NCC International AB v Alliance Concrete Singapore Pte Ltd
[2008] SGCA 5

Case Number : CA 47/2007

Decision Date : 26 February 2008

Tribunal/Court : Court of Appeal

Coram : Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Woo Tchi Chu and John Wang (Robert Wang & Woo LLC) for the appellant; Winston Kwek and Eileen Lam (Rajah & Tann) for the respondent

Parties : NCC International AB — Alliance Concrete Singapore Pte Ltd

Arbitration – Interlocutory order or direction – Court's power – Principles governing when court will make interim orders pending arbitration – Sections 28(2), 31(1) Arbitration Act (Cap 10, 2002 Rev Ed) – Sections 12(1), 12(7) International Arbitration Act (Cap 143A, 2002 Rev Ed)

Civil Procedure – Injunctions – Contractor seeking interim mandatory injunction to compel ready-mix concrete supplier to supply concrete – Whether special circumstances existing to justify granting interim mandatory injunction

Courts and Jurisdiction – Abuse of process – Contractor seeking interim mandatory injunction from court despite arbitration agreement – No serious steps taken to commence arbitration – Whether contractor's conduct an abuse of process

26 February 2008

V K Rajah JA (delivering the grounds of decision of the court):

Introduction

1 When should the court lend its assistance to prospective or ongoing arbitration proceedings? How should the court exercise its powers in this regard? These issues often bedevil both counsel and the court alike given the present-day prevalence of arbitration agreements. In these grounds of decision, we attempt to elucidate the legal position in the hope that the arbitral community will find it helpful. In particular, we wish to clarify the circumstances in which it may be appropriate for parties to an arbitration agreement to seek the assistance of the courts.

2 This was an appeal by NCC International AB ("the appellant") against the refusal of the High Court judge ("the Judge") to grant an interlocutory mandatory injunction pending arbitration in *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2007] SGHC 64 ("the GD"). Having carefully considered the submissions of both parties, we dismissed the appeal. We now give the detailed grounds for our decision.

The facts

3 The appellant is the main contractor for the construction of underground train stations and tunnels at Upper Paya Lebar and Macpherson for the Circle Line of the Mass Rapid Transit system. Under the contract between the Land Transport Authority ("LTA") and the appellant ("the Main Contract"), the construction works ("the Works") were scheduled for completion on 30 November 2007.

4 Alliance Concrete Singapore Pte Ltd ("the respondent") was the supplier of ready-mixed

concrete to the appellant pursuant to a letter of award dated 26 July 2006 ("the Letter of Award") and a contract of the same date ("the Concrete Contract").

5 The Letter of Award contained various terms on which the respondent was to supply ready-mixed concrete to the appellant. These included preparing the necessary submission requirements for approval by the LTA's engineer ("the Engineer"), guaranteeing the quality of the ready-mixed concrete and guaranteeing delivery to the appellant subject to a minimum notice period of one day.

6 The Concrete Contract contained, *inter alia*, two additional terms. The first was a "firm price" clause (cl 10), which provided that:

> The Domestic Sub-contract rates [*ie*, the rates set out in para 1.0 of the Letter of Award] shall not be adjusted for any price fluctuation in the cost of labour, materials, goods … or for any changes in current legislation or regulations …

The second was a dispute resolution clause (cl 80), which provided that:

> If any dispute or difference shall arise between the Domestic Sub-contractor [*ie*, the respondent] and the Main Contractor [*ie*, the appellant] in connection with or arising out of the Domestic Sub-Contract [*ie*, the Concrete Contract] … such dispute or difference shall be referred to the following course for settlement in the same manner as that stated under clause 71 in the Main Contract.

7 In turn, cl 71 of the Main Contract provided that any dispute was to be referred in the first place to the Engineer, and, if there was dissatisfaction with the Engineer's decision, the dispute was to be referred to the Singapore Mediation Centre ("SMC") for mediation in accordance with the rules of the SMC. If mediation was unsuccessful, the dispute would then be referred to arbitration according to the rules of the Singapore International Arbitration Centre ("the SIAC Rules"). Before us, both parties accepted that cl 80 of the Concrete Contract read with cl 71 of the Main Contract constituted an arbitration agreement.

8 The present dispute arose following the decision of the Indonesian government in late January 2007 to ban the export of sand – one of the essential ingredients of ready-mixed concrete – to Singapore with effect from 6 February 2007. This decision sent shock waves throughout the local construction industry, which depended primarily, if not solely, on sand from Indonesia.

9 The Singapore government soon intervened via the Building and Construction Authority ("BCA") and the Singapore Contractors Association Ltd ("SCAL"). On 1 February 2007, the SCAL issued a circular to its members (including the appellant) stating that "BCA has agreed to supply sand directly to contractors for onward delivery to ready-mixed concrete suppliers, precaster [*sic*] and those contractors with onsite batching". A few days later, on 3 February 2007, the SCAL issued a more comprehensive advisory ("the SCAL Advisory") setting out in detail the BCA's procedure for distributing sand which was to be released from the Government's stockpile.

10 Unfortunately, the appellant and the respondent failed to agree on how to collect and pay for the sand distributed by the BCA. Although the BCA approved the appellant's applications for a few weeks' worth of sand supplies, the sand requested for by the appellant ("the allocated sand") went uncollected. From 2 February 2007, the respondent stopped supplying ready-mixed concrete to the appellant, save for small quantities required to maintain the structural integrity of the Works.

