Securing Natural Justice in Arbitration Proceedings

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Abstract

The legitimacy and integrity of any system that adjudicates the rights and duties of persons would be evaluated by reference to the standards required by the principles of natural justice. Arbitration is becoming more popular as a system of dispute resolution because of the exponential increase of cross-border transactions that are a feature of globalization. Now arbitrations take place in countries that lack a well-developed arbitration culture. Courts in some of these countries have yet to develop a coherent body of law that clarifies and gives effect to the principles of natural justice. Moreover, important values protected by natural justice principles can be compromised because of factors peculiar to arbitration. Judicial attitudes to arbitration and the fact that high value arbitrations are being conducted in places like Mongolia that are not traditional arbitration hubs make it highly desirable that a uniform and consistent interpretation of the principles of natural justice be developed by the courts. This would bring welcome clarity to an area of the law that is important but unclear because of judicial policy.

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I. Introduction

The principles of natural justice,[1] enshrined in the legal culture of all mature legal systems, may be said to be the *grundnorms*[2] of any system of adjudication forming part of a legal system based on the rule of law.[3] These legal systems recognize that decisions that affect the rights and duties of persons, whether by administrative tribunals obliged to act quasi-judicially or by judges, lack moral force if the principles of natural justice are breached.[4] Detailed sets of rules giving effect to the principles of natural justice were first developed in the context of judicial review of administrative actions.[5] Thereafter, judicial

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1 '*Nemo iudex in sua causa*' ('no one shall be a judge in his own cause') and '*audi alteram partem*' ('hear the other side'). In *Yong Vui Kong v AG* [2011] 2 SLR 1189, 1237, Chan CJ referred to the former rule as 'the rule against bias' and the latter as 'the hearing rule'. For the sake of convenience, the terminology of the learned Chief Justice will be adopted in this article.

2 Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press, 1967).

3 'In a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to "law" in such contexts as in "in accordance with law", "equality before the law", "protection of the law" and the like, in their Lordship's view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England … ' per Lord Diplock in *Ong Ah Chuan v PP* [1981] AC 648, 671. In *Yong Vui Kong v AG* [2011] 2 SLR 1189, 1243 Chan CJ observed that the rules of natural justice referred to by Lord Diplock and the administrative law rules of natural justice are not different rules because they are the same in nature and function, but that they operate at different levels of the legal order.

4 Arguably, the principles are enshrined in the bills of rights found in most constitutions. For example, Art 6(1) of the European Convention on Human Rights (ECHR) provides that: 'In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing with a reasonable time by an independent and impartial tribunal established by law …': see European Convention on Human Rights as amended by Protocols Nos 11 and 14; available at: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf. Arbitrations that are international in character can satisfy the requirements of Art 6(1) of the ECHR because the primary instrument that affects international arbitration, the Convention (note 9 below), itself mandates, albeit indirectly in Art V(1), observance of these principles. Although it is theoretically an option for an enforcing court to disregard violation of these principles by enforcing an award that violates principles of natural justice because of the use of the word 'may' in Art V of the Convention, most commentators agree that this would be an abuse of the discretion granted in Art V of the Convention.

5 Most law students from the Commonwealth and Hong Kong would be familiar with the classic text, the most recent edition of which is by Lord Woolf, Jeffrey Jowell and Andrew Le Sueur, *De Smith's Judicial Review* (6th ed, Sweet & Maxwell, 2007).

clarification of what is required in order to comply with the principles of natural justice has occurred in various contexts that required flexibility in the application of such rules.

Because arbitration has become a popular alternative to litigation, the observance of the principles of natural justice in arbitration proceedings is an indispensable requirement in order to preserve its legitimacy. First, the scrutiny by courts to ensure observance of the principles of natural justice by arbitral tribunals is necessary especially because arbitrations increase in jurisdictions that are relatively new to the culture of arbitration. Paris, London, New York, and Singapore continue to be respected and popular arbitration venues, but high value arbitrations are also conducted in places like Ulaanbaatar in the Mongolian language and subject to the arbitration law of Mongolia, the application of which is overseen by the Khan-Uul District Court of Mongolia.[6] The latter group of venues does not yet have as developed an arbitration culture as the former group of countries, and unfamiliar language issues may also give rise to concerns in a common law court about the level of observance by foreign arbitral tribunals of the principles of natural justice. Second, persons such as small businessmen, franchisees and employees are frequently given no choice about the type of dispute settlement they would choose and in order to get the deal, have to sign standard form contracts that mandate arbitration in a foreign land, a foreign governing law, and a foreign *lex arbitri*.[7] A familiar charge is that arbitrators tend to issue awards against the 'small fry' in order to be reappointed as arbitrators in future arbitrations by the 'big fry'.[8] Third, as a system of adjudication, arbitration can be regarded as more potent than litigation in courts because, unlike court judgments, arbitration awards can be set aside or refused enforcement only on very limited grounds, and also, unlike court judgments which depend on their enforcement on recognition of foreign judgment statutes, arbitration awards are portable and can be enforced in the more than 150 countries that are parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'Convention').[9] Reaffirming

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6 *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248 ('*Altain Khuder*').

7 *Aloe Vera of America Inc v Asianic Food (S) Pte Ltd* [2006] SGHC 78.

8 Ruth V Glick, 'California Arbitration Reform: The Aftermath' (2003) 38 *USFL Rev* 119, dealing with state legislation enacted after reports of alleged partiality by repeat player arbitrators hoping to be selected again in California. Although these allegations concerned domestic arbitration, there is no reason to believe that international commercial arbitrators are more immune to the temptations faced by their domestic counterparts.

9 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted in New York, the United States on 10 June 1958 and entered into force on 7 June 1959. For a list of parties, see: http://www.newyorkconvention.org/new-york-convention-countries/contracting-states.

the observance of the principles of natural justice as an indispensable requirement for the legitimacy of the arbitration award, the Convention, the UNCITRAL Model Law on International Commercial Arbitration ('Model Law'),[10] national arbitration laws,[11] and the rules of arbitration institutions[12] all require arbitrators to meet the standards required by these principles. Awards may be set aside or enforcement may be denied if a breach of the principles of natural justice is found.

