# 4. ARBITRATION

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4.1 Despite the continuing effects of the COVID-19 pandemic, international arbitration continued to thrive in 2021. Arbitration institutions like the International Chamber of Commerce International Court of Arbitration ("ICC"), the Singapore International Arbitration Centre ("SIAC") and the Hong Kong International Arbitration Centre continued to report high caseloads, albeit lower than in 2020.[1]

4.2 The Singapore courts saw a range of arbitration-related applications filed in 2021, with the majority being applications to set aside arbitration awards under the International Arbitration Act 1994[2] ("IAA"). In addition, there were three cases relating to the stay of court proceedings, two concerning the enforcement of arbitration awards, and one arising out of an appeal under the Arbitration Act 2001[3] ("AA"). There were also a number of notable cases in 2021 relating to issues such as jurisdiction, confidentiality and disclosure in investment arbitration, a tribunal's duty to consider corruption, as well as other procedural matters. Overall, the jurisprudence continues to reinforce the pro-arbitration approach taken by the Singapore courts.

1 The International Chamber of Commerce's preliminary 2021 statistics (released 26 January 2022) reported 853 new cases filed in 2021, compared to 946 in 2020 ("ICC Unveils Preliminary Dispute Resolution Figures for 2021" *International Chamber of Commerce* (26 January 2022)), while the Singapore International Arbitration Centre reported 469 new cases filed in 2021 (Singapore International Arbitration Centre, *Annual Report 2021*), compared with 1,080 in 2020. The Hong Kong International Arbitration Centre reported a total of 277 arbitration cases submitted to the institution in 2021 (Hong Kong International Arbitration Centre, "2021 Statistics" <https://www.hkiac.org/about-us/statistics> (accessed May 2022)), compared with 318 in 2020.

2 2020 Rev Ed.

3 2020 Rev Ed.

## I. Stay of court proceedings

### *A. Imposition of conditions upon the grant of a stay*

4.3 The court's power to order a stay of proceedings in favour of arbitration is enshrined in statute. Both s 6 of the IAA and s 6 of the AA set out the court's power to grant a stay. The key difference between the two provisions is that a stay under the IAA is mandatory ("The court to which an application has been made in accordance with subsection (1) is to make an order"),[4] while a stay under the AA is discretionary ("The court to which an application has been made in accordance with subsection (1) may, if the court is satisfied … make an order").[5]

4.4 Under s 6(2) of both the IAA and the AA, a court is empowered to grant a stay upon terms that the court thinks fit. Some conditions that have been granted include the imposition of a timeline to commence arbitration, requiring a party to appoint solicitors or ordering parties not to frustrate the appointment of the tribunal[6].

4.5 In *The Navios Koyo*,[7] the appellant sought to persuade the Singapore courts to prohibit the respondent from relying on a time-bar defence as a condition to the grant of a stay. The appellant had commenced an admiralty action in Singapore against the respondent for claims arising under a bill of lading. The bill of lading incorporated, on its face, the terms of a charterparty together with an arbitration clause. However, by the time the appellant asked the respondent for a copy of the charterparty, it was the night before a time bar accrued to bar claims under the bill of lading.

4.6 On the basis of the arbitration clause in the charterparty, the respondent obtained an unconditional stay of the admiralty action under s 6 of the IAA. The appellant appealed, arguing that the stay ought to have been conditioned upon the respondent's waiver of the time-bar defence in the London arbitration.

4.7 The Court of Appeal dismissed the appeal as it was not persuaded that a condition should be imposed in this case and the court should be "exceedingly slow to carve out substantive defences, such as a defence of time bar, from the jurisdiction of the arbitral tribunal".[8]

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4 International Arbitration Act 1994 (2020 Rev Ed) s 6(2).
5 Arbitration Act 2001 (2020 Rev Ed) s 6(2).
6 *The Navios Koyo* [2022] 1 SLR 413 at [27].
7 [2022] 1 SLR 413, upholding the High Court's decision in [2021] SGHC 131.
8 *The Navios Koyo* [2022] 1 SLR 413 at [4].

4.8 In the Court of Appeal's view, the grant of conditions under s 6(2) of the IAA is a discretionary power to be exercised depending "on the true nature of the condition(s) sought, in the context of the relevant circumstances",[9] and the decision informed by the justice of the case.[10] This would involve the court's consideration of whether the party is able to put forward "proper justification" for the imposition of a condition. In determining whether such "proper justification" has been established, the Court of Appeal established the following three-part test:[11]

> (a) "the reasons for the conditions being sought, and whether those reasons could have been obviated by the applicant's own conduct" [emphasis in original omitted];
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> (b) "whether the need for any of the conditions was contributed to or caused by the conduct of the respondent"; and
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> (c) "the substantive effect on the parties of any condition that the court may impose" [emphasis in original omitted].

4.9 In this case, the Court of Appeal was not persuaded that there was any justification for the imposition of a condition. In arriving at its decision, the court took into account a number of factors, including the appellant's failure to protect its own commercial interests and the nature of the condition sought. The court also took into account whether there was any dispute that the matter should have been arbitrated from the outset (the court concluded that "it was not in contention that this dispute ought properly to have proceeded to arbitration *from the very outset*" [emphasis in original]).[12]

### *B. Case management stay*

4.10 In addition to the statutory powers of stay, courts have the inherent power to stay proceedings to ensure a fair and efficient resolution of a dispute. Such a stay may be ordered where the court considers that there are issues in the arbitration proceedings, the determination of which could affect existing issues in the court proceedings. This is referred to as a "case management stay", and such stays have been ordered in a number of decisions since its first adoption in 2016.[13]

9 *The Navios Koyo* [2022] 1 SLR 413 at [26].
10 *The Navios Koyo* [2022] 1 SLR 413 at [30].
11 *The Navios Koyo* [2022] 1 SLR 413 at [30].
12 *The Navios Koyo* [2022] 1 SLR 413 at [4].
13 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373.

4.11 The High Court upheld a case management stay ordered by a senior assistant registrar in *CJY v CJZ*[14] ("*CJY*"), holding that to do so would ensure the efficient and fair resolution of the dispute as a whole. The case involved disputes relating to a construction project. The architects for the project issued a schedule of defects to the contractor, which then led to the employer calling upon the performance guarantees furnished by the contractor.

4.12 The contractor disputed the defects and the calls and commenced arbitration against the employer in 2018, seeking repayment of the amounts paid out under the performance guarantees and interest thereon. The employer disputed the claim on the basis that the calls were justified by the schedule of defects. The employer also counterclaimed for the cost of rectifying outstanding defects, as well as new defects discovered since the schedule of defects was issued.

4.13 In October 2020, while the arbitration between the contractor and the employer was ongoing, the contractor commenced court proceedings based on various tortious claims against five individuals who were involved in the project: the employer's country manager (defendant 1), the project's quantity surveyor and a representative of the quantity surveying firm engaged for the project (defendants 2 and 3), and the project's architect and a representative of the architectural firm engaged for the project (defendants 4 and 5). It was not disputed that no arbitration agreement existed between the contractor and these five individuals.

4.14 The country manager (defendant 1) successfully applied to stay the court proceedings. On appeal, the High Court agreed with the grant of a case management stay, noting that both the arbitration and the court proceedings involved an overlap in parties and in remedies. There were also common issues in both the arbitration and court proceedings in respect of the employer's calls on the performance guarantees, the contractor's liability for the defects in the schedule of defects, and whether the estimated rectification costs were fabricated or inflated. These were all issues falling within the arbitration agreement and their resolution in the arbitration would be crucial to the eventual outcome of the court action. The High Court also observed that the arbitration had been ongoing for more than three years, and the parties to the arbitration (that is, the contractor and the employer) "ought properly to finish the Arbitration, before the [contractor] proceeds any further with the [court action]".[15]

14 [2021] 5 SLR 569.
15 *CJY v CJZ* [2021] 5 SLR 569 at [74].

4.15 *CJY* was clearly a case suitable for a case management stay. The contractor was already in the middle of arbitration proceedings when it sought to commence court litigation against individuals with whom it had no contractual relationship with, and in relation to the same project. While not entirely clear in the judgment, this appears to have been a case of strategic satellite litigation, which was swiftly put in its place by the Singapore courts.

## II. Jurisdiction of the tribunal

4.16 The most fundamental concept in arbitration is that of jurisdiction. This forms the basis of an arbitral tribunal's power to determine the merits of a particular case and also limits the scope of what a tribunal may adjudicate. Jurisdiction is conferred upon an arbitral tribunal through parties' agreement to submit a dispute to arbitration (for example, through an arbitration agreement); unlike national courts, arbitral tribunals do not have inherent jurisdiction to decide a dispute.

4.17 In accordance with the principle of *kompetenz-kompetenz*, a tribunal is the first arbiter of its own jurisdiction. This principle is enshrined in Art 16(1) of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration[16] ("Model Law") and s 21(1) of the AA. A party who is unhappy with a tribunal's decision on jurisdiction may seek recourse to the supervisory courts under s 10 of the IAA or s 21A of the AA.

4.18 The Singapore International Commercial Court ("SICC") had to consider an appeal against a tribunal's positive jurisdiction ruling in *CLQ v CLR*.[17] The plaintiff (who was the respondent in the arbitration) was the Government of Ruritania, while the defendant (the claimant in the arbitration) was a land developer. The parties had entered into a joint venture agreement ("JVA") to develop a site in Ruritania; the JVA was executed by Ruritania's finance minister as the authorised representative of the Government, while one S signed the JVA on behalf of the land developer.

4.19 The JVA provided, amongst other things, that the parties would incorporate a joint venture vehicle ("JVCo") to undertake and execute the land development project. The plaintiff's obligations under the

16 UN Doc A/40/17, annex I; UN Doc A/61/17, annex I (21 June 1985; amended 7 July 2006) (hereinafter "Model Law").

17 [2022] 3 SLR 145.

JVA included an obligation to procure the necessary approvals for the incorporation of the JVCo, as well as the execution of a "master lease agreement" with the JVCo for a 50-year lease of the project site. The JVA contained a dispute resolution clause providing for Singapore-seated arbitration under the SIAC arbitration rules.

4.20 After the JVA was signed, the defendant sought to register the JVCo with the relevant Ruritanian authorities. It was unsuccessful and was unable to obtain any explanation as to why that was the case. The defendant eventually commenced proceedings in the Ruritanian court against certain Ruritanian ministries (but not against the Government of Ruritania) to compel the registration of the JVCo and execution of the master lease agreement. The defendant was ultimately successful in obtaining the orders sought. It bears noting that the defendant and the named Ruritanian ministries fully participated in these court proceedings, and at no time during the course of these court proceedings did the parties refer to the arbitration clause in the JVA.