11 In the ensuing exchange of correspondence between the parties, the appellant took the

position that the respondent should collect the allocated sand and supply ready-mixed concrete to it at the fixed price stipulated in the Letter of Award, as provided for under cl 10 of the Concrete Contract. In contrast, the respondent took the position that the appellant should arrange for delivery of the allocated sand to the respondent's batching site according to the BCA's procedure and that the Concrete Contract should be renegotiated. However, neither party suggested submitting the dispute to the Engineer or commencing mediation or arbitration in accordance with cl 71 of the Main Contract.

12 On 15 March 2007, the appellant applied via Originating Summons No 429 of 2007 for an interlocutory mandatory injunction ("the Interim Injunction") that would compel the respondent to deliver ready-mixed concrete which the former had ordered as well as perform the Concrete Contract by continuing to supply ready-mixed concrete in accordance with the terms of that contract. The title of the originating summons contained the words, *inter alia*, "In the Matter of An *Intended Arbitration* between [the appellant] as Claimants and [the respondent] as Respondents" [emphasis added]. In a supporting affidavit filed on the same day, the appellant's authorised representative stated that the appellant undertook "to commence the arbitration expeditiously". Nevertheless, at the hearing before us on 23 August 2007, approximately seven months after the dispute arose, counsel for the appellant confessed that he had not had any instructions to proceed with arbitration. *Indeed, astonishingly, even the notice to commence arbitration had yet to be issued by the appellant*.

The decision below

13 The Judge focused on the merits of the application for the Interim Injunction. Despite a request by counsel, the Judge made no finding as to whether he was exercising his jurisdiction under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") or the Arbitration Act (Cap 10, 2002 Rev Ed) ("AA").

14 The Judge dismissed the application on the basis that the appellant had failed to show that it deserved the court's assistance in terms of issuing the Interim Injunction. He gave three reasons for his decision (at [29] of the GD). First, the appellant was not justified in taking the position that because the Concrete Contract did not specify that the ready-mixed concrete was to be prepared using sand from Indonesia, the appellant did not have to do anything except insist on delivery of the ready-mixed concrete. Second, the appellant had failed to follow the process of dispute resolution set out in the Concrete Contract. Third, the appellant should have availed itself of the measures contained in the SCAL Advisory so as to obtain the sand which it needed.

15 Although the Judge expressed wariness about prejudging the appellant's likelihood of succeeding at the arbitration proceedings to be initiated, he concluded that the arbitrator would most likely adopt "a broad perspective" (at [30] of the GD) in deciding the dispute and that the appellant could not be said to be assured of obtaining an order for specific performance of the Concrete Contract at the arbitration.

The arguments on appeal

16 Taking the Judge's cue, both parties focused their arguments before this court on the merits of the application for the Interim Injunction. The appellant sought to persuade us that it had a high chance of succeeding at the arbitration (in terms of obtaining an order for specific performance of the Concrete Contract) based on a literal construction of the Concrete Contract and because damages would not be an adequate remedy since the respondent's failure to supply ready-mixed concrete had halted the Works. The respondent, on the other hand, advanced the doctrine of frustration to show that the appellant was unlikely to succeed at the arbitration, and also argued that, even if the

appellant did succeed, damages would be adequate compensation because the appellant's damages could be quantified. Further, the respondent submitted that the appellant had failed to demonstrate any urgency warranting the grant of the Interim Injunction because, *inter alia*, the latter had not asked for the present appeal to be treated as an expedited appeal.

17 Unfortunately, both parties dealt only peripherally with the issue of whether the court could and should intervene in the light of the pending arbitration proceedings. The appellant's position was that the court's power to provide interim relief in these circumstances was founded on the IAA, and that such power should be exercised in this instance because the merits of the case warranted it. In contrast, the respondent contended that the applicable legislation was the AA, and not the IAA, because the appellant had a business office in Singapore and that, under the AA, the court had no power to grant an interim injunction when arbitration proceedings were either pending or ongoing.

Our decision

18 In the ensuing analysis, we set out our view on the proper role of the court in providing interim relief when arbitration proceedings are pending or in progress under the IAA and the AA, respectively. Based on the legal principles that emerged from our analysis, we came to the conclusion that the appellant's conduct amounted to an abuse of process. As our decision was unaffected by whether the court's jurisdiction was founded on the IAA or the AA, we did not make any finding as to which of these statutes was applicable on the facts of this appeal.

19 We also considered the substantive merits of the appellant's application for the Interim Injunction. We found that the Judge had, in the exercise of his discretion, correctly refused to grant the relief sought, an interim mandatory injunction being, it must be emphasised, a very exceptional remedy.

The role of the court in arbitration proceedings

20 It is presently accepted that the courts have a conspicuously circumscribed role in relation to all arbitration proceedings, whether pending or ongoing. In the apposite words of the learned authors of *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue) ("*Halsbury's*") at para 20.088:

> The courts have supportive and limited supervisory functions over arbitrations held in Singapore. These functions are those granted by statute. There are no inherent supervisory powers at common law which the court could otherwise exercise.

