4. ARBITRATION

Lawrence **BOO**
LLB (University of Singapore), LLM (National University of Singapore);
FSIArb, FCIArb, FAMINZ, Chartered Arbitrator;
Solicitor (England and Wales), Advocate and Solicitor (Singapore);
Adjunct Professor, Faculty of Law, National University of Singapore;
Adjunct Professor, Faculty of Law, Bond University (Australia).

Earl J Rivera-**DOLERA**
BSc (Philippines), LLB (Philippines),
LLM (National University of Singapore);
FSIArb, MCIArb, MPIArb;
Attorney-at-law (Philippines).

Enforcement of arbitration agreements

Stay of court proceedings – Multiple jurisdiction clauses

4.1 Parties who have dealings with each other do often have their relationships governed by more than one contractual arrangement. At times, these contractual arrangements overlap each other. Should differences arise, the individual contracts could provide for different methods of dispute resolution. There would then be a need to reconcile them to determine the proper forum for the resolution of such disputes. Even where the relationships are overlaid by a master or overarching agreement, the need for reconciling competing dispute resolution could still arise. Where an action commenced in court is said to be made in breach of an arbitration agreement, the court is then required to consider these issues in an application for stay of the action.

4.2 In *Oei Hong Leong v Goldman Sachs International* [2014] 3 SLR 1217 ("*Oei Hong Leong*"), the plaintiff, a customer of the defendant, commenced action claiming that he had incurred losses on foreign exchange option trades as a result of the fraudulent misrepresentations made to him by the defendant's employees. The plaintiff's relationship with the defendant was set out in a private wealth management client agreement pack ("Account Agreement Pack") containing an arbitration agreement, as well as the terms of the International Swap Dealers Association Inc Master Agreement ("ISDA Agreement") with a non-exclusive jurisdiction clause in favour of English courts. The defendant applied for stay of proceedings pursuant to s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") on the basis of an arbitration agreement set out in the Account Agreement Pack. The assistant registrar granted a stay ruling that the

agreement which was "at the commercial centre of the transaction" ought to be the Account Agreement Pack.

4.3 Lee Seiu Kin J heard the plaintiff's appeal and addressed two questions:

> (a) As a preliminary issue, what is the applicable threshold for ordering a stay of court proceedings?
>
> (b) Where there are two competing modes of dispute resolution mechanism, which mechanism should be applied?

The defendant submitted that there is a low threshold for ordering a stay of proceedings and proffered that it should be at least "arguable" that the plaintiff's claims are the subject of an arbitration agreement and a stay must be granted (the "arguable" test). To this, Lee J took the view that in cases where the disputes are referable to a *single* contract containing an arbitration clause, the principles of *kompetenz-kompetenz* and judicial non-intervention are undoubtedly made applicable. Where, however, there are *two* competing modes of dispute resolution and the parties cannot agree on which one to apply, there is a "separate question of which dispute resolution clause the parties *objectively intended* to apply" [emphasis in original; other emphasis added] (the "objective intention" test): at [25]. Citing *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] 2 SLR 821 ("*Transocean*"), the court held that the parties must have intended to "apply the dispute resolution clause in the contract out of which the claim arose or that which has a *closer connection* to the claim" [emphasis in original]: *Oei Hong Leong* at [26]. The court also noted that *Transocean* was followed by the English case of *PT Thiess Contractors Indonesia v PT Kaltim Prima Coal* [2011] EWHC 1842 which approved of the approach of ascertaining the objective intention of the parties (*Oei Hong Leong* at [27]) and other similar approaches adopted where the courts sought to find the agreement which was the "centre of gravity of the dispute" (see *Sebastian Holdings Inc v Deutsche Bank AG* [2010] EWCA Civ 998; [2011] 1 Lloyd's Rep 106) or "the agreements which [were] at the commercial centre of the transaction" (see *UBS AG v HSH Nordbank AG* [2009] EWCA Civ 585; [2009] 2 Lloyd's Rep 272]): *Oei Hong Leong* at [30].

4.4 Applying this approach, Lee J agreed with the AR's decision that the Account Agreement Pack was the "only contractual arrangement which tie[d]" the defendant and the services it provided pursuant to that relationship whereas the ISDA Agreement governed the specific operation of derivative transactions which the dispute therein was not concerned with: *Oei Hong Leong* at [16]. He found the allegation of fraudulent misrepresentation of the employees of the defendant in the course of the banking relationship of the plaintiff with the defendant's

group of companies as the "pith and substance" of the dispute, and thus held that the Account Agreement Pack ought to apply: *Oei Hong Leong* at [37].

4.5 This case also brings forth the tension between the role of the tribunal and the courts in determining the applicability of the arbitration clause, in particular in cases where there are two agreed but competing dispute resolution processes. The tension was apparent when Lee J posed the question (*Oei Hong Leong* at [27]):

> [W]hy should the courts *not* be allowed to decide which dispute resolution clause parties intend to apply to a dispute. The courts are in no worse position than the arbitrators to decide. [emphasis in original]

The more challenging questions for the practitioner, however, are: Is such a decision final and determinative of the tribunal's decision? Could not the subsequent tribunal disagree with or take a different view from the court? Is it not equally the duty of the tribunal under the principle of *kompetenz-kompetenz* to decide for itself if the arbitration clause supersedes or is subject to the exclusive jurisdiction clause? Would it have made a difference if the jurisdiction clause is an "exclusive" one? Is the court decision on this aspect binding on the tribunal? While some of these questions remain unanswered, this case once again affirms Singapore courts' support for arbitration when confronted with multiple jurisdiction clauses setting out conflicting and competing dispute resolution mechanisms.