4.21 Following the Ruritanian court judgment, the JVCo was registered. However, for various reasons, the master lease agreement was not signed, and the development project envisaged under the JVA – for reasons not elaborated upon in the judgment – never took off. Instead, the plaintiff purported to terminate the offer of the master lease agreement and listed the project site for lease in a closed auction.

4.22 The defendant therefore commenced arbitration against the plaintiff pursuant to the terms of the JVA. In the arbitration, the defendant alleged that the plaintiff had repudiated the JVA by failing to lease the project site to the JVCo. The plaintiff objected to the tribunal's jurisdiction on the basis that the defendant had earlier repudiated the arbitration agreement by commencing and pursuing court proceedings in Ruritania.

4.23 The tribunal dismissed the plaintiff's jurisdictional objection, ruling that the defendant's conduct (by commencing the Ruritanian court proceedings) could not objectively be viewed as evincing an intention to abandon the arbitration agreement. Dissatisfied with the tribunal's decision, the plaintiff applied to the Singapore courts pursuant to s 10(3) of the IAA to challenge the tribunal's positive jurisdiction determination.

4.24 The application was heard by a three-judge bench of the SICC and dismissed. The SICC took the view that based on the background and history leading to the Ruritanian court proceedings, it appeared that the defendant did not consider the non-registration of the JVCo to be an issue of non-performance of the JVA at that time. Instead, the defendant had taken this step to compel the relevant Ruritanian ministry to perform

its duty as the companies registrar so that the preliminary steps under the JVA could be achieved and the longer-term relationship under the JVA could be started. The SICC concluded that "it cannot reasonably be inferred that, by commencing and pursuing the [Ruritanian court proceedings], [the defendant] evinced an intention to repudiate the Arbitration Agreement".[18]

4.25 A tribunal's negative ruling on jurisdiction over a party may be challenged in court following the amendment of Art 16(3) of the Model Law by s 10(3) of the IAA in 2012. Parties may apply to the court whenever a tribunal makes a decision on "a plea at any stage of the arbitral proceedings that it has no jurisdiction".[19] In *CJD v CJE*,[20] the ambit of this provision was applied to challenge a tribunal's decision rejecting the joinder of party on the basis that the tribunal held it had "no jurisdiction" to do so under the procedure set out in the applicable rules. The plaintiff, first and second defendants, together with three other parties, were parties to a JVA for the development of a mixed use residential/commercial complex. The agreement contained a dispute resolution clause specifying arbitration under the London Court of International Arbitration ("LCIA") Arbitration Rules (2014)[21] ("LCIA Rules").

4.26 The first defendant commenced arbitration against the plaintiff. The plaintiff then applied to join the second defendant as a party to the arbitration, relying on Art 22.1(viii) of the LCIA Rules, which provided as follows:[22]

> The Arbitral Tribunal shall have the power, upon the application of any party or (save for sub-paragraphs (viii), (ix) and (x) below) upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide:
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> …
>
> (viii) to allow one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented to such joinder in writing following the Commencement Date or (if earlier) in the Arbitration Agreement;

18 *CLQ v CLR* [2022] 3 SLR 145 at [72].
19 International Arbitration Act 1994 (2020 Rev Ed) ss 10(2) and 10(3).
20 [2021] 4 SLR 734.
21 Effective 1 October 2014.
22 In the current 2020 edition of the London Court of International Arbitration Arbitration Rules (effective 1 October 2020), a similar provision is found in Art 22.1(x). While the language is substantially similar, the 2020 edition of the rules required the applicant and the party to be joined to "have consented *expressly* to such joinder in writing" [emphasis added].

> and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration …

4.27 The tribunal declined to join the second defendant as a party to the arbitration as it was of the view that it did not have the "jurisdiction" to do so.

4.28 The plaintiff applied under s 10(3)(*b*) of the IAA to challenge the tribunal's refusal of the joinder application. The High Court judge, citing in support the Court of Appeal's decision in *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime (Pte) Ltd*[23] that a "'plea' on a tribunal's jurisdiction need not be in any specified form",[24] accepted that such a decision required the tribunal to consider its powers under the LCIA Rules to permit a joinder and was thus "in substance, a ruling by the Tribunal on its jurisdiction to order a joinder" [emphasis in original omitted].[25] Counsel appeared not to have addressed the court on the distinction between the power of the tribunal and its jurisdiction. It should be noted that s 10(3) of the IAA and Art 16(3) of the Model Law address the substantive jurisdiction of the tribunal over a disputing party as opposed to whether a procedural rule permits a tribunal to add or join a party who has yet to be impleaded in the arbitration proceeding. The latter falls within the procedural powers and is not a matter of substantive "jurisdiction", a term which the tribunal had unfortunately used. Such a distinction was made in the Court of Appeal's decision in *PT First Media TBK v Astro Nusantara International BV*[26] ("*First Media*"). If a distinction was made in this case, perhaps the court would not need to inquire any further.

4.29 The court, in dismissing the application, quite rightly held that Art 22.1(viii) of the LCIA Rules would not permit the tribunal to order a joinder, notwithstanding that the party to be joined was a party to the arbitration agreement. The court, however, suggested that there was a "doctrine of double separability":[27] while a party may have consented generally to arbitration as a dispute resolution mechanism in the original contract, specific consent is still required before that party may be joined to a specific arbitration reference between other parties to the original contract. This view should, however, be seen only in the context where the agreed procedural rules permit a joinder conditioned in the manner akin to that of the LCIA. The Court of Appeal's use of the term "double separability" in *First Media* was made to emphasise that while procedural

23 [2019] 2 SLR 131.
24 *CJD v CJE* [2021] 4 SLR 734 at [32].
25 *CJD v CJE* [2021] 4 SLR 734 at [34].
26 [2014] 1 SLR 372 at [181].
27 *CJD v CJE* [2021] 4 SLR 734 at [59] and [62].

rules may permit joinder of "other parties", such other parties must nevertheless be parties to the arbitration agreement. Indeed, procedural mechanisms could not of themselves establish substantive arbitral jurisdiction absent an agreement to arbitrate.

4.30 It is indeed ironical that Art 22.1 of the LCIA Rules, which was obviously intended to grant power to join "third persons" (who need not be parties to the arbitration agreement), suffers from this drafting defect that now prevents a party to the arbitration agreement from being joined in the arbitration. In this regard, the ICC and SIAC joinder mechanisms appear to be free from such an abnormality.

## III. Setting aside of awards

4.31 The primary recourse for a party dissatisfied with the outcome of an international arbitration is to apply to set aside the award. There were 21 applications to set aside arbitration awards that were reported in 2021, of which six applications were allowed, either in whole or in party.

4.32 An application for setting aside may only be made on limited grounds – six grounds are specified in Art 34(2) of the Model Law, and two are listed in s 24 of the IAA. The main grounds relied upon in the 2021 reported cases are as follows:

(a) The award contains decisions on matters beyond the scope of the submission to arbitration.[28]

(b) There has been a breach of natural justice in the making of the award.[29]

(c) The party making the application was unable to present his case.[30]

These grounds are frequently deployed together in a single setting-aside application.

4.33 In line with the policy of minimal judicial interference in arbitration proceedings, the Singapore courts, when reviewing an award in a setting-aside application, would read through an award supportively "in a manner that is likely to uphold it rather than to destroy it".[31] In

28 Model Law Art 34(2)(iii).
29 International Arbitration Act 1994 (2020 Rev Ed) s 24(*b*).
30 Model Law Art 34(2)(iii).
31 *CNQ v CNR* [2021] SGHC 287, citing *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86.

addition, it is not the court's function to "assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process"[32] or nit-pick at the award.[33]

### *A. Article 34(2)(iii) of the Model Law: Outside the scope of the submission to arbitration*

#### *(1) Role of pleadings in defining scope of submission arbitration*

4.34 It is trite that the role of pleadings in arbitration is less significant than in court proceedings. While pleadings provide a convenient way for parties to define the jurisdiction of the arbitral tribunal, they should not be construed too narrowly;[34] "any new fact or change in the law arising after a submission to arbitration which is ancillary to the dispute submitted for arbitration and which is known to all parties to the arbitration is part of that dispute and need not be specifically pleaded".[35] Further, the courts take a practical view as to the substance of the dispute being referred to arbitration.[36]

4.35 In *CDM v CDP*,[37] a dispute had arisen between parties in respect of an agreement for the design, build, sale and delivery of a vessel. The vessel was purportedly launched on 20 January 2015, and then relaunched on 3 May 2015 after certain outstanding issues were resolved. Further to the second launch, and pursuant to the terms of the parties' agreement, the respondent-builder issued an invoice for payment to the appellants.

4.36 The appellants, however, refused to make payment, and the respondent commenced arbitration seeking the outstanding sums. The tribunal found in its award that there was no valid reason for the appellants to withhold payment and ordered payment be made to the respondent. The appellants thereafter applied to set aside the award, contending that the tribunal had exceeded the scope of the parties' submission to arbitration in ordering payment.

4.37 The appellants argued that when the respondent commenced arbitration, it did not make any reference in the notice of arbitration and

32 *CNQ v CNR* [2021] SGHC 287, citing *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86.
33 *CNQ v CNR* [2021] SGHC 287, citing *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972.
34 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [33] and [47].
35 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [47].
36 *Prometheus Marine Pte Ltd v King, Ann Rita* [2018] 1 SLR 1 at [58].
37 [2021] 2 SLR 235.

statement of claim to the second launch as providing the basis for payment being due. The Court of Appeal rejected this argument, noting that (a) the appellants' own defence and counterclaim filed in the arbitration made express reference to the second launch and approval thereof; and (b) the issue of the second launch was included not only in the parties' agreed list of issues but also in the parties' opening and closing submissions, and the evidence adduced in the arbitration. In the circumstances, the appellants' contention that the tribunal had exceeded its jurisdiction in determining the validity of the second launch and the appellants' obligation to make payment was unsustainable.

4.38 A different result was reached in *CIZ v CJA*[38] ("*CIZ*"), where the High Court set aside a final award on the basis that the tribunal had exceeded the scope of submission to arbitration. The dispute related to a consultancy agreement under which the defendant provided business consultancy and advisory services on acquiring interests in oil and gas fields to the plaintiff. The consultancy agreement provided that in the event certain conditions were satisfied, the defendant would be entitled to a "success fee".