Despite the widespread acknowledgment that observance of the principles of natural justice in arbitration proceedings is a fundamental condition that must be met in judicial and quasi-judicial proceedings, the informal nature of arbitration proceedings and judicial acknowledgement of the need for such informality can, in practice, result in a dilution of the principles of natural justice. The result might be 'natural justice – lite', such that a decision by an administrative board that would be quashed on the grounds of a breach of natural justice could be recognized and enforced in similar circumstances when made by an arbitral tribunal. In *Sermalt Holdings SA v Nu-Life Upholstery Repairs Ltd*,[13] Bingham J observed that a court will be unwilling to subject an arbitrator's decision making process to a strict review even where such review would have been mandated if the decision had been taken not by an arbitrator but by a trial judge. As Bingham J explained, this is because the arbitrator is usually an expert and there is no expectation that he would behave as if he were a high court judge. The parties expect him to use skill and diligence in finding out the facts as quickly and cheaply as possible. But, errors of fact may be made despite the arbitrator's expertise. These errors do not cause a 'serious irregularity'[14] but are simply an ordinary incident of the arbitral process based on an arbitrator's powers to make findings of fact relevant to the issues. Sometimes, even an extraneous factor such as the qualifications and experience of the arbitrator alleged to have breached the principles could be considered in a proceeding to set aside the award. So not only is '(t)he threshold which an applicant (alleging a

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[10] UNCITRAL Model Law on International Commercial Arbitration; available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

[11] For example, s 24 of the International Arbitration Act of Singapore (Cap 143A), and s 33 of the UK Arbitration Act 1996 requires that the tribunal 'act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent'.

[12] Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence …': Rule 11.1 of the Singapore International Arbitration Centre.

[13] [1985] EGLR 14, 15.

[14] The standard set forth by the UK Arbitration Act of 1996.

breach of natural justice) has to surmount is high. *It is particularly so* … (because) *of the undoubted calibre and experience of the Arbitrator'* (emphasis added).[15] A trial judge, or for that matter a law lord of undoubted eminence and integrity as Lord Hoffman,[16] however well-respected, against whom allegations of breaches of natural justice were made would not normally be accorded a level of similar deference by a reviewing court.

Several factors promote this indulgent approach by the courts. First, as courts never tire of pointing out, the parties by choosing arbitration trade the formality and the punctiliousness of a court proceeding in return for something quick and informal with the inevitable result that some corners would be cut.[17] Invocation of Lord Hewart CJ's famous maxim[18] in the context of arbitration would seem overwrought precisely because arbitration is a private and informal proceeding where public confidence in the administration of the law is not the central concern of the reviewing court. In deciding how far those corners could be cut without violating the principles of natural justice, courts are influenced by factors that would be deemed irrelevant if the decision maker were the head of an administrative tribunal. Second, the courts of the commercial centres of the world do not want to be seen as hostile to arbitration by engaging in intrusive scrutiny of arbitration proceedings. Instead, these commercial centres compete among themselves for the lucrative 'arbitration business' and strive to make their venues attractive as seats of arbitration. For example, in March 2012, the Singapore Ministry of Law, in order to boost Singapore's reputation as a

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15 *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 per Andrew Ang J. In *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs Government of Pakistan* [2010] UKSC 46, [2010] 2 Lloyd's Rep 691, [2010] 3 WLR 1472, although the UK Supreme Court was invited to take into consideration the high calibre of the arbitrators, it declined to give this factor any weight.

16 *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119.

17 *The Pamphilos* [2002] 2 Lloyd's Rep 681.

18 *R v Sussex Justices; ex parte McCarthy* [1924] 1 KB 256, 259 ('Sussex Justices') Lord Hewart CJ ringing call that it is 'of fundamental importance that justice should not only be done, *but should manifestly and undoubtedly be seen to be done*' (emphasis added) can be contrasted with a more down to earth re-statement by Marks J in *Gas & Fuel Corporation of Victoria v Wood Hall Ltd & Leonard Pipeline Contactors Ltd* [1978] VR 385, 396 who observed that: 'One amplification of the first rule is that justice must not only be done but appear to be done' quoted by Andrew Ang J in *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 at [30]. 'The highest requirement that justice should manifestly be seen to be done may require that a judicial decision be overturned because of the manner in which it was reached, without it being demonstrated that the result produced injustice. But that is not the system applied to arbitrations by the [UK Arbitration Act]', per Bowsher J in *Groundshire v VHE Construction* [2001] 1 BLR 395 at [40].

global arbitration hub, introduced amendments to the International Arbitration Act.[19] One would be hard pressed to cite court reforms expressly designed to make the courts an attractive venue for litigation. Being a global arbitration hub is an important qualification for any country or city that wants to be a commercial centre. The term 'global arbitration hub' connotes a thriving, or at least an independent, arbitration culture that is supported by the courts. Court interference with arbitrations is discouraged in such cultures and courts in Model Law jurisdictions are enjoined to refrain from intervening in arbitral proceedings unless expressly authorized to do so by the Model Law provisions.[20] Frequent setting aside of awards based on a breach of the principles of natural justice could negatively affect the market's perception of the seat of arbitration as a desirable venue to conduct the arbitration. Third, in practice, the award-debtor not infrequently tries to set aside or resist enforcement of an award on the ground that the principles of natural justice were breached. Not surprisingly, this claim becomes quickly jaded and the courts keep out these frivolous claims by requiring satisfaction of a detailed criteria to hold that the award should be set aside because of the breach of these principles. But sometimes the application of the standard could be too strict and therefore inappropriate because of the high threshold that the complaining party has to surmount.[21] Finally, international commercial arbitration is popular as a means of settling disputes because the Convention requires state parties to enforce foreign arbitral awards where the Convention's conditions for enforcement are satisfied. Courts wanting to achieve the objectives of minimal court interference and ease of enforcement mandated by the Convention are concerned that such objectives could be undermined if awards are set aside or not recognized on grounds that do not disclose an egregious breach of the natural justice principles. Because of the foregoing factors, a purist's insistence on adherence to the principles of natural justice in their strictest form may not be practicable or desirable. The danger, however, is that a reviewing court can go too far in the other direction and, influenced by the talismanic invocation of pro-arbitration policy, allows serious breaches of natural justice principles to go uncorrected.

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[19] The International Arbitration (Amendment) Bill, introduced in Parliament on 8 March 2012, Republic of Singapore, Government Gazette (Bills Supplement) No 10. The principal amendments expand the definition of 'writing' as required in a valid arbitration agreement and would also allow a court to review for correctness a decision by an arbitral tribunal that it lacks jurisdiction.

[20] Model Law, Art 5. The non-intervention principle enshrined in s 1(c) of the UK Arbitration Act guides a court in the approach to an interpretation of s 33 of the Act. See *Lesotho Highlands v Impreglio SpA* [2005] UKHL 43.

[21] *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 per Andrew Ang J.