4.6 Another case of overlapping dispute resolution processes came before the Court of Appeal in *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381 ("*Burgundy*"). The exploration company, Burgundy Global Exploration Corp ("Burgundy") engaged Transocean Offshore International Ventures Ltd ("Transocean") under an offshore drilling contract ("the Drilling Contract") to supply a semi-submersible drilling rig and provide offshore drilling services to Burgundy. Article XI of the Drilling Contract sets out the parties' obligation to enter into an escrow agreement ("the Escrow Agreement") where Burgundy was to deposit funds as security for payment to Transocean. Failure to deposit such funds entitled Transocean to exercise its right to terminate the Drilling Contract. The Drilling Contract had an arbitration agreement. The Escrow Agreement, on the other hand, provided that disputes thereunder be referred to the Singapore courts. Burgundy having failed to deposit moneys into an escrow account, Transocean terminated the Drilling Contract and commenced court proceedings claiming, *inter alia*, damages for loss of profits under the Drilling Contract against Burgundy and for breach of the Escrow Agreement. Burgundy applied for stay of proceedings in favour of arbitration, relying on the arbitration

clause in the Drilling Contract. The stay application was granted by the assistant registrar but that decision was reversed on appeal in *Transocean* where Andrew Ang J held (at [39]) that the dispute resolution mechanism in the Drilling Contract did not extend to claims arising from breach of the Escrow Agreement, the latter being governed by the jurisdiction clause of Singapore courts. That decision was affirmed by the Court of Appeal.

4.7 Transocean applied for and obtained summary judgment granted by the assistant registrar whose decision was upheld by Quentin Loh J. Transocean was awarded damages being the net profit it would have earned under the Drilling Contract. Burgundy appealed but the same was dismissed by the High Court in *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2013] 3 SLR 1017.

4.8 Burgundy's appeal against the decision granting summary judgment was allowed by the Court of Appeal. Disagreeing with Loh J, the Court of Appeal ruled that this was a case where the parties entered into two contracts to give effect to a single transaction. While the Drilling Contract set out the parties' rights and obligations, the Escrow Agreement set out the manner on how Burgundy ought to make payment for Transocean's services, with each of these contracts having different dispute resolution mechanisms. The Court of Appeal, however, found that despite the close link, the parties in each contract had clearly set out provisions that governed the separate interests of the parties, that is, the Drilling Contract protected Transocean's interest to make profits from the contracted services whereas the Escrow Agreement provided security for Burgundy's performance of its payment obligations under the Drilling Contract: *Burgundy* at [44].

4.9 Sundaresh Menon CJ said that Burgundy's breach of the Escrow Agreement to provide security by way of opening the escrow account did not necessarily translate into the fact that Burgundy had also breached the Drilling Contract and that Transocean would be entitled to damages: *Burgundy* at [45]–[46]. Any claim for breach and loss under the Drilling Contract must as such be resolved in accordance with arbitration as provided in the Drilling Contract.

Stay of court proceedings under the Arbitration Act – Standard of proof

4.10 Stay of court proceedings commenced in breach of an arbitration agreement is also available under s 6 of the Arbitration Act (Cap 10, 2002 Rev Ed) ("AA"). The power to do so is, however, discretionary. A question of the standard of the existence of dispute was

raised for consideration in *H P Construction & Engineering Pte Ltd v Chin Ivan* [2014] 3 SLR 1318 ("*H P Construction*"). The defendant had employed the plaintiff as the main contractor for the construction of houses in Sentosa Cove. The building contract incorporated the Singapore Institute of Architects Articles and Conditions of Building Contract (7th Ed, April 2005) ("the SIA Conditions") which entitled the plaintiff to progress payments for works certified by the architect. Clause 31(13) of the SIA Conditions provided for the temporary finality of such certificates "in the absence of fraud or improper pressure or interference by either party": at [17]. The plaintiff commenced court proceedings and the defendant applied for stay of proceedings under s 6 of the AA. Stay was granted by the assistant registrar but on appeal Edmund Leow JC allowed the appeal in part, granting partial stay.

4.11 The plaintiff argued that the applicable test should be whether the defendant had made an "arguable case" on the presence of fraud when the certificates were procured and to support this contention, the plaintiff cited the case of *Multiplex Construction Pty Ltd v Sintal Enterprise Pte Ltd* [2005] 2 SLR(R) 530 ("*Multiplex Construction*"): at [35]. The defendant, on the other hand, relied on the case of *Anwar Siraj v Teo Hee Lai Building Construction Pte Ltd* [2007] 2 SLR(R) 500 ("*Anwar Siraj*"), where the court had held that stay of proceedings could be had on the *prima facie* showing of a *bona fide* dispute as to whether there was improper pressure or interference.

4.12 Leow JC saw no sufficient basis to ascribe a different standard of proof for fraud allegations in stay applications as opposed to improper pressure or interference in the context of cl 31(13): *H P Construction* at [37] and [40]. In reconciling the decisions in *Multiplex Construction* and *Anwar Siraj*, the court saw no real difference in the "arguable test" and the "*prima facie* case" approaches. The court noted that both decisions had cited with approval the discussion in *Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd* [1992] 3 SLR(R) 595 at [17], which stated that when a defendant "makes out a *prima facie* case of disputes the courts should not embark on an examination of the validity of the dispute as though it were an application for summary judgment": *H P Construction* at [41]; *Multiplex Construction* at [6]; *Anwar Siraj* at [20]. The court, therefore, agreed with the defendant that it only had to establish a *prima facie* case that there was a *bona fide* dispute on the presence of fraud, but added a caveat that there ought to be some "credible evidence of fraud, and mere allegations are insufficient", as set out by the court in *Samsung Corp v Chinese Chamber Realty Pte Ltd* [2004] 1 SLR(R) 382 ("*Samsung Corp*"): *H P Construction* at [42], citing *Samsung Corp* at [25].

4.13 The court, however, observed that in the case before it, the fraud as alleged by the defendant, if proven, only related to part of the

certificates and was thus severable from the other claims: *H P Construction* at [66]. The stay order was, thus, lifted in relation to those claims to which the allegation of fraud could not relate.

