# The Court of Appeal for Bermuda

**CIVIL APPEAL No 2 of 2014**

Between:

**SAMPOERNA STRATEGIC HOLDINGS LTD**

Appellant

**-v-**

**HUAWEI TECH INVESTMENTS CO. LTD &**

**HUAWEI INTERNATIONAL PTE. LTD.**

Respondents

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**Before:** **Zacca, President**
**Evans, JA**
**Baker, JA**

**Appearances:** Mr. Saul Froomkin, QC, Isis Law Limited, for the Appellant
Mr. David Kessaram, Cox Hallet Wilkinson, for the Respondent

**Date of Hearing:** **3 November 2014**

**Date of Judgment:** **19 November 2014**

**JUDGMENT**

**EVANS, JA**

1. The issue in this appeal is whether the Supreme Court correctly gave leave to the Respondents to the Appeal to enter judgment against the Appellant in the terms of a Consolidated Final Award dated 27 June 2013 issued by the Singapore International Arbitration Centre ("SIAC"). The Appellant is a Bermudian company named Sampoerna Strategic Holdings Ltd. The Respondents are Huawei Tech.

Investment Co. Ltd. (a Hong Kong company) and Huawei International Pte. Ltd. (a Singapore company).

2. The Respondents were Claimants in two arbitrations against the Appellant. The two claims raised identical issues and as stated above SIAC issued a Consolidated Final Award. It is unnecessary to distinguish between the arbitrations for the purposes of the Appeal.

3. For convenience, the present Respondents will be described as "Claimants" and the present Appellant as "the arbitration Respondent".

4. The claims were made under two documents, both described as "Promissory Notes". They were issued by the arbitration Respondent dated Jakarta, September 9th. 2008, promising to pay US$6,435,220 and US$4,574,990 respectively, at Jakarta – Indonesia "based on terms under Contract dated March 9, 2007.....and the terms stipulated in the cover letter to this PROMISSORY NOTE".

5. The cover letters referred to provided that the Promissory Notes "shall be governed by and construed in accordance with the laws of the Republic of Indonesia". The parties agreed that the merits of the dispute were governed by those laws and that the SIAC Rules governed the conduct of the arbitration and that the seat of the arbitration(s) was in Singapore.

6. The parties each appointed arbitrators, and the Chairman of SIAC appointed Dr. Eun Young Park of South Korea as the presiding arbitrator of the Arbitral Tribunal.

7. Both parties confirmed to the Tribunal that there was no challenge or objection to the jurisdiction of the Tribunal (Consolidated Final Award para.19).

**The Issue**

8. By way of background, the Claimants entered into Product Supply Agreements under which they agreed to supply various items of wireless products to STI, a third party company, as purchaser. The arbitration Respondent is a shareholder in STI and it issued the Promissory Notes "to secure payment of the products ordered by STI" (Consolidated Final Award para.51).

9. The products were delivered but, as found by the arbitrators, STI failed to pay for them.

10. Therefore, the Claimants "notified [the arbitration Respondent] that due to STI's default, [they] would execute the purported promissory notes and demanded remittance" (Consolidated Final Award para.61).

11. In the arbitration(s), the Claimants served Statements of Claim contending that the documents were valid promissory notes under Indonesian law and claiming payment under them; or alternatively, that they gave rise to obligations on the arbitration Respondent to pay the sums stated in them. In the latter connection, particular reference was made in the Statements of Claim to Articles 1313, 1320 and 1314 of the Civil Code of Indonesia (see the Consolidated Final Award paragraph 267).

12. The above claims were disputed by the arbitration Respondent, and they were all dismissed by the arbitral Tribunal in the Consolidated Final Award. However, the

arbitrators awarded the sums claimed to the Claimants after deciding in their favour a further issue which they defined as –

> "267.
>
> a. .....
>
> b. If the purported note is not a valid promissory note under Indonesian law, does the Respondent have an obligation to Claimant.....in connection with the purported promissory note?
>
> i.....
>
> ii.....
>
> iii. Does the purported promissory note constitute a strengthening agreement under Article 1316 of the Civil Code?"
>
> (Consolidated Final Award para.267)

13. In short, the Arbitral Tribunal awarded the sums claimed by the Claimants, not on the grounds advanced in the Statements of Claim, which were rejected, but under the provisions of Article 1316 of the Civil Code, which was not expressly pleaded.