II. Fairness and Natural Justice

The common law draws a distinction between situations where there is an obligation to act fairly and other situations where there is not only the obligation to act fairly but also, when so acting, observe the principles of natural justice. Some judges have been impatient with what they perceive as an unhelpful technical distinction. For instance, Mason J (as he then was) observed: 'What is appropriate in terms of natural justice depends on the circumstances of the case, and they will include, *inter alia*, the nature of the inquiry, the subject matter and the rules under which the decision-maker is acting … The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the case?'[22] With respect, it is submitted that for practical and legal reasons, it is incorrect to conflate these two concepts. Observing the distinction leads to commercial efficacy and respects legislative intent. Statutes, like arbitration statutes, command observance to principles of natural justice which is obviously a term of art when used by a parliament enacting legislation in the backdrop of common law. For example, s 8(7A) of the Australian International Arbitration Act[23] explicitly states that it is against the public policy of Australia to enforce an award where 'a breach of the rules of natural justice occurred in connection with the making of the award'. Taken literally, s 8(7A) of the Australian International Arbitration Act can be read to mean that any breach, regardless of the prejudice suffered by the award-debtor, is a ground for refusing enforcement of a foreign award. Clearly, simple unfairness that does not also amount to a breach of natural justice principles will not be sufficient to trigger the operation of this provision. One will have to examine specific natural justice principles enunciated by the courts to give effect to s 8(7A) of the Australian law. It must therefore be concluded that whereas the duty to act fairly may not require observance of the principles of natural justice in all cases, the obligation to observe the principles of natural justice invariably requires that the decision process be fair.[24] The danger of conflating these two concepts is that a court may conclude that an arbitrator acted fairly and thus deny a set aside claim or permit enforcement against an award debtor who complains about a breach of these principles when in fact a more detailed inquiry into the factual matrix to ascertain whether one of the technical sub-rules of the principles of natural justice should have been undertaken.

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22 *Kioa v West* (1985) 159 CLR 550, 584-85.

23 International Arbitration Act 1974 (Cth).

24 See *Furnell v Whangarei High Schools Board* [1973] AC 660, 679 per Lord Morris of Borth-y-Gest: 'Natural justice is but fairness writ large and juridically. It has been described as 'fair play in action.'

The arbitrator, unlike a consulting engineer in a construction contract or a valuer, is not an employee.[25] The arbitrator, while owing her appointment to the parties, is also independent of the parties. It is a default term of the arbitrator's terms of engagement that her functions and duties require her to rise above the partisan interests of the parties. Unlike a consulting engineer or a valuation expert, an arbitrator is not in a position of subordination to the parties. She is in effect a 'quasi-judicial adjudicator'.[26] The sensitivity to fair play is so acute in the common law that it even requires observance of natural justice principles even of those performing functions of a quasi-arbitrator. However, the demands of business and the practices of some service industries, such as construction, are such that one person can wear two hats, and when an employee who is a professional wears the non-employee hat, all that is required of that person is that he acts independently and honestly.[27] This distinction is best illustrated by construction law cases.

In *Hounslow London Borough Council v Twickenham Garden Developments Ltd*,[28] Megarry J held that a certifying architect was only obliged to retain his independence and that unless the contract provided otherwise, he need not observe the rules of natural justice. In the first instance decision in the New Zealand Supreme Court in *A C Hatrick (NZ) Ltd v Nelson Carlton Construction Co Ltd*,[29] Richmond J stated that an architect or engineer acting as a certifier must exercise honest and independent judgment, and went on to reject implications of 'fairness' because the term connoted obedience to natural justice. However, the New Zealand Court of Appeal in *Canterbury Pipe Lines Ltd v Christchurch Drainage Board*[30] did not think that the concept of fairness necessarily connoted a duty to follow the principles of natural justice. According to Cooke J, 'Duties expressed in terms of fairness are being recognised in other fields of law also, such as immigration. Fairness is a broad and even elastic concept, but it is not altogether the worse for that. In relation to persons bound to act, judicially fairness requires compliance with the rules of natural justice. In other cases this is not necessarily so.'[31]

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25 *Hashwani v Jivraj* [2010] EWCA (Civ) 712.
26 *K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd* [1992] QB 863, 885.
27 See generally, DJ Mullan, 'Fairness: The New Natural Justice?' (1975) 25 *University of Toronto LJ* 281.
28 [1971] Ch 233.
29 [1964] NZLR 72.
30 [1979] 2 NZLR 347, 357.
31 *Ibid*, 357.

It is a highly permeable membrane that separates situations where there is a duty to act with fairness that also requires observance of the principles of natural justice from other situations where a duty to simply act with fairness is all that is necessary. Because arbitrations are supposed to be informal and quick, there is a temptation to regard an arbitrator who has merely acted fairly as one who thereby observed the principles of natural justice. This temptation is not always resisted.

The special features of arbitration, such as the experience of the arbitrator, the informal nature of the proceedings and the need for a speedy resolution of the disputes, are sometimes invoked to justify recognizing awards despite the arbitrator violating some of the principles of natural justice. This result is ironical because this approach serves to lower the bar of procedural fairness in arbitration and in turn reduces the integrity of the process. As arbitrations are conducted in many countries that lack the professional culture that places the emphasis on observing the principles of natural justice found in common law cultures, arbitrators might not be so vigilant about observing these principles. If courts entrusted with setting aside or enforcing arbitral awards are less tolerant of a breach of these principles, consequences that improve the quality of arbitration and make arbitral awards more acceptable would follow. First, arbitrators would not want to get a reputation for breaching principles of natural justice and suffer the ensuing reputational damage. Second, market forces would operate to discipline errant arbitrators because parties and their advisors would shun arbitrators whose awards have been set aside on grounds that natural justice principles were not observed. Third, the effect of strict insistence on observance would incentivize counsel appearing before arbitral tribunals as well as the arbitrators themselves to be mindful of the principles. The result would be that it would be in the interests of all parties involved in the arbitration, though for different reasons, to support the observance of the principles in arbitration proceeding.

III. Non-Signatories and the Principles of Natural Justice

When a party to an arbitration agreement declines to appear before an arbitral tribunal established pursuant to that agreement, the tribunal could proceed nonetheless and issue an award against that party. No court would entertain a plea by the award-debtor that the award should not be enforced because the hearing rule was breached. The situation is different when a third party who is not named as a party to the arbitration agreement, a non-signatory, is asked to appear as a defendant in an arbitration. If this third party denies being a party to the arbitration agreement, then the arbitral tribunal has *prima facie* no jurisdiction over him. If the tribunal fails to notify the non-signatory that he is alleged to be a party and does not invite him to contest that claim, there

is a clear breach of the hearing rule.[32] However, if the non-signatory defendant is summoned but still refuses to appear before this tribunal which then makes an award against him, the hearing rule is *prima facie* violated and the value of the award as being compliant with the principles of natural justice becomes questionable. The argument that the non-signatory had the opportunity to appear but willfully declined to do so and thus must bear the consequences of its choice is unpersuasive. Unlike a signatory who refuses to attend, the non-signatory could well take up the position that it should not be asked to bear the expense and inconvenience of litigating in an expensive foreign capital to contest the jurisdiction of the tribunal. That is perhaps one reason why it has been held that the non-signatory has no obligation to first try to set aside the award before the court of the seat of the arbitration before resisting enforcement of the award in a foreign country.[33] If the arbitral institution appoints an arbitrator to complete the composition of the tribunal because the non-signatory refuses to participate and the tribunal so constituted issues an award adverse to the non-signatory, important principles are put into play.