21 This position was achieved in respect of international arbitration in 1994 when Singapore implemented the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") via the International Arbitration Act 1994 (Act 23 of 1994) ("the 1994 Act"): see s 3(1) of the 1994 Act, which states that "[s]ubject to this Act, the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore". (Section 3(1) of the 1994 Act is identical to what is now s 3(1) of the IAA.)

22 Article 5 of the Model Law states that "[i]n matters governed by this Law, no court shall intervene except where so provided in this Law". This provision requires all instances of court involvement in arbitration proceedings to be specifically stipulated, thus excluding any general or residual powers of domestic courts in relation to matters which are prescribed as governed by the Model Law. The rationale here is to engender certainty for both arbitral parties and arbitrators alike as to the instances in which curial supervision or assistance is to be expected, such certainty being regarded as beneficial to international commercial arbitration: see "Analytical Commentary on draft

text of a model law on international commercial arbitration: Report of the Secretary-General" UNCITRAL, 18th Sess, UN Doc A/CN.9/264 (1985), reprinted in [1985] 16 YB UNCITRAL 104 ("the Model Law Commentary") at 112.

23 The powers of the Singapore courts in respect of international arbitration are therefore listed exhaustively in the IAA where matters governed by the Model Law are concerned.

24 In respect of domestic arbitration, Singapore brought its regime in line with that under the Model Law by enacting the Arbitration Act 2001 (Act 37 of 2001) ("the 2001 Act"), the immediate precursor of the AA. The 2001 Act was largely based on the Model Law, but also incorporated useful features from the Arbitration Act 1996 (c 23) (UK) ("the 1996 UK Act"): see Law Reform and Revision Division, Attorney-General's Chambers, *Review of Arbitration Laws* (LRRD No 3/2001) ("the LRRD Report") at para 4.3. The purpose of this approach, as stated in *Singapore Parliamentary Debates, Official Report* (5 October 2001) vol 73 at col 2214 (Assoc Prof Ho Peng Kee, Minister of State for Law), was to allow:

> … the creation of an arbitration regime that is in line with international standards and yet preserves key features of those existing arbitration practices that are deemed to be desirable for domestic arbitrations.

25 Hence, the AA (which is substantially similar to the 2001 Act) shares a common bedrock with the IAA, including the preservation of commercial certainty by limiting curial intervention, but with certain modifications tailored to suit domestic arbitration.

26 Having set the tone with regard to the court's statutorily circumscribed powers to intervene in arbitration proceedings in general, we now examine the slightly different regimes under the IAA and the AA in order to clarify the court's role of providing interim relief *vis-à-vis* such proceedings.

Arbitral proceedings under the IAA

27 The IAA applies to "international" arbitrations, which are defined under s 5 of the IAA. The court's power to provide interim relief in international arbitrations is prescribed by s 12(7) read with s 12(1) of the IAA. These subsections provide as follows:

> **Powers of arbitral tribunal**
>
> **12.**—(1) Without prejudice to the powers set out in any other provision of this Act and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for —
>
> …
>
> (*i*) an interim injunction or any other interim measure.
>
> …
>
> (7) The High Court or a Judge thereof shall have, for the purpose of and in relation to an arbitration to which this Part [*ie*, Pt II of the IAA] applies, the same power of making orders in respect of any of the matters set out in subsection (1) as it has for the purpose of and in relation to an action or matter in the court.

28 Although the courts are conferred the power to grant interim relief in international arbitration

proceedings, they will not exercise this power generously. We broadly agree with Belinda Ang Saw Ean J's remark in *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR 854 at [15] that the interim measures of protection in s 12(1) of the IAA "are essentially remedies aimed at assisting in the just and proper conduct of arbitration, or in the preservation of property which is the subject matter of the arbitration". We arrived at this conclusion based on a contextual reading of ss 12(1) and 12(7) of the IAA, taking into consideration the drafting history as well as the object and purpose of this Act.

(1) Contextual interpretation

29 We regard the genesis and the context of s 12(7) of the IAA as pointing towards limited curial intervention for two reasons. First, the court's power in respect of interim measures is contained in a single subsection of a provision which bears the heading, "Powers of *arbitral tribunal*" [emphasis added] (see [27] above). Evidently, precedence is given to the arbitral tribunal to provide interim relief, with the court's power being incidental to that of the tribunal. Second, reading the IAA as a whole, it can be seen that the designated functions of the court are purely supportive in nature. These functions include enforcing an international arbitration agreement by granting a stay of court proceedings under s 6 of the IAA, referring the parties to arbitration under Art 8 of the Model Law, issuing subpoenas to compel witnesses' attendance before the arbitral tribunal under s 14 of the IAA and assisting the tribunal in taking evidence under Art 27 of the Model Law (see *Halsbury's* ([20] *supra*) at para 20.093). Clearly, ss 12(1) and 12(7) of the IAA must be read in a way which is consistent with the overall scheme of curial assistance contemplated by this Act.

30 In our view, therefore, a contextual interpretation of ss 12(1) and 12(7) of the IAA unequivocally points towards the court's powers being employed only to the extent that the exercise of such powers would essentially aid arbitration proceedings being or to be diligently pursued. In short, the court's role is to assist in the arbitration process and not to resolve the dispute at hand either directly or indirectly.