14. The arbitration Respondent contends, as Appellant –

> "(i) [the Award]...deal[s] with disputes not contemplated by and not falling within the terms of the submission to arbitration;
>
> (ii) .....contain[s] decisions on matters beyond the scope of the submissions to arbitration;
>
> (iii) ..the Respondent was unable to present its case;
>
> (iv).. the enforcement of [the Award] would be contrary to public policy."
>
> (Summons dated 14 November 2013)

15. All of these contentions are disputed by the Claimants.

**Court Proceedings**

16. On 9 October 2013 Hellman J. gave leave to enter judgment in the terms of the Consolidated Final Award (and of an Addendum thereto, not relevant for present purposes), on the *ex parte* application of the Claimants.

17. By Summons dated 14 November 2014, the arbitration Respondent applied to set aside the Order of Hellman J, on the grounds stated in paragraph 14 (above).

18. The application was dismissed by on 31 January 2014 by the Chief Justice following a hearing in Chambers. The Chief Justice gave his Reasons for Decision dated 14 February 2014.

19. The Appellant (arbitration Respondent) was represented before the Chief Justice and before this Court by Mr. Saul Froomkin OBE QC, and the Claimants (Respondents to the Summons and to this Appeal) by Mr. David Kessaram. The Court is grateful to both counsel for their succinct and helpful submissions.

**Ground (i) – Excess of Jurisdiction**

20. Section 42(2) of the Bermuda International Conciliation and Arbitration Act 1993 ("the Act") provides *inter alia* that enforcement of an Award may be refused where the defendant proves –

> "(d).....that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration;...".

21. It was unclear to the Chief Justice whether, and if so to what extent the arbitration Respondent was contending before him that the Arbitral Tribunal had no jurisdiction to decide what may be called the Article 1316 issue. He said, in a footnote "The line between the two limbs of attack on the Award was itself somewhat blurred.....". He held that this first limb was "wholly unmeritorious" (Reasons, paragraph 23) and he added that no jurisdictional point was raised before the Tribunal (ibid.).

22. In my judgment, it is clear beyond doubt that the jurisdictional challenge must fail. The arbitration agreement was contained in the covering letters to the two documents that were described as Promissory Notes, and it was in the following terms –

> "All disputes arising out of or in connection with this letter shall be finally settled under the administrative and procedural rules of [SIAC].....".

Each letter identified the relevant Promissory Note which was attached to it.

23. Mr. Froomkin's submission, as I understood it, was that the claims were for moneys due under documents which described themselves as Promissory Notes but the Arbitral Tribunal held that they were not properly described as such. Therefore, he submitted, the arbitration agreement did not include claims made under documents that were not promissory notes. But, having regard to the facts that, first, the arbitration agreement includes disputes arising "out of or in connection with *this letter*" (emphasis supplied), and secondly, the documents, even if they were wrongly described as promissory notes, were identified in and attached to the letter, I would reject that argument as untenable.

24. Reference is also made to the terms of the Notices of Arbitration that were given by the Claimants dated 12 July 2010. They referred to "the arbitration agreements found in the following letters enclosing Promissory Notes", specifically identifying the letters and Promissory Notes "issued in accordance with the Product Supply Agreement" which it identified. The claims included ""All amounts due and payable....pursuant to" the Promissory Notes, and "(c) Any other reliefs as may be just and expedient" (paragraph 24).

25. If it is suggested – I am not sure that it is - that the jurisdiction of the arbitrators was defined and further limited by the terms of the Notices of Arbitration, I would hold for the same reasons that it included claims made under Article 1316. There was no room for doubt that the claims were made under the documents in question, even if they were wrongly described as promissory notes.

**(ii) "The Pleading Point"**

26. The arbitration Respondent submits that "The [Claimants] did not, in their Notices to Arbitration, their Consolidated Statement of Claim, or their Consolidated Statement of Reply, plead or even mention Article 1316.....(the "strengthening agreement" argument)." (Skeleton Argument para.12).