First, however diligently the arbitral tribunal considers the arguments that could have been made on behalf of the non-signatory that it is not a party to the arbitration agreement, this is no substitute for hearing the arguments made by the non-signatory. The command is clear, '*audi alteram partem*' which command is not satisfied when the tribunal considers arguments *sua sponte*.[34] As will be seen later, an important rule in arbitration proceedings is that counsel for the parties be allowed to argue points of law before the tribunal, and a tribunal should not decide legal questions about which there has not been submissions from counsel. Moreover, lawyers accustomed to the adversarial system would be sceptical of the value of such an exercise where robust legal arguments for both parties are missing. Second, the established jurisprudence in much of the common law world is that the burden of proof is on the non-signatory award debtor to show that it was not a party to the arbitration agreement in any action to set aside the award or resist its enforcement.[35] The UK Supreme Court in *Dallah*

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[32] See *Altain Khuder* (note 6 above) pp 293-96.

[33] The view that the non-signatory should attempt to set aside an award in the court of the seat of the arbitration that found favour in *Aloe Vera of America Inc v Asianic Food (S) Pte Ltd* [2006] SGHC 78 was rejected by the UK Supreme Court in *Dallah* (note 15 above).

[34] It cannot be argued that the second principle is being violated when the tribunal rules on its own jurisdiction as this happens all the time in arbitrations and in court proceedings.

[35] See *Dallah* (note 15 above). This conventional reading of Art V of the Convention, as implemented by arbitration statutes, was decisively rejected by the Victorian Supreme Court in *Altain Khuder* (note 6 above).

made it abundantly clear that, when an enforcing court tries to determine whether the non-signatory was a party to the arbitration agreement it will not be bound by the holding of the tribunal that the non-signatory was a party to the agreement. The court also made it equally clear that a foreign enforcing court must be satisfied that the foreign law used by the arbitral tribunal to support the assertion of jurisdiction over the non-signatory must be fair. Referring to a principle of French law that the tribunal invoked to authorize jurisdiction over the Government of Pakistan, the non signatory, Lord Mance SCJ observed that '[i]t is difficult to conceive that any more relaxed test would be consistent with justice and reasonable commercial expectations, however international the arbitration or transnational the principles applied'.[36] This is an authoritative statement by the UK Supreme Court that the satisfaction of justice referred to by Lord Mance SCJ is an *in limine* issue. It is only after the enforcing court is satisfied that the principle of foreign law that authorizes jurisdiction is fair that it will inquire whether the tribunal erred in applying the law to the facts in order to conclude that jurisdiction over the non-signatory is established.

In *Dallah*, the UK Supreme Court found that the arbitral tribunal had wrongly concluded that the Government of Pakistan was a party. If a foreign enforcing court finds that under an acceptable theory of jurisdiction, the foreign arbitral proceeding rightly assumed jurisdiction, may a non-signatory award-debtor be allowed to show that the facts would not have justified imposition of liability under the substantive principles of contract law as determined by the tribunal? In other words, should the foreign court allow the award debtor to challenge the award on the merits? Such a course of action goes against the accepted rule that an enforcing court should not engage in a review of the merits of case. On the other hand, it is unjust to enforce an award against an award debtor where strong arguments that could have been advanced to show that on the merits the non-signatory should not be held liable were not made. It is submitted that the enforcing court in such cases should engage in a limited review so that manifest errors of law or grave and manifest errors in the application of the law to the facts should be a ground for non enforcement. This procedure could be justified as an application of the public policy exception in Art V(2) of the Convention.

[36] See *Dallah* (note 15 above), [18].

IV. Natural Justice in the Arbitral Jurisprudence of Singapore

A. General principles

A dualist system of arbitration exists in Singapore. The IAA,[37] which incorporates the Model Law and the Convention with legislative clarifications and amendments, applies to international commercial arbitrations as this term is defined by the Model Law, while the Arbitration Act[38] applies to domestic arbitrations and permits a greater judicial involvement in the arbitration. Section 24(b) of the IAA and s 48(1)(a)(vii) of the Arbitration Act respectively permit the court to set aside an award where there is a breach of the rules of natural justice that occurred in connection with the making of the award that resulted in prejudice to the rights of a party. As Rajah JA observed with regard to these provisions, 'no State will permit a binding arbitral award to be given or enforced within its territory without being able to review the award, or, at least without allowing the parties an opportunity to address the court if there has been a violation of due process'.[39] The language of these provisions makes it clear that the power to set aside an award is a discretionary power. However, the Singapore Court of Appeal, while noting that the Singapore courts infrequently use their power to set aside awards, also declared that 'they will unhesitatingly do so if a statutorily prescribed ground for setting aside an award is clearly established'.[40] The policies behind the rule against bias and the hearing rule are also enshrined in the Model Law and the Convention in that both instruments refer to the hearing rule explicitly while the rule against bias is a part of the public policy exception. Although allegations of bias are on the rise in international commercial arbitrations,[41] bias, whether actual or apparent, has been rarely alleged with regard to international commercial arbitrations conducted in Singapore. However, the allegation that the hearing was unfair and that due process was denied is regularly made and when made has resulted in a detailed assessment of the allegation by the courts.

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37 International Arbitration Act (Cap 143A).

38 Arbitration Act (Cap 10, 2002 Rev Ed).

39 *CRW Joint Operations v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [26].

40 *Ibid*, [27] per Rajah J.

41 Sam Luttrell, *Bias Challenges in International Commercial Arbitration* (Kluwer Law International, 2009), p 4, believes that 'bias challenges are now a key means of "playing dirty" in' international commercial arbitration.