Arbitrability of subject matter

4.14 While there is no serious debate that not all matters are amenable to arbitration even if parties have so agreed that they are arbitrable, no statutory provision defines what are arbitrable or non-arbitrable subject matters apart from s 11(1) of the IAA which provides that:

> … [a]ny dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless it is contrary to public policy to do so.

4.15 The plaintiff in *Silica Investors Ltd v Tomolugen Holdings Ltd* [2014] 3 SLR 815 commenced an action alleging that it had been oppressed as a minority shareholder of the eighth defendant on the basis of issues concerning share issuance and management participation and sought relief under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) which included, *inter alia*, a buy-out order and an order for winding up the eighth defendant. The plaintiff had purchased the shares in the eighth defendant from the second defendant, pursuant to a share sale agreement ("SSA") which contained an arbitration clause for "any dispute arising out of or in connection with" the SSA to be referred to Singapore International Arbitration Centre ("SIAC") arbitration. The assistant registrar dismissed the stay application and the decision was subsequently affirmed by Quentin Loh J.

4.16 Loh J adopted the approach that in the case of composite claims, the court could ascertain what the "essential dispute" was and ruled that in the circumstances, the essential dispute between the parties was whether the affairs of the eighth defendant were being conducted and managed by the other defendants in a manner that was oppressive towards the plaintiff as a minority shareholder. Having regard to two out of the four main allegations (that is, the issues on share issuance and management participation), the court held that a sufficient part of the factual allegations fell within the scope of the arbitration clause. The court, however, had then to consider if the subject matter of minority oppression is a matter capable of arbitration.

4.17 The court considered the tribunal's power under s 12(5)(*a*) of the IAA to grant "any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court" but noted that a tribunal could, nevertheless, not be able to "exercise the coercive powers of the courts or make awards *in rem* or

bind third parties who are not parties to the arbitration agreement": at [111]. The learned judge also noted that ss 216(1) and 216(2) of the Companies Act provides for personal remedies with a view "to bringing to an end or remedying the matters complained of"; the arbitrability of the remedy could, in his view, affect the arbitrability of the claims. He therefore declined to set any general rule as to whether all minority oppression claims under s 216 were either non-arbitrable or arbitrable. The determination of this issue, in his view, would depend on a case-by-case basis. On the basis that there were other parties who were not parties to the arbitration *and* the plaintiff had asked for remedies that the tribunal had no power to grant, Loh J took the view that the minority oppression claim in this case was not arbitrable and stay of the action was, accordingly, refused.

4.18 The minority shareholders have since appealed to the Court of Appeal. It would be interesting to see if the Court of Appeal would agree that a minority oppression claim could be considered arbitrable in some circumstances and not in others; the fact that an arbitral tribunal is unable to grant certain statutorily reliefs ought to render such claims non-arbitrable.

Silence to subsequent terms containing arbitration clause

4.19 It is not unusual in commodities trading that parties enter into contracts by telephone or e-mail with some basic terms and thereafter follow up through exchange of more detailed terms. The question that could arise is whether the terms could include an arbitration clause even if it was not previously mentioned.

4.20 In *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521, the parties had entered into a total of five transactions whereby R1 International Pte Ltd ("R1") supplied natural rubber to Lonstroff AG ("Lonstroff"). Each transaction would start with sales negotiation by e-mail or telephone. R1 would then send an e-mail setting out the basic terms of the sale where R1 was to sell rubber to Lonstroff ("E-mail Confirmation"). Lonstroff would thereafter send a "Purchase Order" and R1 would send a sales contract to Lonstroff in the form of a "Contract Note". R1 would thereafter deliver the rubber and issue an invoice to Lonstroff. Disputes arose in relation to the second supply contract where Lonstroff complained of a foul smell emitting from the rubber supplied by R1. R1 denied this and asserted that the smell was not a parameter required in the supply contract in relation to the second transaction ("the Second Supply Contract"). Lonstroff commenced legal proceedings in Switzerland against R1 for breach of the Second Supply Contract ("the Swiss Proceedings"). R1 responded by commencing proceedings in Singapore seeking an anti-suit injunction to prevent

Lonstroff from continuing the Swiss Proceedings, averring that an agreement to arbitrate had been incorporated as part of the terms of the Second Supply Contract.

4.21 R1 claimed that the parties had entered into an agreement to arbitrate their disputes in Singapore which had been incorporated as part of the terms of the Second Supply Contract. R1 contended that it had sent a Contract Note to Lonstroff for the second transaction which stated that the terms and the arbitration clause of the International Rubber Association Contract ("IRAC") ("IRAC terms") would apply to the second transaction. Under the IRAC, arbitration would be held in London though the parties were permitted to agree otherwise. A rider was included in the Contract Note that specified the arbitration to be conducted in Singapore. Lonstroff did not sign and did not return that Contract Note to R1.

4.22 The third, fourth and fifth transactions followed a different sequence from the first and second transactions in that Lonstroff first sent across a Purchase Order setting out that its own general terms were to apply to the last three transactions. R1 responded with an E-mail Confirmation ignoring Lonstroff's statement for the latter's general terms to apply. The Contract Notes for the fourth and fifth transactions had set out that in addition to the IRAC terms, arbitration would be conducted by the Singapore Commodity Exchange Ltd ("SICOM"). R1 filed this application for a permanent injunction, an interim order was made and the defendant applied for its discharge.

4.23 The issues raised included whether the contract between the parties had provided for disputes to be submitted to arbitration and, if so, whether the trade custom required the reference to SICOM arbitration agreement to be part of the sales contract or to IRAC arbitration in London by virtue of a previous course of dealing. Judith Prakash J answered them in the negative and dismissed R1's applications.

4.24 The main issue raised before the Court of Appeal was whether a set of terms containing an agreement to arbitrate in Singapore which was found in a detailed Contract Note sent by R1 to Lonstroff shortly after the deal had apparently been agreed were incorporated as part of the contract between the parties.