27. This submission appears to embrace both the issue raised under paragraph (ii) of the Summons, quoted above ("matters beyond the scope of the submission to arbitration") and the further contentions (iii) ("The Respondent was unable to present its case [on the Article 1316 issue]") and (iv) (enforcement would be contrary to public policy).

28. Despite this overlap, the "Pleading Point" can be considered separately at this stage. It is common ground between the parties that the arbitration proceedings were governed by the procedural laws of Singapore where the arbitration took place in accordance with the arbitration agreements. Mr. Froomkin submits that under Singapore law "a party is bound by his pleadings and an action is confined to the issues raised therein". It is common ground that the Claimants` pleadings (Statements of Claim) were concerned exclusively with claims under the "Promissory Notes" (although they also claimed "Any other reliefs as may be just or expedient" para.57(c)) and that they made no reference to Article 1316 of the Civil Code. Therefore, he submits, the Arbitral Tribunal was precluded from granting any relief under Article 1316.

29. The Singapore authorities he relies upon are *Loy Chin Associates Pte. Ltd. v. Autohouse Trading Pte. Ltd.* [1991] SLR 755 (at pp.759-760) and *Tan Kia Poh et al v. Hing Leong Finance Ltd.* [1992] 3 SLR(R) 429 at p.435. These make it clear, however, that the Courts of Singapore apply similar principles to those that are familiar in common law jurisdictions, whether in Singapore, England and Wales or, for that matter, in Bermuda. In the former case, claims made under a contract failed, and, on appeal the High Court Judge was invited to allow an amended claim for payment under a *quantum meruit*. He held that he could not do so because of irreparable prejudice that would be caused to the defendant if an amendment was allowed at that stage. In the second case, the Court of Appeal refused to allow the Respondent to take a point (whether a supplemental agreement was a variation of an earlier agreement) that had not been pleaded "with the specificity required by Rules of the Supreme Court". The Court of

Appeal added "There was in this case also a demonstrable element of prejudice to the respondents should the appellants be permitted to put forward these submissions" (para.30).

30. In addition, the Chief Justice referred with approval to a judgment of the Singapore Court of Appeal in *PT Prima International Development v. Kempinski Hotels SA* [2012] SGCA 35. He did so in support of his "working hypothesis that every conceivable legal basis for seeking relief did not have to be pleaded if the relevant dispute was clearly set out" (Judgment para.26). The Singapore Court of Appeal said this –

> "33. The role of pleadings in arbitral proceedings is to provide a convenient way for the parties to define the jurisdiction of the arbitrator by setting out the precise nature and scope of the disputes in respect of which they seek the arbitrator`s jurisdiction."
>
> [*quaere* whether this means "jurisdiction of the arbitrator" in the same sense as under the arbitration agreement]

31. The Chief Justice also quoted from the judgment of Lord Phillips of Worth Maltravers MR in *Loveridge v. Healey* [2004] EWCA Civ. 173 where he said "It is on the basis of the pleadings that the parties decide what evidence they will need to place before the court and what preparations are necessary before the trial"(para.23).

32. Mr. Froomkin accepted in the course of argument that the Singaporean authorities do not go so far as to hold that an arbitrator`s finding can be aside merely because it was on a ground not expressly included in the pleadings before him. The same applies, in my judgment, to a finding by a Judge. In every case where there is no express reference in the pleadings it is necessary to consider

how that situation has come about. There is no general rule that, because the matter was not pleaded, the finding must be disregarded or set aside, or that an award cannot be enforced.

33. That makes it necessary to consider the course of the arbitration proceedings, and it leads in the present case to objections numbers (iii) and (iv) – the arbitration Respondent had no opportunity to present its case, and as a matter of public policy the award should not be enforced. How did it come about that the Arbitral Tribunal made its Award under Article 1316 of the Civil Code, which was not expressly pleaded by the Claimants?