The relationship of s 24(b) of the IAA to corresponding provisions in the Model Law raise issues about the scope of coverage of these respective provisions. The provisions deal with setting aside awards and do not address the issue of enforcing foreign awards. Section 24 of the IAA states explicitly that the High Court 'may, in addition to the grounds set out in Article 34(2) of the Model Law' set aside an award if the tribunal making the award has breached the rules of natural justice by which 'the rights of any party have been prejudiced'. Article 34(2) of the Model Law, unlike s 24(b) of the IAA or s 48(1) of the Arbitration Act, does not require that the affected party show that his rights have been prejudiced. It would appear that s 24(b) of the IAA must be read as replacing Art 34(2)(ii) of the Model Law *pro tanto* so that prejudice must always be proved to set aside an award. For the purposes of setting aside an award, the words 'in addition to' in s 24 must be read to mean 'notwithstanding'. A plain reading of s 24(b) of the IAA suggests two conclusions. First, the breaches of natural justice referred to may not be of the magnitude or severity contemplated by the Model Law or the Convention where the award could be set aside or not enforced because of serious breaches of procedure. In other words, while a Singapore court might not refuse to enforce a foreign award pursuant to s 31(2), which mirrors Art V(1) of the Convention, because the infraction is insufficiently serious, it might, in the same factual circumstances, set aside an award that causes detriment to the complaining party because of its interest in policing the arbitration and ensuring compliance with her *lex arbitri*. Thus s 24(b) of the IAA and s 48 of the Arbitration Act could be read as, at the very least, a direction and caution to arbitral tribunals conducting arbitrations in Singapore to adhere to certain basic standards of natural justice. Second, the 'rights of any party' referred to in the sub-section embraces a range of procedural rights as well as substantive rights. However, the quality of the infraction must be such that prejudice must result. Accordingly, even infractions that are more than *de minimis* infractions will not engage s 24(b) of the IAA if no prejudice is caused. This is rightly so because the flexibility and informal nature of an arbitration that the parties themselves wanted would be compromised if there is any procedural default, however minor that does not cause detriment, permits a court to set aside an award pursuant to section 24(b) of the IAA.

In *John Holland Pty Ltd v Toyo Engineering Corp (Japan)*[42] the court set forth the criteria that must be satisfied by a party invoking s 24(b) of the IAA. It stated that the challenging party must show:

[42] [2001] 1 SLR (R) 443.

a. which rule of natural justice was breached;
b. how it was breached;
c. in what way the breach was connected with the making of the award; and
d. how the breach prejudiced its rights.

Subsequently, the Singapore Court of Appeal elaborated on these principles. Although, the pronouncement was made in respect of the hearing rule, some of the criteria listed will also apply when the allegation is that the rule against bias was violated. When stating these criteria, the court was interpreting s 48 of the Arbitration Act but subsequent cases have held that these criteria also apply to the interpretation of s 24(b) of the IAA.[43]

In *Soh Beng Tee & Co Pte Ltd v Fairmont Development Pte Ltd*[44] ('*Soh Beng Tee*'), the Singapore Court of Appeal interpreted the scope of the obligation as set forth in s 48 of the Arbitration Act. According to the court, the 'overriding concern … is fairness'.[45] It then went on to state the following principles on how the standard of natural justice operates in an arbitration proceeding, which set of criteria have been used as the starting point in subsequent decisions to evaluate claims that natural justice principles were breached in the arbitration proceeding:

a. Parties have a right to be heard effectively on every issue that may be relevant to the resolution of the dispute. The arbitrator must treat the parties equally and allow them the opportunity to present their cases and to respond. The arbitrator should not base his decision on matters not submitted or argued before him.
b. The court is not a place where the losing party has a second bite at the cherry. So no arid or technical challenges should be entertained by the court.
c. Given the nature of arbitration, the courts should follow the international practice of minimal curial intervention. The two principal considerations that support this practice are: (i) a need to recognize the autonomy of the arbitral process by encouraging finality so that its advantage as an efficient alternative

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43 *Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 633 and *Sobati General Trading LLC v PT Multistrada Arahsarana* [2009] SGHC 245.

44 [2007] 3 SLR (R) 86.

45 The court went on to observe that '[f]airness … is a multidimensional concept' and that 'the … conception of fairness justifies a policy of minimal curial intervention …': *ibid*, [65].

dispute resolution process is not undermined; and (ii) acknowledge that when the parties chose arbitration, they accepted the very limited right of recourse to the courts. A court should not intervene because it might have resolved the various controversies in play differently;

d. That the arbitrator did not refer every point for decision to the parties for submissions is not invariably a ground for challenge. It is only where the impugned decision reveals a dramatic departure from the submissions or involves the arbitrator receiving extraneous evidence, or adopts a view wholly at odds with the established evidence or adopts a view wholly at odds with the established evidence adduced by the parties or arrives at a conclusion unequivocally rejected by the parties as being trivial or irrelevant, might it be appropriate for a court to intervene. The party challenging the award must show that a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award.
e. The parties will urge diametrically opposite solutions to resolve a dispute. The arbitrator is not required to adopt an either/or approach. He may embrace a middle path so long as it based on the evidence before him and he is not required to consult the parties on his thinking processes before finalizing his award unless it involves a dramatic departure from what has been presented to him.
f. Each case must be decided within its own factual matrix. An award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied.

In applying the criteria set forth in *Soh Beng Tee*, reliance on English decisions should be undertaken with care because the standard under the UK Arbitration Act is 'serious irregularity' which combines different concepts such as the existence of the breach, the way in which the breach occurred and the prejudice caused thereby. Section 24(b) of the IAA and s 48 of the Arbitration Act, on the other hand, unbundle these concepts and enumerate them as distinct criteria. Accordingly, in determining whether a breach of the principles took place, it would not be appropriate to consider whether any mitigating factors operated to cause the breach. Once a breach has occurred, the issue of prejudice, not qualified as substantial or serious, is a separate issue that the court should consider.

B. The hearing rule

Article V (1)(b) of the Convention in its pertinent part refers to a situation where the award-debtor 'was *** otherwise unable to present his case'. As the well-known authors of the standard treatise on arbitration observe, Article V(1)(b) of the Convention is 'the most important ground for refusal under the New York Convention (and the Model Law)' and go further to observe that this provision is 'directed at ensuring that the arbitration itself is properly conducted, with

proper notice to the parties and procedural fairness'.[46] Another scholar observes that: 'Due process … is often understood as a "hard" rule of law, a kind of core or foundation of all other procedural rules, the violation or disregard of which will lead to unenforceability of the award or decision given'.[47] Although the language of Article V of the Convention, the use of the word 'may', implies a discretion to enforce an award despite a breach of the rules of natural justice,[48] no court would be willing to enforce a foreign award that breaches these principles unless the effects of the breach are *de minimis*. The Singapore Court of Appeal re-affirmed the hearing rule as the first principle in *Soh Beng Tee*.

The nature of arbitral proceedings and the deference accorded by the courts to decisions by arbitrators on how to structure proceedings and conduct hearings provides the context for disputes over whether the arbitrator observed the hearing rule. Obviously, a party may feel aggrieved that an argument it had advanced, especially if the argument related to the proper interpretation of a foreign law that was not familiar to the arbitrator, was given short shrift by the arbitrator. Arguably, Principle (d) enunciated in *Soh Beng Tee* would not allow a party complaining about a superficial or untenable analysis by the arbitrator relating to a submission on foreign law to succeed. But this is not a bright line rule.