4.25 The Court of Appeal adopted an objective approach on questions of contractual formation and incorporation of terms. This went to ascertaining the parties' objective intention surrounding the Second Supply Contract and the second Contract Note and the relevant background thereto, that is, the industry, the character of the documents and course of dealings. Sundaresh Menon CJ found that it was common

for parties to first agree on essential terms of the contract even while discussions would continue in the incorporation of other more detailed terms. Even if the parties would thereafter disagree on the detailed terms, it does not follow that no contract has been concluded on the essential terms.

4.26 Menon CJ said that Lonstroff's silence does not, by itself, constitute acceptance of the terms from R1 although a party's positive, negative or even neutral conduct could evince acceptance. The effect of silence is context-dependent. In certain circumstances, a failure to object may be deemed an assent to the incorporation of the other party's terms: at [54]. The court was convinced that the terms of the E-mail Confirmation became binding when they were sent across and that both parties did contemplate that the basic terms in the E-mail Confirmation would be supplemented by a set of standard terms. There was sufficient evidence to show that it was the practice in the international rubber commodities market for parties to contract on standard terms to be followed with the more detailed terms. In the Swiss proceedings, Lonstroff had held itself as someone known in the rubber trade and ought to have known this common practice of contracting in the industry. The size and scope of such supply contracts make it improbable for the parties to purely contract standard terms as set out in the E-mail Confirmation. There were further important provisions fully dealt with in the Contract Notes which incorporated the IRAC terms.

4.27 The parties' conduct had also shown throughout the five transactions that they had contemplated that the basic terms would be supplemented by a set of standard terms. In each of the five transactions, R1 had sent to Lonstroff a Contract Note containing supplementary terms. Lonstroff had also sought to impose its own standard terms in the third to fifth transactions. These actions were an acknowledgement that standard terms would supplement the essential terms found in the E-mail Confirmations. Lonstroff's position that a countersignature by it was a precondition to acceptance must be weighed against the objective evidence. In the second transaction, Lonstroff did not object to the applicability of the Contract Note. Its payment of the invoice for the Second Supply Contract without protest was an unequivocal acceptance that the terms thereof were as set out in the second E-mail Confirmation read with the second Contract Note. Lonstroff was, thus, bound by the arbitration agreement in favour of Singapore. The appeal was allowed and an anti-suit injunction was ordered against Lonstroff in support of the arbitration in Singapore.

4.28 The Court of Appeal had in this case given much consideration to the different manner in which silence to an imposition of a term (in this case an arbitration clause) may be construed. While silence to such a term had previously been held to be a refusal of acceptance (see *United*

Engineers Contractors Pte Ltd v L & M Concrete Specialists Pte Ltd [2000] 2 SLR(R) 524), the court had, in this instance, sought to ascertain the objective intention of the parties by considering not only the pre-contract behaviour but also the post-contract exchanges, the parties' performance of the contract, as well as subsequent transactions. The interesting issue that could arise in the arbitration arising from the court's detailed examination of the parties' behaviour, is whether the tribunal subsequently seised of the matter could look at them afresh and come to a different conclusion. Questions of *res judicata* and issue estoppel would most certainly feature should the tribunal be subsequently asked to do so by one of the parties.

Setting aside of awards under the IAA

Failure to decide a counterclaim – Breach of natural justice?

4.29 The High Court had in one of the few instances set aside an award in *BLB v BLC* [2013] 4 SLR 1169 (see author's review in (2013) 14 SAL Ann Rev 72 at 85–87, paras 4.50–4.60). The Court of Appeal, however, reversed that decision and reinstated the tribunal's award in *BLC v BLB* [2014] 4 SLR 79 ("*BLC v BLB*"). The parties in that case were two groups of companies, the P Group in Malaysia and the D group in Germany, which had entered into a joint venture in hydroforming technology. It was said that P could not fulfil all the orders prescribed under the business operations agreement ("BOA") and had failed to deliver all the products ordered within the time prescribed by the BOA. D claimed P was in breach for delay of supply, failure to adequately stock raw materials and for defective goods in breach of the licence agreement ("LA"). P counterclaimed for receivables on the purchase price and bank balances for the goods it had sold to D ("the receivables counterclaim"). The tribunal ruled that D was entitled to recover loss of profits and rectification costs for defective products; on the other hand, as P had failed to establish breach by D of its obligations under the joint venture, the remedies and reliefs it had sought (including the receivables counterclaim) did not arise for determination. The tribunal took the view that P ought to prove breach and loss and as it had failed to do so, there was no need to consider the remedies and reliefs sought by P. The High Court had found that there was an unjustified omission by the tribunal to consider an essential issue, *viz* the receivables counterclaim, and it set aside that part of the award and ordered that the issue be remitted for determination by a new tribunal to be constituted.

4.30 Upon appeal, the Court of Appeal analysed the pleadings, lists of issues and the written submissions, and found that the parties had joined issue that the receivables counterclaim depended on who was responsible for the alleged defects of the goods. It was also P's case that if

the goods they had delivered to D were defective, they should *not* receive payment for such goods.

4.31 Adopting a "generous approach" taken in *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972, the Court of Appeal said that an award should be read in a "reasonable and commercial way expecting … that there will be no substantial fault that can be found with it": *BLC v BLB* at [86]. A court's function is not to "assiduously comb an arbitral award microscopically in attempting to determine if there was any blame…in the arbitral process": *BLC v BLB* at [85], citing *Soh Beng Tee & Co Pte Ltd v Fairmont Development Pte Ltd* [2007] 3 SLR(R) 86 at [65(f)].

4.32 The Court of Appeal found that the arbitrator had addressed his mind to the receivables counterclaim and did render a decision on them. Andrew Phang Boon Leong JA examined the list of issues submitted by the parties and those which the tribunal had concluded on and found that the question as to who was responsible for the alleged defects of the goods was directly linked to the issue of payment of the goods delivered. Having found that P was in breach of contract, the tribunal need not make any specific finding on P's receivables counterclaim. There was, thus, no breach of natural justice justifying intervention by the court.