4.39 The defendant subsequently commenced arbitration against the plaintiff for non-payment of success fees for two business opportunities, X and Y, that the defendant had purportedly presented to the plaintiff. As the term of the consultancy agreement had expired, the defendant's claim in the arbitration was premised on (a) an oral agreement for the extension of the original consultancy agreement; (b) an implied contract between the parties on the same terms as the original consultancy agreement; or (c) estoppel.

4.40 The tribunal found in favour of the defendant in relation to opportunity X. In coming to its decision, the tribunal found that there was neither an oral nor an implied agreement between the parties, and that the consultancy agreement was not extended after its original expiry date. However, the tribunal determined that the plaintiff was still entitled to payment of success fees "as long as a clear link to the successful completion of the opportunity"[39] was shown.

4.41 The plaintiff applied to set aside the award on the basis that, *inter alia*, the scope of the submission to arbitration had been exceeded. The High Court agreed with the plaintiff, holding that the tribunal's finding that the defendant was entitled to payment of success fees "was based on grounds that were entirely different from the defendant's case

38 [2021] SGHC 178.
39 *CIZ v CJA* [2021] SGHC 178 at [36].

in the arbitration proceedings" and that "[i]t was not possible to describe the Tribunal's findings as being ancillary to the matter submitted to arbitration".[40] The court noted that "[n]owhere in the defendant's Notice of Arbitration, pleadings or submissions in the arbitration proceedings did the defendant claim it was entitled to the Success Fee on [the grounds relied upon by the tribunal]", and that "it was never the defendant's case in the arbitration proceedings that it had a valid claim if there was no subsisting agreement after the [consultancy agreement] expired".[41]

4.42 The tribunal's award in relation to opportunity X was consequently set aside. This decision underscores the importance of framing claims carefully and ensuring that such claims as framed fall within the scope of the arbitration agreement.

4.43 In the Court of Appeal decision of *CAJ v CAI*[42] ("*CAJ*"), the applicants successfully set aside part of an arbitral award on the ground that the tribunal had exceeded the scope of submission to arbitration. The parties' dispute concerned two contracts for the construction of a polycrystalline silicon plant. During the construction process, issues arose in relation to excessive vibrations of certain machinery in the plant, which were eventually rectified allegedly on the plant owner's instruction.

4.44 The plant owner commenced arbitration against the appellants ("CAJ"), and the respondent ("CAI") was later joined to the proceedings as an assignee of the owner's claims. In the arbitration, CAI sought liquidated damages on the basis of a 144-day delay to the mechanical completion of the plant. CAJ, however, contended that mechanical completion had in fact been achieved on time, the vibrations did not materially affect the operation or the safety of the plant, and any delay was the result of the owner's instruction. In these circumstances, CAJ argued that CAI had waived its right to liquidated damages or was estopped from claiming such damages.

4.45 It was common ground that CAJ's pleadings in the arbitration did not contain any assertion of a contractual entitlement to an extension of time so as to reduce the amount of liquidated damages payable ("the EOT Defence"). CAJ also conceded that the EOT Defence had been raised for the first time only in the written closing submissions in the arbitration.

4.46 In the award, the tribunal found that CAJ failed to achieve mechanical completion on time, and the defence based on estoppel was

40 *CIZ v CJA* [2021] SGHC 178 at [59].
41 *CIZ v CJA* [2021] SGHC 178 at [56].
42 [2022] 1 SLR 505.

rejected. However, the tribunal accepted CAJ's EOT Defence, finding that the defence was "perfectly capable of consideration"[43] by the tribunal because CAI had been given the opportunity to make submissions in response to CAJ's arguments in written closing submissions. Moreover, CAJ was entitled to make use of existing evidence in the arbitration to make good the EOT Defence. Arising from this, the tribunal determined that CAJ was entitled to an extension of time of 25 days, with the result that CAI was only entitled to liquidated damages for 74 days of delay instead of 99 days.

4.47 CAI applied to set aside the part of the award granting the extension of time on the basis that the tribunal had exceeded the scope of the parties' submission to arbitration and/or the award had been made in breach of natural justice.

4.48 The Court of Appeal upheld the High Court's decision to set aside the part of the award allowing a 25-day extension of time. The Court of Appeal considered that the EOT Defence, which arose from a contractual provision with specific express conditions, was fact-sensitive and necessarily required particulars to be pleaded and evidence to be led. It was not merely an issue which arose naturally from the arbitration. The Court of Appeal further noted that the EOT Defence could not be said to have come within the scope of the arbitration as it had not been raised expressly in the pleadings, the list of issues or the terms of reference.

4.49 While CAI did in fact make submission on the merits of the EOT Defence, the Court of Appeal nevertheless held that it could not be precluded from seeking to set aside the award as the EOT Defence was "undoubtedly foisted" on the respondent at the eleventh hour of the arbitration, and there was no dispute that the respondent had "seriously opposed the raising of this new defence".[44]

4.50 In these circumstances, the tribunal's decision to grant a 25-day extension of time to CAJ was "unequivocally in excess of its jurisdiction and in breach of natural justice".[45] In the Court of Appeal's view, the correct procedure to introduce the EOT Defence in the proceedings was for the tribunal "to invite submissions from the parties as to whether an amendment to the pleadings to include the EOT Defence should be allowed"; "if allowed, it would lead to various consequential orders such as consequential amendments to the respondent's pleadings, specific

43 *CAJ v CAI* [2022] 1 SLR 505 at [10].
44 *CAJ v CAI* [2022] 1 SLR 505 at [65].
45 *CAJ v CAI* [2022] 1 SLR 505 at [26].

discovery, leave to adduce fresh evidence (both factual and expert) to meet the new EOT Defence, and recalling witnesses for cross-examination".[46]

4.51 In *Convexity Ltd v Phoenixfin Pte Ltd*[47] ("*Convexity*"), Phoenixfin Pte Ltd ("Phoenixfin") had engaged Convexity Ltd ("Convexity") to provide services on the terms of a services agreement. The agreement was for an initial 24-month term, governed by English law, and provided that in the event of early termination, Phoenixfin had to pay Convexity a "Make Whole Amount", unless the termination was the result of certain specific grounds under the agreement.

4.52 Phoenixfin terminated the agreement after ten months and Convexity commenced arbitration in October 2019 seeking the "Make Whole Amount". Phoenixfin did not plead in its defence and counterclaim in the arbitration that the "Make Whole Amount" provision in the agreement was a penalty ("the Penalty Issue"). Instead, the Penalty Issue was first raised in April 2020, when Phoenixfin circulated a list of witnesses which included a legal expert on English law. Phoenixfin explained that the intention was for the legal expert to give evidence on whether the Penalty Issue was under English law.

4.53 It is not disputed that:

(a) an agreed list of issues was filed by the parties, as well as individual lists containing issues which were not agreed. The Penalty Issue was not included in any of the lists;

(b) the tribunal agreed with Convexity that an expert witness was not required; instead, the legal expert could be co-counsel with Phoenixfin's counsel and make submissions on English law; and

(c) Phoenixfin applied to amend its defence and counterclaim but was disallowed.

However, at the hearing of oral reply submissions, the tribunal asked Convexity's counsel to address the Penalty Issue in a "fulsome manner".[48] The judgment recorded that the claimant's counsel objected to this "but the tribunal was insistent on dealing with the Penalty Issue".[49] In correspondence and directions that followed, Convexity maintained its objections to the Penalty Issue, while the tribunal maintained that it was in issue.

46 *CAJ v CAI* [2022] 1 SLR 505 at [40].
47 [2021] SGHC 88.
48 *Convexity Ltd v Phoenixfin Pte Ltd* [2021] SGHC 88 at [26].
49 *Convexity Ltd v Phoenixfin Pte Ltd* [2021] SGHC 88 at [26].

4.54 In its final award, the tribunal dismissed all of Convexity's claims in the arbitration on the sole basis of the Penalty Issue. Convexity applied to set aside the award, which was granted by the High Court. The court considered that the Penalty Issue was "a question of fact and law"[50] and must have been pleaded; the tribunal's rejection of Phoenixfin's amendment application meant that the Penalty Issue was never properly introduced into the arbitration.[51] Consequently, the tribunal's award based on the Penalty Issue was out of scope of the submission to arbitration and ought to be set aside.

4.55 The court appeared to place a lot of emphasis on the fact that the tribunal had misapprehended Convexity's objection. While it is true that the tribunal could have been more vigilant and consistent in its rulings on the Penalty Issue, the court appeared to adopt the position that once an objection is taken it has to be accepted by the tribunal. The question of whether a particular provision is a penalty has an element of public policy as if so found, it may render the same unenforceable. A tribunal should be expected to insist that such an issue be addressed even if the parties do not think so. The tribunal has the overriding duty to ensure that its holding is compliant with the applicable law of the seat and the law applicable to the contract. It is curious that the court should suggest that the plaintiff should be allowed to keep the issue out of the arbitration.

4.56 Of the cases considered above, *Convexity* is perhaps most difficult to reconcile with the general approach towards pleadings in arbitration. Unlike *CIZ*[52] and *CAJ*,[53] the Penalty Issue and the relevance of English law were made known to parties at least a month before the merits hearing. Further, while certain facts and particulars would have to be formally pleaded in support of this issue, the Penalty Issue appeared – at least based on the facts and information set out in the judgment – to be more a matter for English law submissions rather than factual witness testimony. Finally, the *Convexity* tribunal specifically requested that parties address the Penalty Issue fully and gave the parties time to do so. In these circumstances, if one were indeed to take a practical approach in considering what had been referred to arbitration, it would seem to allow for the inclusion of the Penalty Issue rather than its exclusion.

50 *Convexity Ltd v Phoenixfin Pte Ltd* [2021] SGHC 88 at [33].
51 *Convexity Ltd v Phoenixfin Pte Ltd* [2021] SGHC 88 at [26] and [33]–[38].
52 See para 4.38 above,
53 See para 4.43 above.

*(2) Award not based on "crux" or "focus" of parties' arguments*

4.57 An award is not out of scope of a submission to arbitration merely because the tribunal's decision turned on an argument not considered by a party to be the main focus of its case. In *CDM v CDP*,[54] the appellants argued that the second launch and approval of the second launch did not form the "crux" or "focus" of the parties' respective cases in the arbitration. Consequently, the tribunal's final award finding that payment was due from the appellants to the respondents following the second launch exceeded the tribunal's jurisdiction.