Although grounded in fairness, the specific applications of the hearing rule mirror another concept of fairness in the law, the concept of equality of arms. In the context of the hearing rule, this means that each party must be advised of, and be able to make submissions with respect to, legal and factual arguments made by the other. Surprise in the form of a theory of liability propounded by the arbitrator but not be shared with the parties and not hearing the submissions of such parties must be avoided at all costs. Many of the complaints about the breach of the hearing rule relate to the use of material that was not disclosed to a party or in respect of which a party was not invited to make submissions.

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[46] Alan Redern and Martin Hunter with Nigel Blackaby and Constantine Partasides, *Law and Practice of International Commercial Arbitration* (4th ed, Thomson Sweet & Maxwell, 2004) ¶10-39.

[47] Matti S Kurkela and Hannes Snellman, *Due Process in International Commercial Arbitration* (Oceana Publications Inc, 2005), p 1.

[48] In *Dardana Ltd v Yukos Oil Co* [2002] 1 All ER (Comm) 819, Mance LJ stated the widely accepted position in common law countries that the discretion to enforce an award where an award-debtor satisfies the requirements of Art V is limited to extreme cases.

The two clear principles that can be extracted from Singapore decisional law are as follows: first, the arbitrator must conduct a hearing that can broadly be characterized as fair; and second, the arbitrator's award must not contain any surprises especially novel theories of liability or an interpretation of facts that a party had no opportunity of contesting. The leading Singapore cases dealing with allegations of breaches of the hearing rule have usually turned on fact situations where the arbitrator had not shared his preliminary views or thinking on the facts, and the law as submitted by the counsel for the parties. The decisions, relying on English precedent, tend to reject assertions of such a broad duty upon arbitrators to share their thinking with the parties or apprise the parties of their train of thought during the proceedings. The Singapore Court of Appeal in *Soh Beng Tee* as well as subsequent decisions have drawn the line where the arbitrator comes up with some new theory or an argument so fanciful that it could not have been anticipated by the parties and thus constitutes an unfair surprise. There is no obligation for the arbitrator to share her views with the parties as the arbitration proceeds.

It would appear that the first step taken by the courts when a breach of the hearing rule is alleged is to examine the conduct of proceedings to ensure that they were fair. In *F Hoffmann-La Roche & Co AG v Secretary of State for Trade & Industry*,[49] the House of Lords held that once a fair hearing has been given, the decision maker does not have to disclose what he is minded to decide so that the parties have a final opportunity of criticizing his mental processes before he reaches a final decision. Because speedy resolutions of disputes in arbitration are desirable, unnecessary delay is to be avoided. Accordingly in *The Pamphilos*,[50] the court emphasized that it was not necessary to refer back to the parties for further submissions every single inference of fact from the primary facts which arbitrators intend to draw. Once it is established that the hearing passed the basic test of fairness, the complaining party is allowed to make specific allegations of the breach of the hearing rule.

Courts are alert to allegations of unfair surprise caused by the arbitrator. In *Fox v PG Wellfair Ltd*,[51] the court held that an arbitrator who develops a novel theory about the interpretation of the facts or of the law must bring this to the attention of the parties. He should not surprise the parties with his own ideas. If he reaches a conclusion contrary to or inconsistent with the evidence given at the hearing, he must bring this to the attention of the parties and give them an opportunity to deal with it. This element of unfair surprise is a feature that the

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[49] [1975] AC 295, 369.
[50] [2002] 2 Lloyd's Rep 681.
[51] [1981] 2 Lloyd's Rep 514.

courts will discourage in arbitral proceedings. Bingham J in *Sermalt Holdings SA v Nu-Life Upholstery Repairs Ltd*,[52] observed that it is not right that a decision should be based on specific matters which the parties never had a chance to deal with because this is contrary both to the substance of justice and to its appearance.

Sometimes, an experienced arbitrator can spot a legal argument that has not occurred to counsel in the proceedings. Maybe he based his award on this legal argument that was not told to counsel and about which counsel did not have an opportunity to comment? In *Trustees of Rotoaira Forest Trust v Attorney-General*,[53] the court observed that when it came to ideas rather than facts, the plaintiff must show that a reasonable litigant in his shoes would not have foreseen the possibility of reasoning of the type revealed in the award. Furthermore, he must show that with adequate notice it might have been possible to persuade the arbitrator to a different result. The thrust of the inquiry is well captured in the test put in *ABB AG v Hochtief Airport GmbH*,[54] where the court asked whether all the essential elements that might lead to the conclusion were in play? There is no duty to refer back to the parties the arbitrator's analysis of the material and the additional conclusion which he derived from the resolution of arguments as to the essential issues which were already squarely before the tribunals. The main question to ask is whether the parties were able to address arguments on all of the essential building blocks in the conclusion?

The Singapore courts have relied on the broad outlines of this jurisprudence that has sought to balance the efficiency of arbitral proceedings with the need to ensure that the essential elements of the dispute are known to the parties as well as the arbitrator. If the issue was not in play during the proceedings, it may be inferred that the 'tribunal had gone on a frolic of it (sic) own and put forth its very own idea unsupported by the evidence placed before it'.[55]

In *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel Gmbh*,[56] the claimant argued that a breach of natural justice had occurred when the other party sent documentation to the tribunal which it had not been allowed to review. The claimant had argued that the initial design that had been supplied by the defendant under their agreement was defective and it was the alleged defects of this design that the tribunal had addressed. In the application to set aside the award, the claimant argued that the tribunal should have considered whether the

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[52] [1985] EGLR 14, 15.
[53] [1992] 2 NZLR 452.
[54] [2006] 2 Lloyd's Rep 1.
[55] *Sobati General Trading LLC v PT Multistrada Arahsarana* [2010] 1 SLR 1065 at [22] per Tay Yong Kwang J.
[56] [2008] 3 SLR (R) 871.

defendant should have been held liable for the delay in providing the improved version of the initial design which the tribunal held had not been defective. This was of course a completely different issue. The claimant argued that the failure to examine this alternative theory of liability resulted in a breach of the principles of natural justice. Predictably, the Singapore High Court gave short shrift to this argument. Chan Seng Onn J observed that it was the responsibility of the claimant to have advanced this theory of liability to the tribunal. The judge thought that the claimant was effectively asking for a second bite of the cherry 'so that it could ventilate an alternative claim at a second arbitration, when such an alternative claim was clearly foreseeable and should have been included for determination at this arbitration in the first place'.[57] The essential function of the arbitrator, the judge observed, is to resolve claims and the live issues raised and disputed by the parties and does not extend to those which the parties never raised in the first place. Concluding that the tribunal did not rely on the material that was not disclosed to the claimant to reach its decision, the judge concluded that the causative link between the breach and resulting prejudice, even at a level lower than 'substantial prejudice',[58] had not been established.