4.33 In adopting a generous approach, the Court of Appeal pointed out that "an award cannot be read like a statute; the ratio of the award ought to be distilled from a reading of the entire award and not of isolated parts: *BLC v BLB* at [97]. Instead of picking at apparent errors, the Court of Appeal considered the arguments and issues placed before the tribunal and the eventual findings and outcome and satisfied itself that although the tribunal could have better expressed itself, it had not ignored the respondent's arguments or disregarded the receivables counterclaim.

4.34 The High Court had in this case earlier directed that the matter be remitted under Art 34(4) of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ("MAL") to a new tribunal to be constituted. As earlier observed (see author's review in (2013) 14 SAL Ann Rev 72 at 87, para 4.60), while a court has the power to suspend the setting aside proceedings to enable the tribunal to take steps to address the procedural defect, such a suspension power is intended *not* to substitute the tribunal but to revive the tribunal's jurisdiction to the extent necessary to rectify any procedural defect. The Court of Appeal confirmed this observation and held that the court's power of suspension does not extend to remitting it to a new tribunal.

Enforcement of Dispute Adjudication Board decisions and "provisional awards"

4.35 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)* [2014] SGHC 146 ("*PT Perusahaan*") is a long-running case that had traversed three dispute resolution phases from the Dispute Adjudication Board in Indonesia ("DAB"), the SIAC-constituted arbitral tribunal, and to the Singapore courts – the High Court ([2010] 4 SLR 672) and the Court of Appeal (*CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305).

4.36 In 2006, PT Perusahaan Gas Negara (Persero) TBK ("PGN") and CRW Joint Operation (Indonesia) ("CRW") entered into a contract where CRW would construct pipelines and an optical fibre cable in Indonesia incorporating the General Conditions of the Federation Internationale des Ingenieurs Conseils Conditions of Contract for Construction (1st Ed, 1999) ("the FIDIC Conditions") and some amendments thereto ("the Conditions of Contract"). Disputes arose on certain variation order proposals and payment requests by CRW which were referred to the DAB at the first instance. The DAB issued various decisions in favour of CRW, which were accepted by PGN, save for one that ordered PGN to pay CRW the sum of US$17m ("the Disputed Decision"). PGN then submitted a notice of dissatisfaction ("NOD").

4.37 CRW commenced arbitration in 2009 ("the 2009 arbitration") pursuant to cl 20 of the FIDIC Conditions, which had also set out a "security of payment" arrangement where the employer was required to pay the contractor the sums so ordered by DAB immediately ("the secondary dispute"), and argued later the merits of such payment obligation should it find it necessary to do so ("the primary dispute"). The tribunal in the 2009 arbitration issued an "award" (by majority) in favour of CRW directing PGN to pay CRW the sum of US$17m under the Disputed Decision on the basis that it was binding on PGN, without having reviewed the same on the merits. Belinda Ang Saw Ean J in the High Court ([2010] 4 SLR 672) set aside the "award" on the basis that the tribunal had exceeded its jurisdiction by making binding the DAB decision without holding a hearing on the primary dispute. CRW's further appeal against Ang J's decision was dismissed by the Court of Appeal ([2011] 4 SLR 305).

4.38 CRW commenced the second round of arbitration in 2011 ("the 2011 arbitration"). In that arbitration, it placed both the primary and secondary disputes for the tribunal's determination. The 2011 tribunal (by majority) issued an interim award holding that PGN's obligation to pay promptly the sums so awarded by the DAB to CRW was not affected by the NOD that PGN had served in relation to the Disputed Decision.

In other words, the 2011 tribunal held that PGN ought to give prompt effect to the DAB decision pending resolution of the primary dispute.

4.39 PGN maintained its argument in 2009 that it could not be compelled to pay the sums ordered in the Disputed Decision unless the primary dispute had been determined on the merits with finality and again sought to have the interim award set aside by the High Court on the basis, *inter alia*, that the same was in truth a "provisional award", giving the award a "provisional effect" and arguing that the IAA did not allow any tribunal to issue "provisional awards".

4.40 Vinodh Coomaraswamy J dismissed the application, holding that s 19B of the IAA does not prohibit a tribunal from issuing a "provisional award", that is, an award granting relief and which is intended to be effective for a limited time only; and even if it were so, the interim award was *not* a "provisional award" as its subject matter was CRW's undisputed substantive (but provisional) right to be paid immediately. Such an award was final and binding; thus, it had complied with s 19B(1) of the IAA. The tribunal could still determine the primary dispute without having to vary the interim award and s 19B(2) would thus *not* be breached.

4.41 The court held that the final award on the primary dispute would supersede or must accommodate the interim award but in neither case would the final award "alter" the interim award: *PT Perusahaan* at [158]. The interim award would remain final on the secondary dispute even after the tribunal resolved with finality the primary dispute: *PT Perusahaan* at [159]. The only effect was that PGN's obligation to pay under the interim award would end upon the resolution of the primary dispute. The tribunal, therefore, did not act in excess of its jurisdiction when it issued the interim award which was entirely "in accordance with the parties' agreed dispute resolution regime and their agreed security of payment regime": *PT Perusahaan* at [169].

4.42 The court had dealt with the secondary dispute as a substantive right capable of being made the subject of a final "award". Should it dispute the payments made, the employer is not without recourse as it could still pursue the primary dispute against the contractor.

"Provisional award" and Singapore law

4.43 The learned judge's analysis of s 19B of the IAA makes for interesting reading, in particular his suggestion that an "award" that could be varied satisfies the final and binding test. The nature of the process "pay now, argue later" – the immediate payment PGN was

required to make arising from the secondary dispute and to argue later the merits of such payment – was open to the possibility that such payment could be rendered unmeritorious in the resolution of the primary dispute. With such a possibility, the interim award was far from being "final and binding". It is curious that while acknowledging that the final award on the primary dispute would supersede or may accommodate the interim award, the learned judge suggested that in neither case could the final award be said to "alter" the interim award.