(2) Drafting history

31 We then considered the drafting history of ss 12(1) and 12(7) of the IAA. Our starting point was the draft bill ("the Draft Bill") prepared by the Law Reform Sub-Committee on Review of Arbitration Laws ("the Sub-Committee"), which is contained in Annex V of the Sub-Committee's 1993 report ("the Sub-Committee's Report"). Clause 12(1) of the Draft Bill was virtually identical to s 12(1) of the IAA as eventually approved by Parliament. However, the Draft Bill contained no equivalent of (among other provisions) s 12(7) of the IAA.

32 In formulating the Draft Bill, the Sub-Committee recommended, *inter alia*, that in order to enable "the proper functioning of international arbitrations in Singapore … arbitral powers given by statute must be substantially increased" (see the Sub-Committee's Report at para 31). The Sub-Committee continued (*ibid*):

> In this respect, the Model Law provisions should be expanded to include the powers set out in the UNCITRAL Rules, SIAC Rules and such other powers as a Court should have, such as:
>
> …
>
> (d) interim injunctions or other interim orders.
>
> Such powers should be made *concurrently exercisable* by the arbitral tribunal and (*to the extent*

that curial intervention is allowed in respect of international arbitrations) by the Court, the liberty being given to either party to choose to make such applications to the Court or the arbitral tribunal as that party deems expedient.

[emphasis added]

33 The meaning of the phrase "to the extent that curial intervention is allowed in respect of international arbitrations" was clarified in a subsequent recommendation (at para 47 of the Sub-Committee's Report) as follows:

> **The [Sub-Committee] recommends that there should be provision to empower the court to grant injunctive relief and other orders *for the interim preservation of property pending the making of an award in an international arbitration*.** Such applications should not be answerable by stay applications and should not be considered as an abuse of judicial process. ***The [Sub-Committee] recognises that while arbitrators should be given some powers to make such orders [see Paragraph 31 above], they should not have the power to make orders affecting third party rights; such powers should remain the preserve of the courts*.**
> [emphasis added in bold italics]

34 In our judgment, the Sub-Committee undoubtedly intended the court's role in arbitration proceedings to be a narrow one operating in situations of urgency (for instance, to preserve property pending the outcome of arbitration) or where third parties (over which the arbitral tribunal has no jurisdiction) are involved. This was obviously meant to guard against an abuse of judicial process arising from a party to an arbitration agreement delaying arbitration proceedings by taking out interim applications in court.

35 Subsequently, the Sub-Committee submitted the Draft Bill to L P Thean J, Chairman of the Law Reform Committee, and the Draft Bill was considered at the 16th meeting of the Law Reform Committee held on 23 October 1993. A new cl 12(6) (currently s 12(7) of the IAA) was then added to the Draft Bill "to make clear the High Court's power to grant *curial assistance*" [emphasis added] (see para 4(c) of the "Supplementary Note on Bill" which prefaces the Sub-Committee's Report). This explanation confirms our view that the court's role, when arbitration proceedings are pending or in progress, is merely to give or lend assistance, and not to liberally intervene.

36 A consideration of the object and purpose underlying the IAA (which approach accords with s 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed)) lends further support to our interpretation of ss 12(1) and 12(7) of the IAA.

37 The object and purpose of the IAA was to implement the Model Law in Singapore because the Model Law, *inter alia*, provided an "internationally accepted framework for international commercial arbitrations" and adopting it would "promote Singapore's role as a growing centre for international legal services and international arbitrations" (see *Singapore Parliamentary Debates, Official Report* (31 October 1994) vol 63 at col 627 (Assoc Prof Ho Peng Kee, Parliamentary Secretary to the Minister for Law)).

38 Where curial intervention in international arbitration is concerned, the pertinent provision of the Model Law is Art 9, which states:

> It is *not incompatible* with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure. [emphasis added]

39 The Model Law Commentary ([22] *supra*) explains (at 115) the rationale for retaining the court's jurisdiction over interim measures as follows:

> The main reason is that the *availability* of [interim measures of protection from a court] is not contrary to the intentions of parties agreeing to submit a dispute to arbitration and that the measures themselves are *conducive to making the arbitration efficient* and to *securing its expected results*. [emphasis added]

40 This shows that, consistent with our interpretation of ss 12(1) and 12(7) of the IAA, parties ought not to be allowed to bypass seeking interim measures from an arbitral tribunal merely because curial assistance is conceivably available. Rather, help from the court is to be sought only when arbitration is inappropriate, ineffective or incapable of securing the particular form of relief sought.

41 In summary, under the IAA regime, although the court has concurrent jurisdiction with the arbitral tribunal to order interim measures, the court will nevertheless scrupulously avoid usurping the functions of the arbitral tribunal in exercising such jurisdiction and will only order interim relief where this will aid, promote and support arbitration proceedings. We concur with the view expressed in Leslie K H Chew, *Singapore Arbitration Handbook*(LexisNexis, 2003) at p 105 that:

> [Section 12(7) read with s 12(1) of the IAA] merely provides an alternative for the parties to apply to the High Court if applications for interlocutory relief may not be conveniently made to the tribunal or if it is more expedient to do so in court.

Examples of such situations include those where third parties over whom the arbitral tribunal has no jurisdiction are involved, where matters are very urgent or where the court's coercive powers of enforcement are required (see David St John Sutton & Judith Gill, *Russell on Arbitration* (Sweet & Maxwell Limited, 22nd Ed, 2003) at para 7-138).