The decisions in *Pacific Recreation Pte Ltd and SY Technology Inc and Koh Bros Building*[59] and *Civil Engineering Contractor Pte Ltd v Scotts Development (Saraca) Pte Ltd*[60] respectively established the principles that a breach of the hearing rule would occur when the tribunal decides a case on a basis not raised or contemplated by the parties and when a party is not allowed to address the tribunal on a key issue. In such cases, the affected party could legitimately complain that it was denied an opportunity to be heard or to address the tribunal on its point of view of the law and the interpretation of facts upon which the dispute was decided.

In 2011, the High Court of Singapore found that the hearing rule had been breached by the arbitrator. This is the first reported case in which a party had successfully persuaded a Singapore court to set aside an award on the ground that principles of natural justice had been breached.[61] In *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd*,[62] Front Row invoked s 48(1)(a)(vii) claiming that the arbitrator had breached the hearing rule

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57 [2008] 3 SLR (R) 911.
58 *Soh Beng Tee & Co v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, 91.
59 [2008] 2 SLR (R) 491.
60 [2002] 2 SLR (R) 1063.
61 A breach of the rules of natural justice has lead to an arbitrator being removed for misconduct: see *Koh Bros Building & Civil Engineering Contractor Pte Ltd v Scotts Development (Saraca) Pte Ltd* [2002] SGHC 223.
62 [2010] SGHC 80.

when he focused on and dealt with only one misrepresentation alleged by Front Row when in fact Front Row had alleged three misrepresentations. In other words, two causes of action were effectively ignored by the arbitrator.

Andrew Ang J derived assistance from Australian authorities interpreting construction legislation from the state of New South Wales.[63] The Australian cases had interpreted the provision circumscribing the matters that could be considered by an adjudicator, and had held that the adjudicator's failure to consider or address his mind to certain submissions and matters breached this provision, and could also be considered a breach of the principles of natural justice. The learned judge also relied on the observations of Judith Prakash J in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd*[64] on the persuasive value of these Australian decisions in determining the content of the hearing rule. The propositions of law regarding the hearing rule that Andrew Ang enunciated are as follows:

- tribunals must consider all issues raised by the parties;
- natural justice principles are breached if the arbitrator disregards the submissions made by a party during the hearing, or has regard to them but does not really try to understand them and so fails to deal with the matter in dispute;
- an arbitrator flouts the hearing rule when he does not expressly deal with arguments and explain why he was rejecting them, even though the decision implicitly or explicitly rejects the argument;[65] and
- a reviewing court will look at the face of the documents and the tribunal's decision to determine whether the tribunal has in fact fulfilled its duty to apply its mind to the issues placed by the parties before it and considered the arguments raised.

Front Row probably heralds an approach of the Singapore courts to discourage seemingly casual approaches to submissions by the parties and perhaps is an attempt to signal an intolerance with procedural unfairness. The Singapore Court of Appeal in *CRW Joint Operations v PT Perusahaa Gas Negara (Persero)*,[66] after a detailed discussion of complex construction dispute arbitration proceedings, set aside an award in a construction arbitration and reversed the holding of the lower court that the owner had been given an opportunity to

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63 Building and Construction Industry Security of Payment Act 1999.

64 [2009] SGHC 257.

65 This rule adopted by Judith Prakash J was in the context of removing an arbitrator for misconduct involving the breach of the hearing rule. However, there is no reason why the same rule cannot support setting aside an award for the breach of the hearing rule.

66 [2011] 4 SLR 305.

present its case. The Court of Appeal disagreed with the finding of the lower court that the owner had been given an opportunity to present its case. The owner in the construction dispute had been asked by the tribunal to state what it believed it owed the contractor when it, the owner, disputed the amount set by the adjudicator. The majority of the arbitrators faulted the owner in the award for not providing this information. The court regarded this direction to provide information about the amount owing as 'an affront to the principle that each party must have a reasonable opportunity to present its case'.[67] The court noted that the arbitral hearing 'had a rather limited compass'[68] and the owner had not envisaged having to produce evidence on how much it owed the claimant-contractor.

It would appear that the Singapore courts have developed a coherent body of law with regard to the hearing rule that can provide guidance for arbitrators conducting arbitration proceedings in Singapore. Hitherto, it was most unusual for the highest court to cast strictures on the conduct of an arbitrator in observing the principles of justice. The gentle reprimand delivered to an arbitrator in this proceeding by Rajah JCA[69] may be a salutary shot across the bow of arbitrators intending to show that the indulgence of the courts to missteps in arbitration proceedings has definite limits.

C. The rule against bias

Of the two rules of natural justice, the rule against bias[70] is arguably the rule where, in the case of actual bias, even minor infractions should not be tolerated. A violation against the hearing rule may be attributed to a procedural oversight, but a rule against bias goes to the root of the integrity of the adjudication. As William Park observes, '[i]ntegrity is to arbitration what location is to the price of real estate. Without it, few other things matters very much, if at all'.[71] Often, parties choose arbitration in order to get a neutral forum and avoid a biased nationalist judge. It would be ironical if they chose arbitration for this reason and end up with a biased arbitrator. Rarely are frivolous allegations of actual bias made[72] as a serious charge that goes to the integrity of a judge or an arbitrator is

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67 *Ibid*, [94].
68 *Ibid*.
69 *Ibid*, [93].
70 See Luttrell (note 41 above).
71 William Park, 'Foreword' in Luttrell (note 41 above).
72 But see *Alpha Projektholding GMBH v Ukraine*, where a charge of bias was made because counsel for a party and the arbitrator nominated by that party had studied together in the Harvard Law School graduate program during a particular year: ICSID Case No ARB/07/16.

perhaps unnecessary because of the safeguards of the system. Public confidence that adjudicators are free of bias is important to any society. Critics have faulted the US Supreme Court for declining to be bound by a publicly available code of ethics on conflicts of interest although other federal courts are so bound. The UK Supreme Court has found it desirable to publish ethics guidelines on its website.[73]

In international commercial arbitration proceedings, the frequency of challenges based on bias has increased.[74] Some writers have attributed this phenomenon to the arrival of large numbers of common law trained arbitration practitioners who relish adversarial tactics.[75] It is to be expected that as Singapore continues to become a popular arbitration hub, a similar development regarding bias challenges will occur in Singapore. One reason for such challenges is the fact that the pool of qualified specialized professionals is relatively small and such professionals could sometimes act as counsel in arbitrations and sometimes as arbitrators. In specialized areas such as foreign direct investment disputes before the International Centre for the Settlement of Investment Disputes, the problem of 'repeat arbitrators' who are frequently appointed by claimants or host states have given rise to challenges regarding bias.[76] The International Bar Association has published guidelines in the form of red, orange and green lists that could be consulted in situations where bias could be alleged.[77] In *Locabail v Bayfield Properties*,[78] the court provided a set of examples where an allegation of apparent bias would not be justified.