4.44 The concept of a "provisional" award is an England derivation. Singapore's Parliament in enacting s 19A of the IAA had consciously omitted to adopt this feature: see Law Reform and Revision Division, Attorney-General's Chambers, *Review of Arbitration Laws* (LRRD No 3/2001, 4 October 2001) at para 2.23 which led to the enactment of the Arbitration Act 2001 (Act 37 of 2001) ("AA 2001") and which explains such an omission to the equivalent of ss 33 and 44 of the AA 2001. Sections 19A and 19B of the IAA were at the same time amended and added.

4.45 The learned judge had defended the "award" as immutable and eternal, and held that no award subsequently made could have changed the decision; therefore, the "award" did not offend s 19B of the IAA. There was really no necessity for the court to do so. The tribunal's decision was easily defended and could be made enforceable under s 12(6) of the IAA as an order or judgment of the court.

4.46 It is unfortunate that the tribunal has decided to title its decision as an "Interim Award" and for the court to consider it as an "award" instead of considering it as what it ought to be – an "interim measure" and give effect to it without offending the underlying character of an award properly so called. An interim measure under s 12 of the IAA has been held by Lee Seiu Kin J in *PT Pukuafu Indah v Newmont Indonesia Ltd* [2012] 4 SLR 1157 *not* to be an award and is incapable of being set aside as it is intended to operate until the award in the arbitration is made. An award, on the other hand, is intended to dispose of issues with finality and finality must necessarily have longevity. It is, therefore, unfortunate that a decision which is limited in time is considered an award.

Reasonable opportunity to be heard

4.47 In *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114, the parties entered into a contract where the defendant would purchase washing machines for glass sheets from the plaintiff. The defendant commenced arbitration under the International Chamber of Commerce Rules of Arbitration 2012 ("ICC Rules") against

the plaintiff claiming, *inter alia*, that the machines failed to meet the agreed contractual specifications. The tribunal held a case management conference and the parties agreed on a procedural timetable setting out the steps and time lines necessary to move forward the arbitration. The timetable did not provide for the service or exchange of expert witness statements.

4.48 The defendant filed an expert report about three weeks before the substantive hearing and the plaintiff immediately sought the exclusion of that expert report alleging that it was agreed at the case management conference that the parties would *not* file any expert reports and that admitting the defendant's expert report would be contrary to the parties' agreed procedure and prejudicial to the plaintiff as it would not have the opportunity to verify the contents of such a report. Alternatively, the plaintiff requested that it be allowed to file an expert report and make an inspection of the machines in eight weeks and, as a consequence thereof, applied to have the hearing vacated and postponed to another date.

4.49 The tribunal granted the plaintiff the opportunity to file its expert report but only within ten days and refused to vacate the hearing dates. The plaintiff complained that the same was "too short" a time but on the last day of hearing, counsel for the plaintiff applied for it to be allowed to adduce its own expert report. The tribunal was not persuaded and continued with the hearing without admitting the plaintiff's expert report. The defendant's claim was allowed and the plaintiff's counterclaim was dismissed.

4.50 Upon an application to set aside the award on the basis of Art 34(2) of the MAL, and s 24(*b*) of the IAA in the High Court, the plaintiff submitted that:

> (a) The tribunal's decision to admit the defendant's expert report was in breach of the agreed arbitral procedure. Alternatively, the award may be set aside if it was not in accordance with Art 18 of the MAL.
>
> (b) The plaintiff was not afforded a reasonable opportunity to be heard in respect of expert evidence.
>
> (c) The decision of the tribunal not to apply the United Nations Convention for the International Sale of Goods 1980 ("CISG") as the applicable law of the contract was against the public policy of Singapore.

The High Court rejected the application.

4.51 Noting that Art 24(2) of the ICC Rules empowers the tribunal to establish a procedural timetable and that the tribunal had done so through a procedural order, the "Filing of Witness Statements" could not be characterised as an agreed procedure for purposes of setting aside application under Art 34(2)(a)(iv) of the MAL. There was, therefore, no breach of any agreed procedure. In its view, there was no causal connection between the tribunal's admission of the defendant's expert report to the holdings in the award and an exclusion of that expert report would not have made a difference to the deliberations of the tribunal. The non-filing of its own expert evidence was the plaintiff's own doing and not due to circumstances attributable to the tribunal.

4.52 The court clarified (at [112]) that the tribunal's duty to afford equal treatment to the parties under Art 18 of the MAL does not mean that the parties ought to have exactly the same amount of time but merely that "similar standards" of opportunity be applied to each party. The time to be afforded to each party cannot be based solely on the amount of time afforded to the other party. Other relevant circumstances include the conduct of the parties and the stage of the arbitral proceedings at the material time. The right of each party to be heard is neither unfettered nor unqualified. It does not mean that the tribunal must "sacrifice all efficiency in order to accommodate unreasonable procedural demands by a party": at [151].

4.53 Unsuccessful parties to arbitration have often been able to find some flaws and lapses in the conduct of the arbitration and would invariably invoke s 31(2)(*e*) of the IAA (replicating Art 34(2)(a)(iv) of the MAL) to argue that the tribunal had failed to conduct the proceedings in accordance with the procedure agreed by the parties. The requirement that the tribunal conducts the proceedings in the manner agreed to by the parties is a reinforcement of the tribunal's obligation under Art 19. As part of the overarching concept of party autonomy, if parties have agreed to a procedure for conducting the proceedings, whether by way of adopting a set of institutional rules or a bespoke procedure, the tribunal is bound to follow. A tribunal's procedural direction, unless it is a mere incorporation of the parties agreed procedure, is an exercise of the power to conduct the proceedings "in such manner as it considers appropriate" given to it under Art 19(2) of the MAL. The tribunal is at liberty to amend or change such directions subject to the overriding caveat that it has to ensure that equality of treatment be maintained and the parties be given a reasonable opportunity to be heard. Belinda Ang Saw Ean J had been astute to see that the tribunal was not doing anything more than to exercise sensible case management powers to ensure that the proceedings carried on without disruption.