4.58 The Court of Appeal disagreed with the appellants' arguments, noting that "the fact that a party to arbitration has formed the view that the tribunal had decided the dispute on a matter which it perceived as not being the 'focus' or 'crux' of the dispute is not a basis for asserting that the tribunal had acted in excess of jurisdiction".[55] This is because whether a particular aspect of the dispute is identified as a "focus" or not, and the amount of time dedicated to an issue, may turn simply on the counsel's competence and ability to identify the central issues, or a strategic decision whether to deal with an issue at length or only briefly. The length and detail of parties' submissions on an issue does not detract from the fact that the issue is already within the tribunal's jurisdiction.

4.59 Counsel should exercise care when framing the scope of submission to arbitration and the submissions to be made in support of issues to be determined. An issue which may be the subject of extensive submissions may not be the one relied upon by the tribunal in coming to a decision; on the other hand, a tribunal's determination of an issue may turn on a secondary or ancillary argument. There need not always be an identity of arguments or reasoning between counsel and that of the tribunal. A tribunal is at liberty to analyse and reason in the manner it wishes and is not required to adopt any party's position or view of the matter.

*(3) Introduction of new claims or causes of action – Role of the tribunal*

4.60 In *CBX v CBZ*[56] ("*CBX*"), the Court of Appeal reversed an earlier decision by the SICC and ordered three ICC awards (two partial awards and a costs award) to be set aside. The parties' dispute related to two share sale and purchase agreements ("SSPAs") for shares in two companies

54 The facts of which are set out at paras 4.35–4.37 above.
55 *CDM v CDP* [2021] 2 SLR 235 at [44].
56 [2022] 1 SLR 47.

which indirectly owned several windfarm projects. Both SSPAs were subject to Thai law, and the agreements provided for arbitration under the ICC Rules of Arbitration[57] and a Singapore seat.

4.61 Disputes arose between the parties which led to the sellers commencing two arbitrations against the buyers for breaches of the SSPAs ("the sellers' arbitrations"). In the sellers' arbitrations, the sellers sought payment of instalments that had fallen due but were unpaid, as well as accelerated payment of future sums ("the Remaining Amounts"). At the time the sellers commenced arbitration, none of the Remaining Amounts were due to be paid. The same tribunal was appointed in respect of both sellers' arbitrations.

4.62 While the sellers' arbitrations were ongoing, the buyers commenced a third arbitration ("the ALRO arbitration") against the sellers to determine, amongst other things, whether the Remaining Amounts could ever become payable due to changes in Thai zoning regulations which would impact the buyers' ability to procure land leases for the windfarms.

4.63 The tribunal in the sellers' arbitrations eventually issued two partial awards and a final costs award in favour of the sellers. While the tribunal rejected the sellers' claim for accelerated payment as having no contractual or statutory basis, the tribunal nonetheless ordered the buyers to pay the Remaining Amounts to the sellers, reasoning that by the time the partial awards were issued, "the first tranches of the Remaining Amounts were already due", "the second and third tranches would in the ordinary course become due, independently of any acceleration", and "all the payments under Schedule 5 [of the SSPAs]" would "now become due and payable, from the date of the Partial Award".[58] The tribunal also ordered compound interest to accrue on the Remaining Amounts at 15% per annum.

4.64 The buyers applied to set aside parts of both partial awards on the basis that the awards had exceeded the scope of submission to arbitration. The buyers argued that the Remaining Amounts were not within the scope of the submission to arbitration unless the tribunal found the sellers entitled to accelerated payment (which it did not do so), and the interest rate ordered exceeded that which was permitted under Thai law. The buyers also applied to set aside the costs award on the basis that that award would fall if the partial awards were set aside in whole or in part.

57 Effective 1 March 2017.
58 *CBX v CBZ* [2022] 1 SLR 47 at [6].

4.65 At first instance, the SICC dismissed the setting-aside application. The Court of Appeal reversed the lower court's decision, setting aside the partial awards in so far as they ordered payment of the Remaining Amounts. The Court of Appeal held that the buyers had never accepted the claims for the Remaining Amounts as coming within the tribunal's jurisdiction, instead maintaining that this issue fell within the jurisdiction of the ALRO arbitration. Although the tribunal expressed its understanding and intention to leave the land lease issue to the ALRO arbitration tribunal, by ordering payment of the Remaining Amounts, the tribunal raised *res judicata* issues for the ALRO arbitration. The tribunal's decision on the Remaining Amounts also could not be reconciled with the tribunal's intention to leave the land lease issue to the ALRO arbitration.

4.66 The Court of Appeal also ordered the tribunal's order for compound interest to be set aside. The parties had in fact agreed that the compound interest provisions in the SSPAs were illegal and unenforceable under Thai law. In light of the parties' agreement, the Court of Appeal held that there was no room for the tribunal to make a determination on compound interest.

4.67 For arbitrators, *CBX* serves as an important lesson on how to manage the introduction of new claims or causes of action. Where an objection is raised to new claims or causes of action, it must be dealt with by the tribunal (whether by allowing the new claim or rejecting it), failing which the tribunal would have no jurisdiction to make any determination on that claim. As noted by the Court of Appeal, the introduction of new claims or new causes of action "must require … clear identification and admission by the arbitration tribunal, even if that were only to occur by conduct rather than express words or a pleading amendment".[59] In this case, the buyers had expressly raised the issue of jurisdiction over the Remaining Amounts other than by way of acceleration. The onus then fell on the tribunal to make a determination on this issue, which it did not. As a result, the tribunal should not have decided on the claim for the Remaining Amounts altogether.

### *B. Section 24(2) of the International Arbitration Act: Breach of natural justice*

4.68 Section 24(2) of the IAA empowers the supervisory court to set aside an award if "a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced". As noted earlier, applicants in a setting-aside

59 *CBX v CBZ* [2022] 1 SLR 47 at [51].

application often rely on multiple grounds to support their application, and it is common to see an application premised on a combination of grounds in Art 34(2) of the Model Law and s 24(2) of the IAA.

*(1) Fair hearing rule*

4.69 The right to a fair hearing is one of the two pillars of common law rules of natural justice. For a hearing to be fair, there must be (a) sufficient notice of a case to a party in order to allow adequate preparation; (b) knowledge of the evidence that has been produced against a party; and (c) opportunity to contest or respond to evidence, and to state one's case before the adjudicator.

4.70 The High Court set aside a final award in *BZV v BZW*[60] ("*BZV*"), holding that the tribunal had breached the rules of natural justice in connection with the making of the award. The disputes in this case related to a shipbuilding contract between the plaintiff (as buyer) and the defendants (as sellers). The plaintiff commenced an SIAC arbitration against the defendants, seeking damages for delay in delivery ("the Delay Claim") as well as breaches of contract arising from incorrect installation of certain generators ("the IP44 Claim"). The defendants counterclaimed against the plaintiff, seeking payment for work done. By an award dated 25 October 2018 (read together with an addendum dated 16 January 2019), the tribunal dismissed the claims and the counterclaim.

4.71 The plaintiff applied to set aside the award (save for the part dismissing the counterclaim). At first instance, the High Court judge undertook a detailed review of the tribunal's analysis of the claims, counterclaim and defences put forward in the arbitration, as well as the tribunal's eventual findings and determination. The judge concluded that the tribunal had breached the fair hearing rule as:

> (a) there was no nexus between the tribunal's chain of reasoning and the parties' cases in relation to the Delay Claim. In particular, the tribunal had "failed completely to identify for determination, let alone apply its mind to determine"[61] to the issue of whether the plaintiff's preventative act had caused the defendants to be unable to deliver the vessel on time; and
>
> (b) there was similarly no nexus between the tribunal's dismissal of the IP44 Claim and the defendants' defences.

60 [2022] 3 SLR 447.
61 *BZV v BZW* [2022] 3 SLR 447 at [149].

4.72 The tribunal's breach of natural justice in relation to the Delay Claim and the IP44 Claim was "causally connected to the making of the award".[62] The plaintiff was clearly prejudiced as, if the tribunal had applied its mind to the parties' respective cases and the essential issues arising from the parties' arguments, "it certainly *could* have found in favour of the plaintiff" [emphasis in original] on both the Delay Claim and the IP44 Claim.[63]

4.73 The High Court judge also had strong words of criticism for what he described as a "general" and "self-serving" paragraph in the award where the tribunal claimed to have "considered in detail such documents and submissions" even if they had not been specifically mentioned.[64] He held that such statements could not "immunise an award against an allegation that the tribunal has breached the fair hearing rule".[65]

4.74 On appeal, the Court of Appeal upheld the lower court's decision to set aside the award, agreeing that the manner in which the tribunal had dealt with the Delay Claim and the IP44 Claim breached the rules of natural justice.[66] The Court of Appeal further cautioned that:[67]

> … [t]he fair hearing principle requires that a tribunal pays attention to what is put before it and gives its reasoned decision on the arguments and evidence presented. If its decision is manifestly incoherent, this requirement would not be met. A manifestly incoherent decision shows that the tribunal has not understood or dealt with the case at all and, in our view, that would mean that parties have not been accorded a fair hearing.

4.75 The defendants (appellants in the appeal) also contended that the High Court judge had overstepped by examining the award and the arbitration record in such minute detail. The Court of Appeal, while agreeing that a detailed study of an award and the corresponding record was not generally required, stated that it was necessary in this case given the nature of allegations that had been made against the tribunal's reasoning and award.[68]

4.76 *BZV* reminds arbitrators of its duty to decide on the matters placed before it judiciously and express its reasons cogently. The mere recital of facts and parties' arguments without a clear expression or logical

62 *BZV v BZW* [2022] 3 SLR 447 at [206]–[210].
63 *BZV v BZW* [2022] 3 SLR 447 at [213].
64 *BZV v BZW* [2022] 3 SLR 447 at [127] and [128].
65 *BZV v BZW* [2022] 3 SLR 447 at [128].
66 *BZW v BZV* [2022] SGCA 1. While the appeal was heard in 2021, the Court of Appeal's grounds of decision was released in January 2022.
67 *BZW v BZV* [2022] SGCA 1 at [56].
68 *BZW v BZV* [2022] SGCA 1 at [54].

and cogent presentation of how it got from point A to point B would show up the tribunal's lack of understanding of the issues or failure to deal with the evidence and arguments. While clerical and computational errors are correctable, such lapses are not.