Rarely, is the charge of actual bias made in Singapore. In *Anwar Siraj v Ting Kang Cheng*,[79] the court held that a subjective lack of confidence in the arbitrator is insufficient. The test is objective and a reasonable person must think, on the basis of real grounds, that the arbitrator could not or would not fairly determine the issue on the basis of the evidence and the arguments to be made before him.

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73 See: www.supremecourt.gov.uk.

74 See Kurkela and Snellman (note 47 above).

75 Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2008), p 141.

76 For example, *Tidewater Inc v Bolivarian Republic of Venezuela ICSID* Case No ARB/10/5 (23 December 2010).

77 Available at: www.ibanet.org. These guidelines include a non-exhaustive list of circumstances pertaining to conflicts of interest in international arbitrations. Three lists, red, orange, and green provide illustrations of different types of conflict of interest. Circumstances described in the red list give rise to any real possibility of an objective appearance of bias.

78 [2000] 1 QB 141.

79 (2003) 2 SLR (R) 287.

English law has witnessed changing standards in respect of apparent bias. The reasonable apprehension test was famously stated by Lord Hewart in *Sussex Justices*.[80] The House of Lords in *Gough*[81] laid down a 'real danger' test so that in order to show apparent bias, there must be a real danger of bias. However, the House in *Porter v Magill*[82] abandoned the 'real danger of bias' test in favour of the 'fair minded and informed observer' test. The question now asked in English law is 'whether a fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'. In Australia, the International Arbitration Amendment Act (Cth)[83] raised the threshold test for establishing arbitrator bias. The common law test that had been used in Australia was the fair-minded objective person test. The amendment provides that the identity of the arbitrator may be challenged only where there are 'justifiable doubts' with respect to his impartiality or independence.

In *ASM Shipping Ltd of India v TTMI Ltd of England*,[84] the arbitrator in a shipping dispute had previously acted as counsel in another arbitration in which the firm of solicitors which had instructed him had made serious allegations against one of the witnesses who had testified in the current arbitration. When the owner objected to the arbitrator's involvement, he refused to step down stating that no circumstances existed which gave rise to justifiable doubts about his impartiality. The IBA Guidelines on Conflicts of Interest in International Arbitration[85] were brought to the attention of the court, but the judge did not rely on these guidelines. Morrison J in deciding that the arbitrator must resign applied a vague timeline standard. Disavowing an intent to establish an 'Armageddon theory', he observed that the mere fact that an arbitrator previously had a trade dispute with the parties or was a barrister, who was sitting as the arbitrator, had once cross-examined an expert witness would not by themselves be circumstances that cause an objectionable situation. However, in both such situations, 'if the contact had been a short time before, and allegations of dishonesty had been made, the position could be different'. With respect, these seem to be rather tenuous criteria. In many arbitrations, expert witnesses on trade practices or on foreign law are critical for the success of the case. If the barrister had conducted an excoriating criticism of the expert witness bringing

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80 *R v Sussex Justices; ex parte McCarthy* [1924] 1 KB 256 ('Sussex Justices').
81 [1993] AC 646.
82 [2001] 1 All ER 465.
83 See: http://www.comlaw.gov.au/comlaw/management.ns/lookupindexpagesbyid/IP200402434.
84 [2006] 2 All ER (Comm) 122.
85 See IBA Guidelines (note 77 above).

her competence into question but leaving her reputation for honesty intact, it seems to be going too far to conclude that there is no bias. Such rules would lead to a slippery slope where the arbitration community becomes a cosy club that prizes mutual self-interest over the interest of the parties.

The test for apparent bias in Singapore appears to be a combination of the reasonable apprehension test found in *Sussex Justices* together with the 'fair-minded and informed observer' test in *Porter v Magill. Thus in Re Shankar Alan s/o Anant v Kulkarni*,[86] Sundaresh Menon JC stated that the complainant must show that 'there are circumstances which would give rise to a reasonable suspicion or apprehension in a fair-minded reasonable person with knowledge of the relevant facts that the tribunal was biased'.[87] Apparent bias could also be shown by proof that the arbitrator had 'evinced a closed mind on the issue and had entered into the fray'.[88] Evidence of the arbitrator descending to the arena of combat or taking an adversarial role will be evidence of apparent bias. These criteria led Judith Prakash J in *Kempinski Hotels SA v PT Prima International Development*[89] to hold that the arbitrator had not entered into the fray merely because he was proactive and sought more information on issues that had been raised by the defendant about the existence of a new management agreement that the plaintiff was alleged to have made with a competitor of the defendant.

It is expected that allegations of apparent bias in the future will probably involve allegations of having a closed mind or having entered into the fray. Future arbitrators, mindful of the potential of these charges, will need to be careful and display a willingness to hear arguments. They would also need to draft a well-reasoned award that includes rational holdings on the facts and the law. This would be a welcome outcome. With regard to entering the fray, this allegation might have a chilling effect if arbitrators are dissuaded from taking a more pro-active role in the arbitration and accelerate proceedings. This outcome would be less welcome.

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86 [2007] 1 SLR (R) 85.
87 *Ibid*, 91.
88 *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd* [1988] 1 SLR (R) 483.
89 [2011] 4 SLR 633, [69].

V. Conclusion

Hitherto, the principles of natural justice have principally been elucidated by means of detailed rules as a result of self-regulation through arbitral institutions and professional bodies. Critics of this process have argued that there is a legitimacy deficit because it is an international treaty, ie the Convention, that gives arbitration much of its force and importance. State parties to the Convention, through their judicial branches, have an important role to play in the development of standards contained in the Convention. Given this common 'ownership' of the Convention, courts rather than unelected and unaccountable bodies, however eminent or distinguished, should be primarily responsible for developing important criteria such as the principles of natural justice. Hence, developments in the law relating to the role of natural justice in international commercial arbitration may portend a discernible shift in arbitration culture and put arbitrators on notice that supervisory courts will be alert to breaches of natural justice principles by reference to judicially developed standards. As noted earlier, high value arbitrations are increasingly being conducted in countries, especially resource rich countries that do not have developed arbitration cultures. This trend cannot be halted. Indeed, some studies project an increase of this trend. Arbitration's major virtue is the avenue it provides to escape hometown justice. But if arbitrators breach the hearing rule and the rule against bias, the escape from hometown justice may prove to be illusory. In many countries in Asia and Africa, arbitration should be encouraged but capacity building will also be required. Coherent and clear statements by the courts of the arbitration hubs will contribute to such capacity building as well as re-focus the attention of arbitrators on a vital area of arbitration law that can sometimes be mistaken for soft law. The arbitral jurisprudence of Singapore relating to natural justice is a useful contribution to the consolidation and clarification of a body of law fundamental to the integrity of arbitrations.