Arbitral proceedings under the AA

42 In the following analysis of the court's role in domestic arbitration, we compare the AA with the IAA.

43 The AA and the IAA ought, as far as the statutory language allows, to be read consistently because both statutes, taken together, comprise the entire arbitration regime available in Singapore. The AA, by virtue of s 3 thereof, applies to any arbitration where the place of arbitration is Singapore and where Pt II of the IAA is inapplicable. All arbitration proceedings in Singapore will therefore almost invariably be undertaken pursuant to either the AA or the IAA.

44 Further, a comparative approach is particularly appropriate because ss 12(1) and 12(6) of the 1994 Act (which correspond to ss 12(1) and 12(7) of the IAA) formed the basis of ss 28(2) and 31(1) respectively of the 2001 Act (which are identical to ss 28(2) and 31(1) of the AA): see the table of derivations in the LRRD Report ([24] *supra*) at pp 92–93.

45 The relevant provisions of the AA state as follows:

> **General powers exercisable by arbitral tribunal**
>
> **28.** …
>
> (2) Without prejudice to the powers conferred on the arbitral tribunal by the parties under

subsection (1) [which provides that the parties may agree on the powers to be exercised by the arbitral tribunal], the tribunal shall have powers to make orders or give directions to any party for —

(*a*) security for costs;

(*b*) discovery of documents and interrogatories;

(*c*) giving of evidence by affidavit;

(*d*) a party or witness to be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation;

(*e*) the preservation and interim custody of any evidence for the purposes of the proceedings;

(*f*) samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute; and

(*g*) the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute.

…

Court's powers exercisable in support of arbitration proceedings

31.—(1) The Court shall have the following powers for the purpose of and in relation to an arbitration to which this Act applies:

(*a*) the same power to make orders in respect of any of the matters set out in section 28 as it has for the purpose of and in relation to an action or matter in the Court;

…

(*d*) an interim injunction or any other interim measure.

46 The content and the context of s 31(1)(*d*) of the AA are reflective of the court's wider supervisory role in domestic arbitration, especially when compared with s 12(7) of the IAA. This can be seen from the following factors.

47 First, the powers of the court are located in a self-contained section headed "Court's powers exercisable in support of arbitration proceedings". The separate section heading reflects the larger role of the court in domestic arbitration, but, at the same time, makes clear the abiding legislative adherence to the principle underlying the IAA – namely, that the court's role is to *support* arbitration.

48 This supportive role is embodied in s 31 of the AA itself, which expressly makes the court's powers under that section subject to those of the arbitral tribunal. The relevant subsections of s 31 of the AA provide as follows:

(2) An order of the Court under this section shall cease to have effect in whole or in part if the arbitral tribunal or any such arbitral or other institution or person having power to act in

relation to the subject-matter of the order makes an order to which the order of the Court relates.

(3) The Court, in exercising any power under this section, shall have regard to —

(*a*) any application made before the arbitral tribunal; or

(*b*) any order made by the arbitral tribunal,

in respect of the same issue.

49 Second, an arbitral tribunal formed under the AA lacks the comprehensive power to grant an interim injunction or other interim measures as a general rule. In contrast, such power is expressly conferred on an arbitral tribunal where international arbitration is concerned (see s 12(1)(*i*) of the IAA). This distinction between the regime under the AA and that under the IAA was deliberate because, as explained at the second reading of the Arbitration Bill 2001 (Bill 37 of 2001) (see *Singapore Parliamentary Debates, Official Report* (5 October 2001) ([24] *supra*) at col 2215):

> [T]he Bill adopts the position that some supervision by the Courts over the conduct of arbitration in domestic arbitration is desirable. For example, the power to grant Mareva injunctions and Anton Piller injunctions is vested in the Court, and not in the arbitral tribunal.

50 The rationale underlying this larger role for the court in domestic arbitration is one of policy – namely, "for the development of domestic commercial and legal practice, and for a closer supervision of decisions which may affect weaker domestic parties"(see the Sub-Committee's Report ([31] *supra*)at para 12).

51 For this reason, the court will generally play a relatively more interventionist role in domestic arbitration as compared to international arbitration. Nevertheless, this greater role for the court in the former scenario still remains firmly and unequivocally premised on the same principle that the court must intervene only in the limited circumstances where curial intervention will support arbitration. This is so because unlike the position under the IAA, where the powers of the arbitral tribunal and those of the court exist concurrently by virtue of s 12(7) read with s 12(1), a court dealing with matters under the AA is endowed with powers that exceed those of the arbitral tribunal.

52 However, where the arbitral tribunal does have concurrent jurisdiction with the court to grant interim relief in domestic arbitration, liberal curial intervention may no longer be appropriate. Such concurrent jurisdiction may arise in two situations. First, pursuant to s 28(1) of the AA, the parties may agree to confer on the arbitral tribunal jurisdiction to make certain interim orders. Second, notwithstanding that domestic arbitration does not fall within the ambit of "international" arbitration as defined under the IAA, the parties can expressly opt to have the IAA apply by either agreeing in writing to this effect or adopting institutional rules which expressly stipulate that the IAA shall apply (see *Halsbury's* ([20] *supra*) at para 20.013). One instance of such an institutional rule is r 32 of the SIAC Rules (3rd Ed, 2007), which provides that where the seat of arbitration is Singapore, the law of arbitration conducted under the auspices of the Singapore International Arbitration Centre shall be the IAA.