**(iii) and (iv) – No Opportunity to Present Case, and Public Policy**

34. The Act further provides that enforcement of an award may be refused when the defendant proves "that he was not given proper notice of the .....proceedings or that he was otherwise unable to present his case" (section 42(2)( c), or "if it would be contrary to public policy to enforce the award" (section 42(3)).

35. A Consolidated Statement of Claim was served on 7 April 2011 and a Consolidated Statement of Defence on 19 May 2011, followed by Consolidated Statements of Reply and of Rejoinder. In August 2011 the parties exchanged Reports by their legal expert witnesses on Indonesian law. The arbitration Respondent submitted an Opinion by Dr. Nono Anwar Makarim ("Dr. Makarim").

36. The Parties exchanged their Opening Statements on 26/30 December 2011 and the hearing took place in Singapore on 9-12 January 2012. The parties

submitted post-hearing briefs on 4 May 2012 (first round) and 15 June 2012 (second round), respectively.

37. During his Opening Statement at the hearing on 9 January 2012, counsel for the Claimant raised the Article 1316 issue. He was "careful to make it clear that this was based on evidence found in Dr. Makarim`s expert report .....the expert for the Respondent." (affidavit of Boey Swee Siang dated 10 December 2013). Counsel continued –

> "I will respectfully reserve our position on article 1316. That does not prejudice the respondent because this has been brought up and discussed by the respondent`s own witness and I do believe that we can also rely on article 1316 of the Indonesian Civil Code." (Transcript p.37)

38. Later during the first morning, counsel for the arbitration Respondent made this submission –

> "[Mr. Kumarasingam] I have one more preliminary point to make in relation to the arguments mooted by the claimants in their opening statement.....there are points that have now been raised in the opening statement of the claimants that have not been pleaded by them in their pleadings.....I`m just making the point that this is not pleaded and as a result they should not be entitled to claim any relief arising from these points.
>
> [Mr. Boey- counsel for the Claimant]
>
> Mr. Chairman, I`m caught by surprise actually by this further submission, and it looks like it is entirely a question of addressing a technical issue in respect of our pleadings.....So if they are saying, "Oh, we are precluded from relying on this or that because it is not pleaded" then that`s a technical point, and on top of that the promissory notes are subject to Indonesian law....."
>
> (Transcript pages 61-62),

and the Chairman said –

> ".....since you have heard what the claimants have argued in terms of their opening statement.....as well as this morning's opening submissions, you are free to comment as to that as a rebuttal response."
>
> (page 63)

39. The discussion continued, apparently with reference to this and other matters which, it was alleged, had not been pleaded, and the Chairman said –

> ".....So if it is a matter of law I would be more flexible. The legal intricacies are not something you would consider as new evidence. So you are free to submit or comment.....I will leave it to you to discuss yourselves the manner that you present your opinions in a fair manner [sic]....." (Transcript page 65).

40. Against that background, both expert witnesses gave evidence including on the Article 1316 issue without further objection. The Claimant's expert witness, Dr. Darus, was cross-examined about Article 1316 by counsel for the Respondent on 12 January 2012 over twelve pages of transcript (pages 26-35) at the conclusion of which counsel said this to the Tribunal –

> "I am going to make certain submissions in my closing submissions.....my submission will be that in so far as they are claiming a sort of 1316 assurance contract or strengthening contract –
>
> [Chairman] With regard to your submission, these are laws, I think that you have ample time to submit.
>
> [Mr. Kumarasingam] I just want to know whether I have to put it to the witness what my understanding of the terms are.
>
> [Mr. Boey] I won`t insist on the put questions [sic] which is a procedural, technical point, and I don`t think we need to take that in an arbitration situation.

> [Chairman] I think that the tribunal believes that we heard enough from Dr. Darus, unless you have really important points.
>
> [Mr. Kumarasingham] No, sir, I am done.
>
> [Chairman] Thank you. With regard to the legal issue, I will want to make sure that you will have a chance to make your submission by way of post-hearing briefs....." (Transcript page 35).