4.77 The Court of Appeal had also set aside the award in *CAJ*[69] on the basis of s 24(*b*) of the IAA. The facts of this case have already been summarised above.[70] There, in addition to arguing that the scope of the submission to arbitration had been exceeded, CAI also contended that the tribunal had breached the rules of natural justice in making the award. The Court of Appeal noted that CAI did not have reasonable notice that it had to engage with the EOT Defence until that defence appeared in CAJ's written closing submissions, and that the tribunal made no reference to the evidence adduced by CAJ when it granted the 25-day extension of time. Instead, the tribunal had relied – whether in whole or in part – on its own experience in arriving at this decision. The failure to accord CAI an opportunity to address the tribunal's "experience" constituted a breach of natural justice.

4.78 The Court of Appeal cautioned that:[71]

> … [a] Tribunal's *prior experience* dealing with extension of time claims for *other construction projects* would be immaterial in deciding on the appropriate extension of time *in this case* without the benefit of pleadings, specific evidence (both factual and expert) and arguments to determine the proper extension of time to be granted. [emphasis in original]

4.79 The decisions in *BZV*[72] and *CAJ* serve as important reminders to arbitrators that while arbitrators may rely to a certain extent on their expertise and experience in coming to a decision, such decision should always be predicated upon the material and evidence that has been placed before them.

4.80 However, the mere failure to fully restate a parties' arguments in the award is not *per se* a breach of natural justice or failure to give it a right to be heard. The plaintiff (who was the claimant in the arbitration) in *CIX v CIY*[73] sought to set aside certain findings in the tribunal's partial award on the basis that the tribunal had failed to consider its arguments in coming to a decision. The High Court dismissed the application,

69 See para 4.43 above.
70 See paras 4.43–4.47 above.
71 *CAJ v CAI* [2022] 1 SLR 505 at [55].
72 See para 4.70 above.
73 [2021] SGHC 53.

finding that there was no "clear and virtually inescapable"[74] inference that the tribunal had failed to consider the plaintiff's contentions. A tribunal's failure to mention certain arguments or submissions in an award does not mean that the tribunal has breached such a duty.

4.81 Similarly, in *Year Sun Chemitanks Terminal Corp v Gunvor Singapore Pte Ltd*,[75] the plaintiff (the claimant in the arbitration) also alleged that the tribunal had failed to consider or address points raised by the parties. In particular, the plaintiff argued that the arbitrator had failed to consider or apply his mind to the plaintiff's arguments on the issue of whether the defendant had "proven its losses to entitle it to claim for the same" as the plaintiff must "prove its losses in the first place before damages can be assessed".[76] The disputes in the arbitration concerned two contracts for the sale of gasoil by the defendant (as seller) to the plaintiff (as buyer). The plaintiff alleged that in respect of the first contract (under which the plaintiff only took partial delivery), there were issues with the quality of the supplied gasoil which led to the plaintiff having to compensate a third party. On the basis of the alleged quality issues, the plaintiff refused to take delivery of gasoil to be delivered under the second contract. It commenced arbitration seeking, *inter alia*, a return of sums received by the defendant from the plaintiff, as well as certain declaratory relief in relation to the second contract. The defendant counterclaimed for damages arising from the plaintiff's refusal to take delivery of the agreed quantity of gasoil under the two contracts, to be calculated based on s 50(3) of the Sale of Goods Act.[77]

4.82 The tribunal found in favour of the defendant, holding that the plaintiff had breached both contracts. The High Court judge dismissed the setting-aside application, holding that the arbitrator had considered and understood the thrust of the plaintiff's arguments, and that there was no clear and inescapable inference that the arbitrator had failed to give any consideration to the plaintiff's arguments. The judge further noted that if the plaintiff's intention was to advance or apply a particular argument to a number of issues in the arbitration proceeding, "it is incumbent on the plaintiff to raise the point or argument clearly before the Tribunal at the material time in the arbitration proceedings".[78]

74 *CIX v CIY* [2021] SGHC 53 at [15].
75 [2021] SGHC 229.
76 *Year Sun Chemitanks Terminal Corp v Gunvor Singapore Pte Ltd* [2021] SGHC 229 at [18].
77 Cap 393, 1999 Rev Ed.
78 *Year Sun Chemitanks Terminal Corp v Gunvor Singapore Pte Ltd* [2021] SGHC 229 at [45].

*(2) Denial of the opportunity to present its case*

4.83 The plaintiff in *Year Sun Chemitanks Terminal Corp v Gunvor Singapore Pte Ltd* also argued that it was not given a full or reasonable opportunity to be heard due to the arbitrator's direction "not to submit expert evidence on certain aspects of industry practice".[79] The plaintiff contended that had the arbitrator not disallowed the plaintiff's application to adduce exert evidence on the survivability of a certain clause in the contracts, the plaintiff "would not have been ordered to indemnify the defendant with respect to the relevant fines and penalties that may have been imposed on the defendant".[80]

4.84 This argument was similarly dismissed by the High Court, which held that the arbitrator's decision to disallow expert evidence was "well within the ambit of the wide discretionary powers of the Arbitrator to determine matters pertaining to procedure and evidence, as well as the deference given to arbitrators on such matters" and did not fall "outside the range of what a reasonable and fair-minded tribunal in those circumstances might have done".[81]

4.85 In *CIM v CIN*,[82] the parties had entered into a contract for the sale and purchase of clinker. CIM (as seller) failed to deliver the agreed quantities of clinker which led CIN (the buyer) to commence arbitration seeking damages arising from the undelivered amounts.

4.86 One of CIM's defences in the arbitration was that it was not obliged to deliver clinker because CIN did not fulfil the conditions precedent of agreeing on a laycan or nominating a vessel. CIN denied that there were any applicable conditions precedent and argued that CIM was "relying on its own failures to agree on the shipment loading laycan".[83] While CIN's pleadings suggested that it was relying on the prevention principle as part of its defence, this was never expressly stated. CIM appeared to have understood CIN's arguments to be premised on anticipatory breach and approached it on this basis throughout the arbitration. It was only in its written reply closing submissions that CIN expressly referred to the prevention principle and highlighted CIM's apparent misunderstanding of CIN's case. The procedural timetable did not allow CIM to reply to

79 *Year Sun Chemitanks Terminal Corp v Gunvor Singapore Pte Ltd* [2021] SGHC 229 at [19].
80 *Year Sun Chemitanks Terminal Corp v Gunvor Singapore Pte Ltd* [2021] SGHC 229 at [19].
81 *Year Sun Chemitanks Terminal Corp v Gunvor Singapore Pte Ltd* [2021] SGHC 229 at [66].
82 [2021] 4 SLR 1176.
83 *CIM v CIN* [2021] 4 SLR 1176 at [7].

CIN's written reply closing submissions, and CIM did not apply for leave to do so.

4.87 In its award, the tribunal accepted CIN's case and found, *inter alia*, that the conditions precedent relied upon by CIM entailed a mutual obligation to engage in good faith and attempt to agree on reasonable laycans. CIM had breached this obligation and therefore could not rely on the non-fulfilment of these conditions precedent to excuse its own failure to deliver. CIM applied to set aside the award on the basis that there was a breach of the rules of natural justice pursuant to s 24(*b*) of the IAA, CIM had been deprived of an opportunity to present its case pursuant to Art 34(2)(a)(ii) of the Model Law, and the tribunal's findings went beyond the scope of submission to arbitration, contrary to Art 34(2)(a)(iii) of the Model Law.

4.88 The High Court dismissed the application, holding that the tribunal was entitled to come to its decision based on the prevention principle since that principle had been put forward in CIN's statement of reply and raised consistently throughout the course of the arbitration. CIM's failure to foresee the possibility of the tribunal's chain of reasoning, or its misapprehension of CIN's case where it should reasonably have done so, were insufficient to set aside the arbitral award.

4.89 Finally, in *CMJ v CML*,[84] the plaintiffs (the claimants in the arbitration) tried to set aside an arbitral award on the basis that they had not been given a full opportunity to present their case. In the arbitration, the plaintiffs sought declarations that the defendants had breached certain contracts and duties under Chinese law (which was the applicable substantive law of the contract) and damages. The defendants denied the claims and counterclaimed for alleged breaches by the plaintiffs. In its award, the tribunal dismissed all the plaintiffs' claims but upheld the counterclaim to a limited extent.

4.90 The plaintiffs' setting-aside application was premised on the following:

(a) The tribunal failed to allow the plaintiffs to admit two witness statements to respond to new factual issues raised in the defendants' rejoinder, thereby denying the plaintiffs a full opportunity to present their case.

(b) The tribunal had denied the plaintiffs' expert the opportunity to state his reasons and areas of disagreement in the joint expert report.

84 [2022] 3 SLR 319.

> (c) The tribunal failed to give adequate reasons for its decision and failed to apply its mind to important aspects of the plaintiffs' submissions.

4.91 The SICC dismissed the setting-aside application, holding that the tribunal's conduct and procedure adopted in the arbitration could not be considered as falling outside the range of what a reasonable and fair-minded tribunal might have done in the circumstances of the case. Further, the tribunal's refusal to admit two witness statements was:[85]

> … an exercise of discretion based upon [the tribunal's] analysis of the nature of the evidence, the proximity of the hearing, the fact that the experts would have to consider the new evidence when they were already in the final stages of drafting the [joint expert reports] and the fact that [the defendant] would not have an opportunity to peruse and respond to the evidence before the hearing.

Instead, the tribunal allowed the plaintiffs' witness 30 minutes to give evidence-in-chief. The plaintiffs did not thereafter protest that the inability to adduce further materials made it impossible for the witness to give evidence.

4.92 As can be seen from the cases addressed in this section, s 24(*b*) of the IAA has been regularly invoked far too much as a sweeping up provision to cover all perceived shortcomings in the arbitration process. Parties should bear in mind that although the terms "breach of natural justice" and "inability to prevent its case" sound at first blush to be wide, their scope is in fact a narrow one; one that requires the applicant to show a specific lapse on the tribunal's part that disables or denies the applicant the opportunity of presenting its case. The burden lies with the applicant to prove this is so.

### *C. Remission to the tribunal*

4.93 A court may, in lieu of setting aside an award, suspend the setting-aside proceedings and remit the award to the same tribunal which may "resume the arbitral proceedings or take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside".[86] The effect of this provision is to confer further jurisdiction on the tribunal in order to consider the matters remitted.

4.94 The SICC had the opportunity to provide guidance on the considerations for remission in *CKG v CKH*.[87] The plaintiff (who was

85 *CMJ v CML* [2022] 3 SLR 319 at [62].
86 Model Law Art 34(4).
87 [2021] 5 SLR 84.

the respondent in the arbitration) applied to set aside certain paragraphs of the dispositive section of an award on the basis that the tribunal had failed to consider and take into account a debt owed by the defendant to the plaintiff ("the Principal Debt"). If the Principal Debt had been taken into account, it would have reversed the final sums payable by the plaintiff to the defendant and affected the interest and costs figures in the award.