53 We conclude this section by emphasising that regardless of whether the court's jurisdiction is exercised under the AA or the IAA, the same general principle of limited and cautious curial assistance applies. The court will intervene only sparingly and in very narrow circumstances, such as where the arbitral tribunal cannot be constituted expediently enough, where the court's coercive enforcement

powers are required or where the arbitral tribunal has no jurisdiction to grant the relief sought in the matter at hand.

English authorities

54 Our view of the court's role in arbitration proceedings, as summarised at [53] above, is consistent with the English authorities, which make clear that the court will be even more reluctant to intervene to grant interim orders before arbitration is commenced. In our judgment, s 12(7) of the IAA and s 31(1) of the AA are in substance similar to s 12(6) of the Arbitration Act 1950 (c 27) (UK) ("the 1950 UK Act"). Section 12(6) of the 1950 UK Act is therefore relevant in interpreting the IAA and the AA. That subsection provides:

> The High Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of —
>
> …
>
> (*h*) interim injunctions or the appointment of a receiver;
>
> as it has for the purpose of and in relation to an action or matter in the High Court:
>
> Provided that nothing in this subsection shall be taken to prejudice any power which may be vested in an arbitrator or umpire of making orders with respect to any of the matters aforesaid.

55 According to a leading English arbitration textbook, Sir Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) at p 296, the position under s 12(6) of the 1950 UK Act is as follows:

> Under section 12(6) of the Act, the High Court has power to make certain procedural orders in a reference, by way of *reinforcement of the arbitrator's own powers.* …
>
> In certain respects, namely the ordering of discovery and interrogatories, the powers of the Court duplicate those of the arbitrator. When a party wishes to avail himself of these over-lapping powers, he should *first have recourse to the arbitrator*, and should not invoke the Court's power *unless the arbitrator's order proves ineffectual*.
>
> [emphasis added]

56 In the House of Lords decision of *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 ("*Channel Tunnel Group*"), Lord Mustill expressed a similar view. In that case, the plaintiffs issued a writ seeking an injunction from the court to compel the defendants to continue the work of building a tunnel under the English Channel after a dispute arose between them. The defendants sought to stay the plaintiffs' action because the contract between the parties provided for final settlement of disputes by arbitration in Brussels. The House of Lords ruled in favour of the defendants and granted a stay of the action.

57 In his judgment, Lord Mustill stated at 365 that:

> The purpose of interim measures of protection … is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute.

He continued at 367–368:

> There is always a tension when the court is asked to order, by way of interim relief in support of an arbitration, a remedy of the same kind as will ultimately be sought from the arbitrators: between, on the one hand, the need for the court to make a tentative assessment of the merits in order to decide whether the plaintiff's claim is strong enough to merit protection, and on the other the duty of the court to respect the choice of tribunal which both parties have made, and not to take out of the hands of the arbitrators (or other decision-makers) a power of decision which the parties have entrusted to them alone. In the present instance I consider that the latter consideration must prevail. The court has stayed the action so that … the arbitrators can decide whether to order a final mandatory injunction. If the court now itself orders an interlocutory mandatory injunction, there will be very little left for the arbitrators to decide.

58 The English authorities on the 1950 UK Act are therefore unequivocal in asserting that in striking a balance between intervening in arbitration to grant interim relief and holding the parties to their arbitration agreement, the latter consideration would more often than not prevail, particularly in situations where the court's decision would largely pre-empt that of the arbitrator.

59 Although the 1950 UK Act is no longer law in England, having been substituted with the 1996 UK Act, the principle of limited curial intervention in respect of interim measures has been preserved. This is not altogether surprising because it is the only stance which is consistent with the existence of arbitration as an alternative method of dispute resolution. The learned author of *Arbitration Law* (Informa, Looseleaf Ed, 1991, Service Issue No 46, 22 May 2007), Prof Robert Merkin, succinctly describes the current English position at para 14.50 as follows:

> The High Court apparently had [under the 1950 UK Act] the discretion to refuse to exercise its powers on the basis that there had not been an initial application to the arbitrators. The position has been maintained, and clarified, by the [1996 UK Act], s 44. The relationship between the arbitrators and the court is now as follows.
>
> > (a) The overriding rule is that the court shall act only if or to the extent that the arbitral tribunal has no power or is unable for the time being to act effectively. …
> >
> > (b) Where an application is made to the court, it may normally act only if permission has been given by the arbitrators or the agreement of the other parties to the arbitration has been obtained. … However, exceptionally, the court may on the application of a party make an order preserving the subject matter of the dispute in the case of urgency without the permission of the tribunal or the consent of the other parties.