4.54 The court also dismissed the plaintiff's argument that the tribunal was obliged to apply the CISG as the governing law of the contract as determined by the tribunal and the failure to do so would be in conflict with Singapore's public policy of upholding international obligations (since it has ratified the CISG). Ang J noted that the tribunal had in fact referred to Art 35 of the CISG for the requisite burden of proof. Further, even if the tribunal failed to refer to any other provisions of the CISG, it would, at worst, be an error of law and no public policy argument could arise.

Breach of natural justice – Ground for setting aside

4.55 The High Court has seldom set aside an international arbitral award. Its decision in *AKM v AKN* [2014] 4 SLR 245 ("*AKM v AKN*") is one of the rare ones where it did. Upon the parties' request under s 22 of the IAA, the case was reported under fictitious names of places and characters from the mythical world of the Lord of the Rings trilogy.

4.56 A company doing business in a country called "Moria" in the judgment ("the Company") had a production facility in a city called "Erebor". The Company went into liquidation and in the course thereof, the liquidator, the secured creditors, the shareholders and the defendants entered into an asset purchase agreement ("APA") under which the defendants agreed to purchase certain assets of the Company. As part of the arrangements, the secured creditors agreed to the APA on the condition that the defendants issue two notes for the former's benefit ("Notes"). The terms for the issuance of the Notes were set out in an "Omnibus Agreement" ("OMNA") between the defendants and the secured creditors. These Notes were eventually sold and bought by certain investment funds ("Funds"). The Funds voluntarily sought for and were joined as a party to the arbitration. Together, the liquidator, the secured creditors and the Funds comprised the plaintiffs. The defendants included the special purpose vehicle in Moria and the subsidiaries of the purchaser of the Company's assets. The APA and the OMNA contained separate dispute resolution clauses. Clause 10.3 of the APA provided that the "APA shall not apply to any default under the OMNA".

4.57 At the time the APA was entered into, the Company owed taxes to the authorities of Erebor. The APA contained a condition precedent for the closing of the APA that the Erebor authorities would agree on a deferred payment scheme for these unpaid taxes. The liquidator delivered to the defendants a tax amnesty agreement ("TAA") which contained a condition that it be revoked if any of the taxes were not paid timeously. The APA was closed in 2004 but the taxes owed to Erebor

were not paid on time. The TAA was eventually revoked by the tax authorities in 2006.

4.58 The defendants commenced arbitration in 2008 claiming that: (a) the liquidator, the secured creditors and the shareholders were in breach of the APA, having failed to deliver to the defendants a clean title to the assets which the defendants were entitled to, but was subjected to a tax lien; and (b) the liquidator, secured creditors and shareholders were jointly and severally liable to indemnify the defendants for failure of the secured creditors to settle certain property claims in breach of their obligation under the APA.

4.59 The defendants succeeded in the arbitration and were awarded US$80m in damages for loss of opportunity to earn profits and US$23.7m as indemnity on the property claims. The defendants were also entitled to suspend the performance of their obligation to pay under the two Notes under the OMNA for as long as the plaintiffs were in breach of their obligation to deliver clean title to the assets. The plaintiffs applied to set aside the award on two grounds: (a) there was a breach of the rules of natural justice within s 24(*b*) of the IAA and/or they were unable to present their case in the arbitration within Art 34(2)(a)(ii) of the MAL; and (b) the award dealt with disputes not contemplated or not falling within the terms submitted to arbitration or had contained decisions on matters beyond the scope of submission to arbitration contrary to Art 34(2)(a)(iii) of the MAL. Vinodh Coomaraswamy J set aside the award.

4.60 The plaintiffs' first complaint was that the tribunal had disregarded their submission that the defendants' right to a clean title to the assets was qualified to the extent of the TAA. In considering this complaint, the court examined various passages in the award. The learned judge gave scant regard to the tribunal's declaration that it had considered the plaintiffs' submission by saying (at [99]–[100]) that it "has already considered … the [l]iquidator's submission" and critiqued that "[t]hat cannot in itself resolve the issue of whether the tribunal actually did so". In his examination of the transcripts and the submissions made before the tribunal, the learned judge criticised the tribunal for having misunderstood the liquidator's defence (at [100]); that the tribunal had assumed (in his view, wrongly) that the defendants would be unable to mortgage the land so long as instalment payments under the TAA were outstanding: at [102]. His Honour could not accept that the tribunal had found "not a shred of contemporaneous evidence" in favour of the liquidator when in the court's view there was: at [111]. The court also described the tribunal as being "odd" and held (at [116]) that it had conflated the obligation of the liquidator to apply for a waiver of the unpaid taxes with the requirement to obtain the waiver; and that it had reached a conclusion "without engaging with the submission of

the liquidator on this point": at [117]. The learned judge concluded (at [122]) that "the tribunal had reached its conclusion by rejecting an argument that was never made to it, and thereby ignoring the arguments that were made to it". He accordingly ruled that the tribunal had breached the rules of natural justice and the award was to be set aside in its entirety.

4.61 The manner and extent to which the court had combed the tribunal's award does set this decision apart as one of the rare instances in which a Singapore court could be said to have gone beyond the normal threshold of examining the award for procedural errors or mishaps. In adopting the approach it did, the court unconsciously substituted its own view of the evidence with that of the tribunal, a role clearly not contemplated in Art 34 of the MAL and probably inconsistent with the approaches hitherto adopted by Singapore courts.

4.62 The plaintiffs' second complaint was that the tribunal had failed to take into account their evidence and submissions on the issue of whether the defendants were responsible for the revocation of the TAA. According to the plaintiffs, it was the defendants' failure to pay the post-closing taxes that had caused the TAA to be revoked. The learned judge took the view that the tribunal had taken the liquidator's concession that it was legally liable for the payment of the 2005 taxes out of context and that "it was also undisputed that the defendants were responsible for the payment of the Post-Closing Plant Assets Taxes" (at [142]) and expressed dissatisfaction that "the tribunal had determined the issue on its own basis without regard to evidence and submissions before it": at [144].