4.95 The SICC agreed with the plaintiff that the tribunal had failed to take into account the Principal Debt issue, which was an issue in the arbitration. This failure constituted a breach of the rules of natural justice for which setting aside was *prima facie* the appropriate remedy. In assessing whether it would be appropriate to suspend the setting-aside proceedings and order remission to the tribunal, the SICC considered:

> (a) the number of issues which the tribunal had determined which were not subject to any challenge;
>
> (b) whether there could be confidence that the tribunal could approach the matter (which it had failed to decide earlier) in a balanced and open-minded way; and
>
> (c) what the ancillary matters relating to the issue to be remitted (for example, costs) were that would make it unfeasible for a new tribunal to determine the remitted issue.

4.96 The SICC concluded that this case was appropriate for remission due to the: (i) limited number of issues being challenged (compared with the number of issues decided by the tribunal which were not the subject of any challenge); (ii) distinction of the tribunal and its ability to relook its earlier decision in a balanced and open-minded way; (iii) challenges a new tribunal may face in determining not just the Principal Debt but also ancillary matters of costs and interest; and (iv) potential difficulties that could arise for the unchallenged parts of the award.

4.97 The question of remission was also considered in *BZV*.[88] BZW (the defendant in the setting-aside application and appellant on appeal) argued that even if the grounds for setting aside the award were established, the court should nonetheless suspend the setting-aside proceedings and remit the award to the tribunal pursuant to Art 34(4) of the Model Law. The High Court judge refused to exercise his discretion to remit the award as the breaches of natural justice were "fundamental and woven deeply into the analytical exercise which the tribunal undertook and reasoned".[89] In order to eliminate the grounds for setting aside – which is the object of

88 See para 4.70 above.
89 *BZV v BZW* [2022] 3 SLR 447 at [222].

the power of remission – the tribunal would be required to analyse and consider the issues and arguments afresh.[90] The court considered this to be a difficult task. Further, there was little confidence that the plaintiff would have a genuine opportunity to persuade the tribunal to arrive at a different result even if the award were remitted.[91]

4.98 On appeal in *BZW v BZV*,[92] the Court of Appeal agreed that remission to the tribunal was not appropriate in this case as:

(a) the tribunal's breach did not involve a single isolated or standalone issue. Instead, the tribunal "failed entirely to appreciate the correct questions it had to pose to itself, let alone apply its mind to determining those questions".[93]

(b) there was a risk that the tribunal could subconsciously be tempted to reach the same conclusion as before. On the facts, a reasonable person would not have confidence in the tribunal's ability to come to a fair and balanced conclusion on the issues if the award was remitted; and

(c) there were no benefits to the parties in terms of time and costs savings as a substantial period of time had passed since the tribunal last heard evidence and submissions.

### *D. Procedural considerations*

4.99 The setting-aside cases also addressed a number of interesting procedural issues relating to when a setting-aside application is considered made and the timelines applicable for an application under Art 34 of the Model Law in the context of a multi-party arbitration.

#### *(1) When is an application to set aside an award "made"?*

4.100 Article 34(3) of the Model Law prescribes a three-month time limit for an application for setting aside to be made. That time limit is calculated from the date on which the party making the application received the award; if a request for correction, interpretation or for an additional award under Art 33 of the Model Law has been made, the three-month time limit runs from the date on which the request had been disposed of by the arbitral tribunal.

90 *BZV v BZW* [2022] 3 SLR 447 at [222].
91 *BZV v BZW* [2022] 3 SLR 447 at [223].
92 [2022] SGCA 1 at [68]–[70].
93 *BZW v BZV* [2022] SGCA 1 at [68].

4.101 In *BZV*,[94] the High Court had to consider whether the applicant's setting-aside application had been made in time. The relevant milestone dates were as follows:

> (a) 30 October 2018: The award was issued by the arbitral institution to the parties.
>
> (b) 27 November 2018: BZV requested that the tribunal correct the award pursuant to Art 33(1)(a) of the Model Law. This request was received within the 30-day period stipulated in Article 33(1).
>
> (c) 16 January 2019: The tribunal issued an addendum to the award.
>
> (d) 15 February 2019: BZV made a further request to the tribunal, this time for an interpretation under Art 33(1)(b) of the Model Law.
>
> (e) 9 April 2019: The tribunal rejected BZV's further request on the basis that it had been made out of time.
>
> (f) 15 April 2019: BZV made the application to set aside the award by filing an originating summons. However, it did not file an affidavit in support of the originating summons at this time. The originating summons was also not served.
>
> (g) 30 April 2019: BZV filed an affidavit in support of the originating summons.
>
> (h) 24 May 2019: BZV served the originating summons and supporting affidavit on BZW's solicitors after the latter confirmed that they had instructions to accept service on behalf of BZV.

4.102 BZW argued that an application to set aside an award is "made" only when both the originating summons and the supporting affidavit are filed. While BZV had filed the originating summons within three months of 16 January 2019, the setting-aside application was not "made" until 30 April 2019, by which time the three-month time limit under Art 34(3) of the Model Law had already lapsed.

4.103 The court disagreed with BZW's submissions, holding that there was no requirement under O 69A r 2 of the Rules of Court[95] that both the originating summons and supporting affidavit had to be filed at the same time. Accordingly, BZV filed the setting-aside application within

94 See para 4.70 above.
95 2014 Rev Ed.

the timeline stipulated in Art 34(3) of the Model Law when it filed the originating summons on 15 April 2019.

4.104 The decision in *BZV* raises concerns as to the perceived finality of an arbitration award. The party who is not setting aside the application may believe that an award has not been challenged once the three-month timeline under Article 34 of the Model Law has lapsed. That party may then be surprised when a setting-aside application is eventually served on it and could well have taken certain commercial or legal decisions between the end of the three-month time limit and the time when it was actually served with the setting-aside application.

4.105 A middle ground approach may be to require a setting-aside application to be filed within the time limit prescribed in Art 34 of the Model Law, and then to be served within a specified period. This would address concerns as to the finality of an award and surprise litigation referred to above, but would require changes to be made to the relevant legislative and procedural framework.

*(2) Extension of time to set aside an award*

4.106 *CNA v CNB*[96] concerned an application to set aside an arbitration award. In 2017, CNB commenced arbitration against CND and CNE, alleging breaches of a software licensing agreement ("SLA"). CNC was joined as an additional claimant, while CNA was added as an additional respondent, to the arbitration. The tribunal issued a partial award finding that CND and CNE had breached the SLA, and that CNA had assisted CND and CNE in the aforesaid breaches. CNA, CND and CNE received the original hard copy of the partial award on 26 June 2020. On 24 July 2020, CNA requested an "interpretation" and a "correction" of the partial award ("the Requests"), which were dismissed entirely by the tribunal on 25 September 2020. CNA received the original hard copy of the tribunal's decision on 5 October 2020.

4.107 Thereafter, on 18 December 2021, CNA applied to set aside the partial award. On 23 December 2020, CND and CNE filed their application to set aside the partial award. CNB and CNC then applied to strike out both setting-aside applications on the basis that they had been filed out of time or were time barred. In the striking-out applications, two key issues came before the High Court: (a) whether the Requests came within Art 33 of the Model Law; and (b) whether the Requests had the effect of extending the time for CND and CNE to make their own setting-aside applications.

96 [2022] 3 SLR 604.

4.108 The High Court judge held that while the request for interpretation did not fall within Art 33(1) of the Model Law as there was "really nothing ambiguous about the way the declaratory relief was worded",[97] the request for correction did fall within Art 33(1) of the Model Law and was properly requested by CNA.[98] On this reasoning, the timeline for CNA to file a setting-aside application was extended to three months from 5 October 2020 and its application was not time barred.

4.109 The High Court judge further held that although neither CND nor CNE made any Art 33 requests to the tribunal, CNA's request for a correction, and the outcome thereof, had a potential impact on CND and CNE. Consequently, the Requests had the effect of extending the setting-aside timelines for CNA, CND and CNE. To hold otherwise would be unsatisfactory as it would effectively mean two different setting-aside timelines for the parties, even though any correction to the partial award would bind all parties.

4.110 With more institutional arbitration rules adopting consolidation and joinder provisions, this case contains helpful procedural guidance to parties involved in multi-party arbitrations, where parties may not have a common strategy or common interests.

## IV. Enforcement of awards

4.111 Arbitration is without doubt a resource-intensive exercise, requiring significant time, effort and expenditure on the part of the arbitrants. The ultimate objective of undertaking an arbitration is to attain an enforceable arbitration award.

4.112 *National Oilwell Varco Norway AS v Keppel FELS Ltd*[99] raises interesting questions on the identification of the proper party to an arbitration agreement and the implications of that identification on the enforcement of an award.

4.113 In 1996, the defendant entered into a contract with Hydralift AS ("Hydralift"). A dispute arose between the defendant and Hydralift in 1999 which the parties attempted to resolve until 2007. While these attempts were ongoing, Hydralift was acquired by National Oilwell-Hydralift AS ("NOH") in 2002 and thereafter merged with NOH in 2004. Following the merger, Hydralift was struck off the Norwegian companies

97 *CNA v CNB* [2022] 3 SLR 604 at [50].
98 *CNA v CNB* [2022] 3 SLR 604 at [62].
99 [2021] SGHC 124.

register in 2004. NOH itself was merged with National Oilwell Norway AS (that is, the former name of the plaintiff) in late 2004, before changing its name to National Oilwell Varco Norway AS – the plaintiff's present name – in 2010.

4.114 The defendant commenced arbitration against Hydralift in 2007, that is, after Hydralift was struck off the companies register. The plaintiff, in the name of Hydralift, defended the claim and brought a counterclaim against the defendant in Hydralift's name. A final award was issued in September 2019 which found in favour of the plaintiff.

4.115 The plaintiff then commenced enforcement proceedings in Singapore against the defendant in December 2019. After the plaintiff obtained leave to enforce the arbitration award, the defendant applied to set aside said leave on the basis that (a) the plaintiff could not enforce an award which the tribunal issued in favour of Hydralift; and (b) the arbitration and the final award were nullities because Hydralift ceased to exist in 2004, well before the defendant commenced the arbitration in 2007.