60 Hence, the English position on interim measures, even after the enactment of the 1996 UK Act, is largely similar to that under the 1950 UK Act. This has been demonstrated by recent case law. One example is *Cetelem SA v Roust Holdings Ltd* [2005] 1 WLR 3555, which concerned an application for an interim mandatory injunction pending arbitration pursuant to s 44 of the 1996 UK Act. There, the English Court of Appeal stated at [63] that:

> Those powers [under s 44 of the 1996 UK Act] include a power to grant interim mandatory injunctions, although the authorities make it clear that the court should exercise such a power *very sparingly*. That would be *particularly so in the context of proposed arbitral proceedings …* [emphasis added]

The court elaborated (at [71]) that:

> The whole purpose of giving the court power to make such orders is to assist the arbitral process in cases of urgency before there is an arbitration on foot. Otherwise it is all too easy for a party who is bent on a policy of non-cooperation to frustrate the arbitral process. Of course, in any case where the court is called upon to exercise the power [under s 44 of the 1996 UK Act], it must take great care not to usurp the arbitral process and to ensure, by exacting appropriate undertakings from the claimant, that the substantive questions are reserved for the arbitrator or arbitrators.

61 It can therefore be said that the English authorities fortify our view that the courts should generally decline to exercise their jurisdiction to grant interim injunctions pending arbitration where an arbitral tribunal has concurrent jurisdiction to make such orders *and* there are no special circumstances to justify the application being made to the court instead of to the tribunal.

Other Commonwealth authorities

62 Commonwealth authorities are also consistent with our interpretation of the court's role in pending and ongoing arbitration proceedings. Below, we briefly discuss the position in New Zealand and in Hong Kong – jurisdictions which, like Singapore, have based their arbitration laws on the Model Law and have had the opportunity to pronounce on the issue of when the court ought to exercise its jurisdiction to provide interim relief to parties to an arbitration agreement.

63 In New Zealand, Art 9(1) of the First Schedule to the Arbitration Act 1996 (NZ) ("the NZ First Schedule") is identical to Art 9 of the Model Law. The court's specific power to order interim measures before or during arbitral proceedings is set out in Art 9(2) of the NZ First Schedule, which is similar to s 12(7) of the IAA and s 31(1)(*a*) of the AA. These interim measures, as defined in Art 17 of the NZ First Schedule, include interim injunctions.

64 In *Pathak v Tourism Transport Ltd* [2002] 3 NZLR 681, the New Zealand High Court observed in *obiter dictum* at [40] that Art 9(1) of the NZ First Schedule in effect requested the court "to act in aid of and to assist the arbitral process by ordering interim measures of protection which an arbitral tribunal, cannot, for practical or legal reasons, order". The issue before the court in that case was whether or not the plaintiff, who had earlier applied to the court for an interim injunction, was subsequently entitled to invoke Art 8 of the NZ First Schedule to seek a stay of court proceedings based on the arbitration clause in its contract with the defendant. The court took the opportunity to also consider its jurisdiction under Art 9 of the NZ First Schedule to grant interim relief in aid of an arbitration agreement. In this regard, the court adopted the view of Wild J in *Marnell Corrao Associates Inc v Sensation Yachts Ltd* (2000) 15 PRNZ 608 at [74] that Art 9 of the NZ First Schedule was "limited to 'interim measures of protection' which the arbitral tribunal … cannot order in time to give necessary protection". These judicial pronouncements comport with our view of current practice where curial intervention in international arbitration is concerned.

65 In Hong Kong, s 2GC(1) of the Arbitration Ordinance (Cap 341) ("the Ordinance") is akin to s 12(7) (read with s 12(1)) of the IAA and s 31(1) of the AA. Specifically, s 2GC(1)(c) of the Ordinance empowers the court to "grant an interim injunction or direct any other interim measure to be taken". Section 2GC(5) of the Ordinance provides that this power can be exercised irrespective of whether or not a similar power may be exercised by the arbitral tribunal under s 2GB(1), which sets out the general powers exercisable by an arbitral tribunal, including (at s 2GB(1)(f)) the power to grant interim injunctions. However, s 2GC(6) of the Ordinance states that the court may decline to exercise this power if the matter is already the subject of arbitration proceedings *and* the court considers it more appropriate for the matter to be dealt with by the relevant arbitral tribunal.

66 These provisions show that the drafters of the Ordinance were keenly aware of the question of when the court *should* intervene to grant an interim injunction in aid of arbitration proceedings even though it clearly has the power to do so. In *Arbitration in Hong Kong: A Practical Guide* (Neil Kaplan gen ed) (Sweet & Maxwell Asia, 2003) vol 1 at para 13-156, it is noted that:

> This concurrent power of the court is not inconsistent with the philosophy of [the Ordinance] and the Model Law … so long as the court's power is used as a *fallback position* only. Accordingly, *it is appropriate for parties seeking an order which the tribunal has the power to give, to approach the tribunal before the court*. [emphasis added]

67 This principle of first seeking recourse from the arbitral tribunal where it has concurrent jurisdiction with the court was applied by the Hong Kong Court of First Instance in *Leviathan Shipping Co Ltd v Sky Sailing Overseas Co Ltd* [1998] 4 HKC 347 ("*Leviathan Shipping*"). The plaintiff in that case chartered a vessel to the defendant pursuant to a charterparty which provided, *inter alia*, that any dispute arising thereunder should be referred to arbitration in Hong Kong. The vessel was subsequently arrested at the instance of third parties who had claims against the defendant. The plaintiff obtained an *ex parte* order requiring the defendant to provide security for the release of the vessel as well as a Mareva injunction. The defendant then sought to set aside these two *ex parte* orders on the basis of, *inter alia*, the arbitration clause in the charterparty.

