legislature, Mr Hwang and Mr Wong alluded to the allegorical illustration of how an elephant might be identified - the `you know it when you see it` approach. It is probably fair to say that this may only be said of cases in the penumbra. In my view, the cases clearly in the definable limits are not difficult to describe. A mistaken view of the application of ***Hadley v Baxendale*** , for example, is an error of law that cannot be challenged. A mistaken calculation of the number of days of delay is a mistake of fact which cannot be challenged. On the other hand, if an arbitrator shows his draft award to one party without showing it to the other before publication, that would, in my view, be misconduct within s 17(2) of the AA and also a breach of the rules of natural justice under s 24(b) of the IAA. In my view, the complaints of JHPL against the award are clearly in respect of errors of law or mixed fact and law.

The second point which Mr Hwang submitted was that the arbitrators committed a `perverse error` in

finding that JHPL was relieved of its duty to pay liquidated damages and at the same time finding that the contractual date for completion applied. The date was scheduled as 19 November 1996, but TEC gave instructions for additional works which JHPL were unable to complete in time. TEC then terminated the contract on 22 November 1996. JHPL contended before the arbitrators that TEC was responsible for the delay and therefore, by reason of the `prevention principle` (as enunciated in **Peak Construction (Liverpool) v McKinney Foundations** [1970] 1 BLR 111, and applied in our courts in **Kwan Im Tong Chinese Temple v Fong Choon Hung Construction** [1998] 2 SLR 137) they (TEC) cannot take advantage of their own wrongdoing. The arbitrators found, in fact, that JHPL were entitled to an extension of 68 days (although they claimed to be entitled to about ten months). Thus, Mr Hwang submitted that the arbitrators` finding was `bizarre` because there cannot be a finding that TEC was in breach and still maintain that the original date for completion applied. This apparent anomaly was recognised by one of the arbitrators who dissented on this point (but not the overall award). Mr Wong explained in his submission why the majority was correct in their decision. It is not necessary for me to recite that part of counsel`s submission, and it is not appropriate for me to make any finding as to the correctness of the arbitrators` decision on this point because, in my view, if they had erred on this point it was an error of law. Even if I agree with Mr Hwang that the error was unusual or ought not to have been made, it does not alter the character of the error such as to constitute misconduct or a breach of the rules of natural justice. Similarly, I am of the view that the contention by Mr Hwang that the arbitrators erred in finding that JHPL did not make an application for an extension of time does not justify an order setting aside the award.

The third (and last) major allegation on behalf of JHPL was that TEC`s termination of the contract must be made by an objective appraisal as to whether the breach was serious. That is strictly a matter of the interpretation of the contract, a task within the scope of the arbitrators` powers. But even if it fell within established law that the opinion of TEC must be derived objectively, an error or omission on the part of the arbitrators in this regard cannot be described as more than an error or omission in law which is subject to an appeal (where an appeal process is prescribed) but not to be set aside on any of the statutory grounds reviewed above.

Article 34 of the Model Law

The relevant portions of art 34 of the Model Law which Mr Hwang relied on are, first art 34(2)(a)(ii) - that JHPL was unable to present its case. This is the same argument as that under s 17(2) of the AA. This relates to the argument that JHPL was unable to argue the non-existent contract point. For the reasons already set out, I am unable to accept this argument.

Secondly, art 34(2)(a)(iii), namely, that the award contains decision on matters beyond the scope of the submission to arbitrate. Mr Hwang appears to rely on this provision to support his argument that the arbitrators erred in the approach they took in interpreting the contract. Mr Hwang referred to **Inter-City Gas Corporation v Boise Cascade Corporation** (Unreported) , of the United States Court of Appeal 8th Circuit, for the proposition that an arbitrator is not entitled to `disregard or modify unambiguous provisions`. Such disregard may warrant the setting aside of an award in some cases, but I do not think that this can be said of the arbitrators` conduct in the present case. None of the `three fundamental and irreparable deficiencies` of the award which JHPL complained of can reasonably be regarded as a disregard of clear and unambiguous contract term.

Thirdly, Mr Hwang relied on art 34(2)(b)(ii); the public policy provision. No particular policy has been identified, however, as having been embarrassed by the award. The contention that public policy covers situations in which there has been a `fundamental irregularity in respect of the law` is, with respect, not very helpful. A fundamental irregularity in itself cannot render an award bad. A public

policy must first be identified, and then it must be shown which part of the award conflicts with it. Mr Hwang`s submission on this ground, therefore, also fails.

Conclusion

The relevant statutes governing domestic as well as international arbitration draw a bright line distinction between the right to appeal against an award and an application to set aside the award. In both situations, the right is dictated by the precise wording of the relevant provision so that a party who is unable to bring his complaint under the one cannot slip it through the other. If the statutes favour a greater degree of forgiveness of errors of law by arbitrators than that shown to courts of law, it is for sound policy reasons which are not for the courts to approve or disapprove. On the other hand, the exactitude demanded of decisions by courts on questions of law is understandable because their decisions may be used as judicial precedent. It is incumbent upon parties wishing to go to arbitration to, therefore, draft their arbitration and choice of law clauses as they truly intend, and then to choose their arbitrators with the degree of care born from the knowledge that they have to live with the award that their chosen arbitrators deliver. In the present case, I had no need to deliberate over the merits of the arbitrators` findings and award, so nothing that I have said above should be construed as a criticism of the arbitrators or the award itself. The nature of arbitration, especially international arbitration, is such that laws are enacted to include, among others, the purpose of promoting, as far as possible, its viability as an alternative form of dispute resolution. That purpose must be achieved without repressing the universal impulse to do justice in the individual case - and that is often a difficult task. In this instant case, I have satisfied myself that there are insufficient grounds to disturb the award in question.

For the reasons above, I will dismiss this motion.

Outcome:

Motion dismissed.