4.116 The High Court judge granted the defendant's application and set aside the leave obtained by the plaintiff. The judge considered that the tribunal had intended to and did issue its award in favour of Hydralift and not the plaintiff; the plaintiff was only referred to in the arbitration award as the parent of Hydralift. Consequently, only Hydralift had the *locus standi* to apply for leave to enforce the arbitration award under s 19 of the IAA. The judge further found that both the plaintiff and the defendant had objectively intended to use Hydralift's name in the arbitration, and that "Hydralift" was not intended to refer to the plaintiff. There was therefore no misnomer that would operate to nullify the arbitration proceedings or the award. Finally, the judge agreed with the defendant that the plaintiff was estopped by its representations in the arbitration and in related litigation from denying that the respondent in the arbitration was Hydralift.

4.117 The outcome of this decision seems rather unfortunate and unsatisfactory, the parties having spent 12 years in arbitration only to be met with an award that was considered unenforceable due to a merger and absorption of the old entity and name. The decision in this case appears to turn on the lack of a "deeming" provision under Norwegian companies legislation, whereby the use of the "Hydralift" name after it was struck off the Norwegian companies register is not deemed to be a reference to NOH, the merged entity. This appears to be a clear case of a mistake by the defendant in naming Hydralift as the party in the arbitration and yet having failed in the arbitration and ordered to bear costs. The defendant managed to stave off an award for costs on the basis that Hydralift was

no longer existent, as it was struck off the register and its undertaking merged with the acquiring party and subsequently renamed as NOH. It appears that if NOH is the merged entity, it would be a successor of Hydralift and should be entitled to enforce the award against defendant. In both law and justice, this decision should be revisited.

## V. Duty to consider possible corruption

4.118 Fraud unravels all. Allegations of bribery and corruption at times crop up in international arbitration. Not every act of impropriety or corruption would vitiate the contract and the arbitration process. Where corrupt acts infect the formation or performance of the contract, the tribunal has a duty to consider.

4.119 The *Lao Holdings NV v Government of the Lao People's Democratic Republic*[100] is another case in the long-running dispute between Sanum Investments Ltd ("Sanum") and the Lao People's Democratic Republic. The plaintiffs ("LH" and Sanum) applied to set aside two arbitration awards made in arbitrations arising out of claims made under the bilateral investment treaties ("BITs") entered between the Government of Laos ("GOL") and the Kingdom of the Netherlands (the "Laos–Netherlands BIT") and between GOL and People's Republic of China ("Laos–China BIT"). The first arbitration was an arbitration under the International Centre for Settlement of Investment Disputes initiated by LH under the Laos–Netherlands BIT; the second was an arbitration under the Permanent Court of Arbitration initiated by Sanum under the Laos–China BIT. The underlying dispute concerned claims of expropriation and other BIT-related claims in relation to the plaintiffs' investments in the Laotian gaming and hospitality industry.

4.120 Prior to the commencement of the arbitrations, the parties concluded a settlement deed and a side letter, pursuant to which the parties agreed to suspend the two arbitrations. The deed contained provisions for a revival of the arbitrations in the event of material breach by GOL.

4.121 The arbitrations were indeed revived; subsequent to a merits hearing, the tribunals held that the claims were not supported by evidence and found that GOL's allegations against the plaintiffs of illegality, bribery and corruption were made out on a balance of probabilities. The tribunals also found that the plaintiffs had dealt in bad faith with GOL from the outset and were consequently disentitled to the treaty reliefs sought.

100 [2021] 5 SLR 228.

4.122 The plaintiffs applied to set aside the awards on the basis that:

(a) the tribunals had exceeded their jurisdiction and dealt with matters beyond the express scope of the submission to arbitration by considering GOL's new allegations of illegality, bribery and corruption;

(b) the tribunals admitted additional evidence introduced by GOL in breach of the terms of the deed (section 34, where parties agreed not to adduce new evidence), thereby adopting an arbitral procedure not in accordance with the parties' express agreement; and

(c) the plaintiffs were not afforded a reasonable opportunity to be heard on certain determinations made in the BIT awards.

4.123 The SICC dismissed the setting-aside application, holding that:

(a) the additional allegations of illegality, bribery and corruption were not new claims; they formed part of the GOL's defence of corruption, bribery, illegality and/or bad faith. The allegations were also not new "reliefs" as the GOL had always sought a dismissal of the plaintiffs' claims;

(b) allegations in relation to the admission of new evidence were procedural matters that did not engage Art 34(2)(a)(iii) of the Model Law;

(c) the plaintiffs did not raise a jurisdictional objection at the time of GOL's application to admit additional evidence ("GOL's application"). Instead, they participated and made submissions. By their conduct, the plaintiffs *de facto* gave the tribunals jurisdiction to decide on whether new evidence could be admitted;

(d) by referring the question of interpretation of the deed on GOL's application to the tribunals, the parties gave the tribunals jurisdiction to decide the matter; and

(e) under both the BITs and the applicable procedural rules, the tribunals had the power to determine their own procedure and to determine the admissibility of any evidence. The terms of the deed did not seek to, and could not, amend the terms of the tribunals' powers to determine their own procedure and the admissibility of evidence under the applicable procedural rules.

4.124 The majority of the SICC held that the plaintiffs had by their conduct waived any failure by the BIT tribunals to comply with the agreed arbitration procedure. In any event, even if there was a breach of the agreed procedure, the plaintiffs failed to establish prejudice.

4.125 Of particular interest is the SICC's holding that arbitral tribunals have a "public duty" to consider evidence of corruption. This duty arises not only where the arbitral tribunal has to deal with allegations of corruption in the dispute but also where the evidence in the case indicates possible corruption. Parties cannot prevent a tribunal from reviewing and admitting evidence of corruption by way of a separate agreement.

4.126 The question that arises from the SICC's holding is whether this "public duty" to consider evidence of corruption would require arbitral tribunals to report on any findings of corruption to the relevant authorities. This could raise questions of conflict between the obligation of the tribunal, parties and counsel to keep matters relating to the arbitration confidential.

## VI. Confidentiality in international investment arbitration

4.127 Confidentiality is one of the fundamental tenets of arbitration and is enshrined in both the IAA and AA. Many institutional arbitration rules also contain provisions obliging parties to maintain the confidentiality of arbitration documents and proceedings.

4.128 In 2020, the High Court in *Republic of India v Vedanta Resources plc*[101] had held that a party, pending the determination of an application made before a tribunal for the disclosure of certain disclosed or generated documents in a related arbitration, could still apply to the court for a declaration that those documents sought were not confidential or private and disclosure of such documents should not be a breach of confidentiality. The court took the view that the application was neither an abuse of the court process nor an attack on the arbitral process. It did not, however, make the declaration sought as it was not satisfied that the circumstances justify doing so. India appealed against the decision.

4.129 The respondent is a company incorporated in the UK. In 2005, the Cairn Group restructured its assets and in 2011, it sold 100% of Cairn India Limited (which held most of the group's Indian assets) to the defendant. India's position was that the restructuring was a tax abusive transaction and subject to India capital gains tax. In light of the appellant's tax assessment orders, the Cairn Group and the defendant commenced separate arbitrations against the appellant ("the Cairn Arbitration" and "the Vedanta Arbitration" respectively). The Cairn Arbitration was seated in the Netherlands, while the Vedanta Arbitration was seated in

101 [2020] SGHC 208.

Singapore. Both arbitrations arose from the same underlying transaction and under the same BIT.

4.130 In the Vedanta Arbitration, India had initially proposed that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration[102] ("the UNCITRAL Transparency Rules") be applied. The tribunal ruled that an implied obligation of confidentiality applied in every arbitration governed by Singapore procedural law, subject to several exceptions including where the public interest or the interests of justice required disclosure. The consequence of the tribunal's ruling was to permit either party to the Vedanta Arbitration to apply for the disclosure of specific and identified documents to the Cairn Arbitration. India subsequently applied to the Vedanta tribunal seeking disclosure of certain documents in the Vedanta Arbitration to the Cairn Arbitration. The first application was partially allowed. However, before a decision on India's second application was made, it applied to the Singapore courts (as the court of the seat) for a declaration that documents disclosed or generated in the Vedanta Arbitration were not confidential or private and disclosure should not be a breach of confidentiality.

4.131 The Court of Appeal dismissed the appeal, holding that India had no legitimate interest to invoke the jurisdiction of the court for declaratory relief. India's argument that the Vedanta tribunal had no "power to develop the *lex arbitri*"[103] and that "the authoritative pronouncement of the *lex arbitri* must come from the court"[104] was roundly rejected by the Court of Appeal. Disclosure is a procedural matter wholly within the purview of the tribunal; "the fact that the obligation of confidentiality applied as a substantive rule of the common law … did not take it outside the scope of the arbitral procedure and place it within the purview of the court".[105] Even if the tribunal had erred in finding that a general duty of confidentiality applied to Singapore-seated investment treaty arbitrations, this was an error of law insufficient to justify curial intervention.[106]

4.132 The Court of Appeal also disagreed with the High Court judge, finding instead that the original application to the High Court was a "backdoor appeal" against the Vedanta tribunal's disclosure orders and an attempt to relitigate matters already determined by the Vedanta tribunal. Taken together with the Court of Appeal's earlier finding that there was

102 Effective 1 April 2014.
103 *Republic of India v Vedanta Resources plc* [2021] 2 SLR 354 at [20].
104 *Republic of India v Vedanta Resources plc* [2021] 2 SLR 354 at [17].
105 *Republic of India v Vedanta Resources plc* [2021] 2 SLR 354 at [29].
106 *Republic of India v Vedanta Resources plc* [2021] 2 SLR 354 at [21].

no legitimate interest to invoke the court's jurisdiction, India's application and appeal constituted an abuse of process.

4.133 This case reinforces the principle of minimal curial intervention adopted by the Singapore courts. The Singapore court is ever conscious that it should refrain from intervening in ongoing arbitral processes. Where the tribunal is seised of matters within its scope and function, the court defers and would be stoically loath to interfere. This is particularly so in matters that are procedural and interlocutory in nature. Thus, save for jurisdictional issues, procedural orders are not subject to appeal or recourse to the courts.

## VII. Domestic arbitration under the Arbitration Act

### *A. Operation of section 4(6) of the Arbitration Act*

4.134 In *Cheung Teck Cheong Richard v LVND Investments Pte Ltd*,[107] the Court of Appeal had the opportunity to provide guidance on the operation of s 4(6) of the AA (which is identical to s 2A(6) of the IAA), a provision which deems the existence of an arbitration agreement where such existence is asserted in arbitration or legal proceedings and not denied.[108]

4.135 The respondent ("LVND") is the developer of Macpherson Mall. The appellants purchased 12 shop units in the mall from LVND ("the Purchasers") pursuant to 12 sale and purchase agreements. Disputes subsequently arose between the Purchasers and LVND, with the Purchasers alleging that LVND had, *inter alia*, misrepresented to the Purchasers the true usable area and rental yields of the shop units, as well as the overall tenant mix in the mall.