41. Dr. Makarim gave evidence for the arbitration Respondent and was cross-examined (we were told, no transcript is available) about the Article 1316 issue. His report included, with reference to a legal commentary –

> "The author stated that such a contractual obligation corresponds with [Civil Code] Article 1316:
>
> *Nevertheless one can strengthen oneself [for the benefit of] or guarantee a third party by promising that he will do something.....[in the sense of strengthening something], in the event the third party refuses to meet his contractual obligation."*

42. Mr. Kumarasingam, counsel for the arbitration Respondent, says in his Second Affidavit that Dr. Makarim went on to express the view that Article 1316 was not applicable in the present case and that "the issue was merely put forth for the completeness of his Opinion" (para.18). Dr. Makarim`s Report (also described as a "position paper") dealt with Article 1316 at some length and it included a reference to "scholarly opinion that the characteristics of a performance assurance given for the benefit of a third party obligor as contemplated by Civ. C. Article 1316 may be imputed to specifically defective commercial papers." (Opinion, page 5).

43. The Expert Witnesses' combined learning on these aspects of Indonesian law established that there are strict requirements for the enforcement of promissory

notes and bills of exchange, but that a document or piece of commercial paper may nevertheless be enforced, either as a guarantee (again, specifically defined) or under Article 1316 as a "strengthening agreement". The Article 1316 obligation was paraphrased by Dr. Makarim as "I assure you he will do it, otherwise I will" which was adopted by Dr. Darus (Transcript page 29).

44. The arbitration Respondent`s Consolidated Closing Submissions dated 4 May 2012 included lengthy and detailed submissions on all the issues raised under Indonesian law, including Article 1316 under the following heading –

> "H. The Purported Notes are not "Strengthening Agreements" and Article 1316 of the Civil Code does not apply in the present case (pages 63-65)
>
> I. Article 1316 of the Civil Code has no application to the purported Notes (pages 65-68)
>
> II. In any case, the obligation under Article 1316 of the Civil Code only arises when the primary debtor fails to make any payment to the creditor (pages 68-69)".

45. The same Closing Submissions, however, raised a preliminary objection to "The Claimants' change of position on their case", contending that "the Claimants should not be allowed to bring new claims against the Respondent at the last minute as that is against the principles of natural justice" (paragraph 13) and citing among others "their reliance on Article 1316 in support of their case" (paragraph 16). This was expanded in the submissions on Article 1316 in section H (see above) where it was alleged that "Claimants have acted unfairly and have prejudiced the Respondent as the Respondent was not provided with any opportunity to prepare its case in relation to this point" (para.113).

46. In the Consolidated Final Award, the Arbitral Tribunal set out the parties` submissions under four headings, one of which was whether the "purported promissory notes are strengthening agreements under Article 1316 of the Civil Code" (paragraphs 83 *et seq* and 97 *et seq*) and they defined the issues as stated in paragraph above, including "iii. Do the purported promissory notes constitute strengthening agreements under Article 1316of the Civil Code?" (para.104). Having held that the documents were conditional and therefore could not be enforced as promissory notes, and that they were not guarantees, the Tribunal held that the obligations to pay the stated sums could be enforced under Article 1316.

47. That part of the Award was set out in paragraphs 132 to 153 covering five pages. It considered the Respondent`s arguments in detail (paragraphs 138 to 147). It concluded –

> (1) "The Respondent`s intention thus appears to fall into the precise definition of Article 1316 of the Civil Code where "an individual may guarantee the fulfilment of a third party`s commitments." (paragraph 140);
>
> (2) "In sum, the Tribunal finds that the purported notes fail as promissory notes, however, they constitute strengthening agreements under Article 1316 of the Civil Code as long as the original debtor, that is STI, fails to pay." (paragraph 148); and
>
> (3) There was no evidence that STI had paid the sums due (paragraph 148).

48. There is no reference in the Award to the arbitration Respondent`s objection in its Closing Submissions that Claimants were not entitled to claim under Article 1316 because that claim was not pleaded and was raised too late (paragraph 43 above).

49. The arbitration Respondent has contended that it was prejudiced by the fact that the claim was not formulated under Article 1316 before the hearing, and was not pleaded. The nature of the suggested prejudice is described by Mr. Kumarasingam as follows –

> "(v) The Respondent was denied the opportunity to prepare for the examination of the expert witnesses of the parties with regard to said Article 1316." (First Affidavit para.15).