68 Findlay J stated in *Leviathan Shipping* at 355, in respect of ss 2GC(5) and 2GC(6) of the Ordinance, that:

> The legislature has provided for the intervention of the courts, but, in my view, this jurisdiction should be exercised sparingly, and only where there are special reasons to utilise it. A special reason would be where the arbitral tribunal does not have the power to grant all the relief sought in a single application.

On the facts of that case, the learned judge set aside both *ex parte* orders, holding that since the arbitral tribunal had the power to grant all the relief claimed, there was no valid reason for the issue of interim relief to be decided by the court as opposed to the tribunal.

69 As can be seen from the foregoing analysis, the New Zealand and the Hong Kong authorities speak with one voice on the issue of when the court ought to intervene to grant interim relief to support arbitration – namely, only sparingly and in limited circumstances when to do so would aid and support a pending or an ongoing arbitration.

Abuse of process

70 Given the legal principles established above, in view of the facts of the present appeal, the appellant's conduct amounted to an abuse of the process of the court because the appellant, despite having no genuine intention to commence arbitration, sought the Interim Injunction from the court on the ostensible basis that it intended to commence arbitral proceedings against the respondent (see, in this regard, [12] above). In effect, the appellant was using the curial process to resolve its dispute with the respondent contrary to the arbitration provision in the Concrete Contract.

71 In *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR 582 ("*Chee Siok Chin*"), the High Court set out (at [34]) four categories of proceedings that would amount to an abuse of process, as follows:

(a) proceedings which involve a deception on the court, or are fictitious or constitute a

mere sham;

(b) proceedings where the *process of the court is not being fairly or honestly used but is employed instead for some ulterior or improper purpose or in an improper way*;

(c) proceedings which are *manifestly groundless or without foundation* or which serve no useful purpose;

(d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.

[emphasis in original]

72 Although *Chee Siok Chin* concerned an application to strike out proceedings, the court's pronouncement on what constitutes an abuse of process is equally pertinent in this appeal. It is also important to note that the four categories set out in that case are not closed; new categories may be created, depending on the circumstances of the case (see *Gabriel Peter & Partners v Wee Chong Jin* [1998] 1 SLR 374 at [22], which was endorsed in *Chee Siok Chin* at [38]).

73 In the present appeal, the proceedings fell within the second category stated in *Chee Siok Chin* (see the list in [71] above). The appellant used the court's process in an improper way as interim relief should rightly have been sought from an arbitral tribunal, as provided for under cl 80 of the Concrete Contract read with cl 71 of the Main Contract (see *Leviathan Shipping* ([67] *supra*)). Yet, instead of either submitting its dispute with the respondent to the Engineer or having recourse to mediation or arbitration, the appellant's first reaction was to apply to court for *ex parte* interlocutory relief in the form of the Interim Injunction.

74 Further, there was more than a hint that the appellant was using the court's process for a collateral purpose because it took absolutely no steps to commence arbitration even after the lapse of more than seven months from the time the dispute arose (see [12] above). In addition, like the plaintiffs in *Channel Tunnel Group* ([56] *supra*), the appellant sought from the court an interlocutory mandatory injunction, which meant that if the application for the Interim Injunction were granted, the court would effectively be ordering specific performance of the Concrete Contract. As this particular issue of whether specific performance of that contract should be ordered fell squarely within the province of the arbitral tribunal, the appellant was in essence requesting the court to nakedly usurp the functions of the arbitral tribunal rather than to assist in or support the intended arbitration.

The exceptional nature of an interim mandatory injunction

75 In any event, an interim mandatory injunction is a very exceptional discretionary remedy. There is a much higher threshold to be met in order to persuade the court to grant such an injunction as compared to an ordinary prohibitive injunction. Case law has established that the courts will only grant an interim mandatory injunction in clear cases where special circumstances exist (see *Chin Bay Ching v Merchant Ventures Pte Ltd* [2005] 3 SLR 142 at [37] and *Locabail International Finance Ltd v Agroexport* [1986] 1 WLR 657 at 663–664).

76 In the present appeal, there was no reason to grant the Interim Injunction because there was simply no urgency or pressing need which warranted the ordering of such an interlocutory measure. By the time the appeal came before this court, a lengthy period of time had already elapsed since the dispute first arose. In our view, it could plainly be inferred from the appellant's inaction *vis-à-vis* commencing arbitration that the appellant would not suffer inordinate prejudice by waiting for

the arbitral tribunal to make a determination. The court was further entitled to take judicial notice of the fact that, by the time this appeal was heard, the construction industry had adjusted to the new market realities. Concrete prices had fallen from a high of about $200 per cubic metre to below $175 per cubic metre, and there were already ten suppliers of ready-mixed concrete in the market (see *Singapore Parliamentary Debates, Official Report* (21 May 2007) vol 83 at col 702 (Mah Bow Tan, Minister for National Development)). The dire situation so colourfully narrated by the appellant no longer existed.

77 On the merits of the case, therefore, there were no exceptional circumstances which provided a basis for this court to grant the appellant the Interim Injunction.

Conclusion

78 For the foregoing reasons, we dismissed the appeal and awarded costs fixed at $10,000 to the respondent. We also made the usual consequential orders.