4.136 Each of the sale and purchase agreements contained the following dispute resolution clause:[109]

107 [2021] 2 SLR 890, on appeal from [2022] 3 SLR 502.

108 Section 4(6) of the Arbitration Act 2001 (2020 Rev Ed) and s 2A(6) of the International Arbitration Act 1994 (2020 Rev Ed) states:

> Where in any arbitral or legal proceedings, a party asserts the existence of an arbitration agreement in a pleading, statement of case or any other document in circumstances in which the assertion calls for a reply and the assertion is not denied, there is deemed to be an effective arbitration agreement as between the parties to the proceedings.

109 *Cheung Teck Cheong Richard v LVND Investments Pte Ltd* [2021] 2 SLR 890 at [30].

> 20A. Mediation
>
> 20A.1 The Vendor and Purchase agree that before they refer any dispute or difference relating to this Agreement to arbitration or court proceedings, they shall consider resolving the dispute or different through mediation at the Singapore Mediation Centre in accordance with its prevailing prescribed forms, rules and procedures.
>
> 20A.2 For the avoidance of doubt, this clause shall not amount to a legal obligation on the part of either the Vendor or Purchaser to attempt mediation as a means of resolving their dispute or difference.

4.137 The Purchasers commenced arbitration at the SIAC pursuant to the cl 20A.1 of the sale and purchase agreements. In the notice of arbitration filed with the SIAC, the Purchasers took the position that the arbitration was to be administered by the SIAC under the SIAC Arbitration Rules.[110] While LVND agreed that the arbitration should be seated in Singapore and that the AA applied, it disagreed that the arbitration should be administered by the SIAC or conducted in accordance with the SIAC Arbitration Rules. This first arbitration was eventually terminated as the Court of Arbitration of SIAC was not *prima facie* satisfied that the parties had agreed to an arbitration administered by SIAC, or the application of the SIAC arbitration rules.

4.138 The Purchasers thereafter issued a second notice of arbitration for the disputes in respect of the 12 sale and purchase agreements to be resolved by a single *ad hoc* arbitration in Singapore. The same cl 20A.1 was invoked by the Purchasers to commence this second arbitration. LVND objected to this second arbitration on the basis that it was a flawed attempt to commence a single arbitration for disputes relating to 12 different agreements. The Purchasers eventually withdrew the second arbitration and instead commenced court proceedings against LVND.

4.139 LVND then applied to court to stay the court proceedings pursuant to s 6(1) of the AA on the basis that the parties had agreed to arbitrate the disputes between them. It bears noting that LVND did not object to the existence of an arbitration agreement between the parties in either the first or second arbitration; in the first arbitration, LVND objected to the terms of the arbitration agreement as asserted by the Purchasers while in the second arbitration LVND objected to there being a single *ad hoc* arbitration arising from 12 separate sale and purchase agreements.

110 6th Ed, 1 August 2016.

4.140 LVND's stay application was successful before the assistant registrar, and thereafter at the Registrar's Appeal before the High Court judge. The judge upheld the stay as he agreed that while cl 20A.1 was not a valid arbitration agreement, the parties had nonetheless separately concluded an *ad hoc* arbitration agreement through the parties' conduct and the positions taken in correspondence, and in documents filed in the two earlier arbitrations. The judge found that s 4(6) of the AA operated in this case to deem – based on the Purchasers' assertion in the first arbitration of the existence of an arbitration agreement and lack of objection by LVND as to the existence of an arbitration agreement – the existence of an effective arbitration agreement between the parties.

4.141 The judge also expressed the view, in *obiter*, that s 4(6) of the AA could operate to deem the existence of an arbitration agreement event if there was no such pre-existing arbitration agreement.

4.142 The Purchasers appealed to the Court of Appeal, arguing that the High Court judge had erred in finding that the parties had entered into a separate *ad hoc* arbitration agreement and in finding that an arbitration agreement had arisen based on s 4(6) of the AA.

4.143 The Court of Appeal allowed the appeal and reversed the decision of the High Court. While the Court of Appeal agreed that cl 20A.1 of the sale and purchase agreements was not an arbitration agreement as defined by s 4(1) of the AA, it disagreed that the parties had concluded an arbitration agreement independent of cl 20A.1. There was also no separate agreement to arbitration between the parties which would ground a stay of the court proceedings. In arriving at this decision, the Court of Appeal adopted the following analytical steps:

> (a) whether the parties had acted exclusively on the assumption that cl 20A.1 was an arbitration agreement; and
>
> (b) if so, whether there was evidence of an agreement to add terms to or depart from what cl 20A.1 already provided, such that it could be said that the parties were intending to enter into an arbitration agreement apart from cl 20A.1.

4.144 The Court of Appeal found that on the facts, the parties had at all times acted exclusively on the assumption that cl 20A.1 was an arbitration agreement. This was an erroneous position since that clause did not contain within itself an agreement to submit disputes to arbitration. Further, while the Purchasers had – independently of cl 20A.1 – offered to arbitrate on certain terms and conditions, these offers were not accepted by LVND. Consequently, no separate arbitration agreement could be said to have been concluded between the Purchasers and LVND.

4.145 The Court of Appeal agreed with the High Court judge that for s 4(6) of the AA to apply, three requirements must be met, namely: (a) there must be arbitral or legal proceedings afoot; (b) there must be an assertion of the existence of an arbitration agreement in a pleading, or any other document in circumstances in which the assertion calls for a reply; and (c) the assertion must not be denied. The deeming effect of s 4(6) would only operate if all three requirements are met. In the present case, the Court of Appeal disagreed with the High Court's conclusions on the applicability of this section, holding that the threshold requirement of "any arbitral or legal proceedings" was not met. While the Purchasers had commenced two arbitrations, both arbitrations had been terminated; indeed, the parties were in dispute as to whether any arbitration proceedings had been commenced in the first place. The second requirement was also not satisfied as cl 20A.1 was not an arbitration agreement, and the parties' belief that it was one did not make it so. The most that can be said about the parties' conduct was that there were conditional offers to arbitrate, none of which crystallised into a binding arbitration agreement.

4.146 Absent a valid arbitration clause, s 4(6) of the AA cannot operate to deem the existence of an effective agreement. The Court of Appeal held that:[111]

> … the specific purpose of s 4(6) is to ensure that an arbitration agreement would be treated as effective for the purposes of the AA even if the writing requirement is not met. In other words, the specific purpose of s 4(6) of the AA is to prevent a party who has not denied the existence of the arbitration agreement in circumstances in which the assertion of the existence of an arbitration agreement in a pleading, statement of case or any other document calls for a reply, from arguing that the agreement (whether pre-existing or arising in the course of the assertion and non-denial) is not in writing and is hence formally invalid in order to escape the consequences of that agreement.

4.147 This case provides clarity to the often misunderstood position that s 4(6) of the AA, s 2A(6) of the IAA and Art 7(2) of the Model Law operate to deem the existence of an arbitration agreement event if there was no such pre-existing arbitration agreement. Parties should therefore take care that an intention to arbitrate should be unambiguous and clear. This is particularly so when the dispute resolution clause is a tiered one, which provides for different alternative dispute resolution mechanisms to apply at different stages of the process.

111 *Cheung Teck Cheong Richard v LVND Investments Pte Ltd* [2021] 2 SLR 890 at [114].

### *B. Appeals under section 49 of the Arbitration Act*

4.148 One of the main differences between the IAA and the AA is the ability to appeal against a domestic arbitration award. This is provided in s 49 of the AA, and such appeals are limited to "a question of law arising out of an award made in the proceedings".

4.149 *Oxley Consortium Pte Ltd v Geetex Enterprises Singapore (Pte) Ltd*[112] was the only 2021 reported decision relating to appeals under s 49(1) of the AA. The appellant is the developer of Oxley Tower. The respondent purchased two units in Oxley Tower from the appellant at the end of 2012. Disputes arose between the parties, with the respondent alleging that the final approved plants of the units differed substantially from the plants and specifications approved by the purchaser. The contracts entered into were as prescribed as *per* Form D of the Schedule to the Sale of Commercial Properties Rules,[113] the use of which is statutorily mandated by s 5 of the Sale of Commercial Properties Act 1979.[114]

4.150 The parties sought to resolve their disputes through arbitration. The tribunal eventually issued an award terminating the sale and purchase agreements and ordering the appellant to refund to the respondent all progress payments, maintenance charges, property tax and stamp duties paid. The appellant appealed against the tribunal's decision.

4.151 The Court of Appeal allowed the appeal in part, reversing the High Court's decision on the applicable interpretation regime for standard form contracts imposed by statute. The Court of Appeal held that such contracts should be construed as legislation rather than contract and the principles of statutory application should apply. The Court of Appeal also disagreed with the lower court's interpretation that the phrase "refund all moneys paid by the purchaser" in the sale and purchase agreement meant that the appellant had to reimburse the respondent for all progress payments, maintenance charges, property tax and stamp duties. Instead, the phrase, when interpreted in the context of the relevant clause, was a "risk allocation clause which operates in the event that there is a substantial difference between the approved plans and the as-built plans".[115] On this interpretation, the sums to be refunded by the appellant would include

112 [2021] 2 SLR 782.
113 1999 Rev Ed.
114 2020 Rev Ed.
115 *Oxley Consortium Pte Ltd v Geetex Enterprises Singapore (Pte) Ltd* [2021] 2 SLR 782 at [112].

progress payments and maintenance charges (if such charges had been paid) but not stamp duty and property tax.

4.152 In coming to its decision, the Court of Appeal accepted that while there is generally a higher degree of court intervention in domestic arbitrations under the AA, "the court can only intervene in instances where the statutory provisions of the AA allow the court to do so".[116] The court reiterated that even under the AA, it does not sit as an appellate court from arbitral tribunals, and its role within the context of s 49 of the AA is to determine questions of law placed before it based on facts as found by the tribunal.

4.153 This decision is consistent with the "light touch" judicial philosophy adopted in respect of arbitration proceedings, regardless of whether the arbitration is international or domestic.

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116 Oxley Consortium Pte Ltd v Geetex Enterprises Singapore (Pte) Ltd [2021] 2 SLR 782 at [5].