**Discussion – Grounds (ii) (iii) and (iv)**

50. As the Chief Justice observed, the suggestion that the arbitration Respondent suffered prejudice "must have rung somewhat hollow" (Judgment para. 12). The fact is that Article 1316 was introduced into the case and was extensively dealt with by the arbitration Respondent`s own expert witness. He introduced it only "for completeness" (para.41 above) and he expressed the view that it did not provide the Claimant with a ground for relief. When it became a live issue at the hearing, both parties` counsel and their expert witnesses proceeded to deal with it without any suggestion that an adjournment or further preparation was necessary.

51. Mr. Kumarasingam has contended "the Respondent was entitled to raise its objection and proceed with the arbitration on the basis that an adverse ruling by the Tribunal on the issue could be the subject of a challenge....in the courts...." and that "a valid objection was made at the hearing, and maintained at all times subsequently" (Second Affidavit paras.28 and 30). But the Transcript shows that when an objection was raised the Chairman indicated that in his view no amendment of the pleadings was necessary ("...since you have heard ..this

morning`s submissions, you are free to comment as to that as a rebuttal response" (page 63) and "The legal intricacies are not something that you would consider as new evidence." (page 65)). Thereafter, the Tribunal heard evidence and received Submissions on the issue without further objection and without a formal reservation of the arbitration Respondent`s rights or any suggestion that new evidence was necessary.

52. It is unfortunate that the Tribunal did not refer in the Consolidated Final Award to the arbitration Respondent`s contention that the Claimant was not entitled to rely upon its unpleaded claim under Article 1316. But having regard to what was said at the hearing and the course of proceedings thereafter, it is abundantly clear, in my judgment, that the Tribunal rejected the submission. I agree with the Chief Justice`s comment –

> "It is obvious that .....the Tribunal implicitly rejected <u>again</u> the objection it had already rejected explicitly during opening speeches." (paragraph 13)

**Conclusions**

**(ii) The Claim under Article 1316 was not Pleaded**

53. The claim raised no new issues of fact, and the Chairman of the Tribunal considered that no amendment was necessary for the claim to be based on Article 1316. The issue was first raised by the arbitration Respondent`s own Expert Witness and it cannot be said, therefore, that either he or counsel for the arbitration Respondent was unprepared to deal with it. In fact, they both dealt with it in detail, both at the hearing and in the arbitration Respondent`s Closing Submissions. The Tribunal treated it as an issue in the proceedings that had

been fully argued by both parties. If an amendment was necessary and had been applied for, there was no ground on which it could properly be refused.

54. For these reasons, in agreement with the Chief Justice, I would reject this ground of complaint.

**(iii) "The Respondent was Unable to Present its Case"**

55. This contention is wholly unsupported by the evidence and has not been made out. The issue was first raised by the arbitration Respondent`s own Expert Witness, and at the hearing both parties` Expert Witnesses and their counsel dealt with it in necessary detail and without suggesting that they were under any disadvantage in doing so.

**(iv) "Contrary to Public Policy"**

56. The Chief Justice cited judgments in the Singapore Court of Appeal (*PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2006] SGCA 41) and in the Federal Court of Australia (*Castel Electronics Pty. Ltd. v. TCL Air Conditioner (Zhongsam) Co. Ltd. (No.2)* [2012] FCA 1214) which demonstrate the heavy burden that lies upon a party seeking to set aside or to prevent enforcement of an arbitral award on the ground of a breach of natural justice. In the former case, Chan Sek Keong CJ citing English as well as Singaporean authority spoke in terms of cases where upholding an award would "shock the conscience" or be "clearly injurious to the public good" or "violate the forum`s most basic notion of morality and justice". It is scarcely necessary to say that, in my judgment, the Appellant (arbitration Respondent) does not come within measurable distance of establishing that the

present Award satisfies that test. And the requirements of public policy demand no less.

57. In my judgment, the Appeal must be dismissed.

Evans, JA

I agree

Zacca, P

I agree

Baker, JA