4.63 The third and fourth complaints of the plaintiffs were on the basis that the award of damages arose out of the tribunal's finding of loss of opportunity to earn profits and that it exceeded the powers the parties had given it. In its review of the award, the court found (at [175]) that the tribunal had re-characterised the defendants' claim from a *loss of actual profits* to a *loss of opportunity to earn profits* and that based on the entire tenor of the award, the tribunal had done so because "the tribunal found as a fact that the defendants' claim for loss of actual profits failed".

4.64 The plaintiffs' fifth complaint was that under the APA the secured creditors were required to settle claims in respect of certain parcels of land and if not so settled, the secured creditors and the plaintiffs would have to indemnify the defendants. As a suit by a third party claiming title to those parcels of land had been upheld by the Morian Supreme Court, the defendants claimed that the land could no longer be transferred to them.

4.65 In this regard, the court also agreed with the plaintiffs that the tribunal had assumed that the secured creditors had accepted that there was no prospect to transfer the land to the defendants when in fact it was "possible and plausible for the tribunal to conclude otherwise": at [237]. The learned judge also criticised the tribunal in that it "simply stated its conclusion that it preferred the defendants' evidence over the secured creditors' evidence … [and] gave no reasons for its conclusion": at [241].

4.66 The author finds it curious that the learned judge had in this case uncharacteristically disregarded the tribunal's various findings of fact and its assessment of evidence. In doing so, the court allowed itself to be drawn into fact-finding, and perhaps strayed into the turf of the tribunal, substituting its own findings to that of the tribunal.

4.67 One saving aspect to this decision is the tribunal's assumption of jurisdiction on matters falling within the realm of the OMNA and falling outside the ambit of the arbitration agreement set out in the APA. As there was a clear and discrete dispute resolution process prescribed in the OMNA, the award on those aspects ought to, to that extent, be set aside. The one obvious weakness in what the tribunal had done in proceeding to assess the damages in the manner it did on a "loss of a chance" basis is that it is unclear if the parties had been given sufficient opportunity to address it adequately.

4.68 One interesting aspect of the case was that the tribunal could not achieve consensus on the amount of damages to be awarded to the defendants. The majority was prepared to award loss of opportunity to earn US$140m while the minority reckoned the defendants' loss to be approximately US$96m. The tribunal then attached the probability of 55% to this opportunity and the majority used its figure to assess compensation for this lost opportunity at 55% of US$140m, or for the sum of US$80m. There is indeed no magical manner and no way of indicating how the tribunal could have reached this figure. If the parties had been given the opportunity to address this issue, the result could well be different.

4.69 A peculiar feature in *AKM v AKN* was also how the Funds made a tactical mistake by joining in the arbitration voluntarily without qualification and adopted the same defences and positions as the rest of the secured creditors. As a non-party, they need not have participated and be caught up in a battle. The decision is currently under appeal and it is likely that the Court of Appeal would have much to say in this regard.

Procedural decisions – Not a ground to set aside

4.70 Another application for setting aside came to the High Court in *ADG v ADI* [2014] 3 SLR 481. Again the court used characters from the mythical world of the Lord of the Rings trilogy to maintain the confidentiality of the identity of the parties. The first plaintiff was in the business of exploring and marketing "Mithril" and it had the rights to survey Mithril in "Moria" under survey agreements. The second plaintiff was the holding company of the first plaintiff. The defendant was in the business of exploring and extracting natural resources in Moria. The first plaintiff and the defendant entered into a separate agreement ("the Option") where the defendant had agreed to fund the first plaintiff's surveys under the survey agreements.

4.71 Disputes arose and the defendant exercised its right to terminate the Option, called on the guarantee and commenced arbitration. The tribunal had on 29 May 2013 notified the parties that it intended to close proceedings on 31 May 2013. Having heard nothing, it declared the proceedings in the arbitration closed on 4 June 2013. On 5 June, the plaintiffs applied to re-open the proceedings, which the tribunal rejected on 9 June 2013. The plaintiffs said that the tribunal's refusal to re-open the proceedings had denied them the opportunity to put to the tribunal "potentially relevant evidence" which they expected to be made available sometime on 8 July 2013: at [3]. The tribunal issued its award in mid-July 2013, ruling that the defendant had validly terminated the Option and ordering the first plaintiff to repay the defendant the entire sum the latter had paid to it plus interest. The plaintiffs hinged their application on the following: (a) they were unable to present their case within Art 34(2)(a)(ii) of the MAL; thus, the plaintiffs suffered real and actual prejudice; and (b) alternatively, their rights were prejudiced by a breach of the rules of natural justice in connection with the making of an award under s 24(*b*) of the IAA. The application was rejected.

4.72 The court clarified (at [103]) that the term "full opportunity" to present one's case under Art 18 of the MAL is "not an unqualified right to present any and all submissions and evidence at any time of a party's choosing no matter what" and is not wider than a "reasonable opportunity": see *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86; *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 45. The court differentiated the concept of "due process" and "natural justice" as used in administrative law and cautioned that (at [113]):

> … the right to be heard as it is applied in arbitration is much less concerned with protecting the vulnerable against arbitrary governmental or quasi-governmental action and much more

> concerned with achieving practical results which fulfil the parties' expectations of arbitration as a dispute resolution process.

The tribunal's actions complained of by the plaintiffs were procedural decisions which the tribunal has a wide and flexible power to make pursuant to Art 19(2) of the MAL and the SIAC Rules as adopted by the parties. The tribunal's closing of the proceedings and refusal to re-open proceedings were reasonable. In any case, the refusal to permit new evidence to be received was not "causally connected" to the reasoning and decision of the tribunal in relation to the central issue and gave no basis to impeach the award.

Impartiality or independence of arbitrator – Ground for setting aside?

4.73 Another issue arising from a case management decision of the tribunal came before the High Court in *PT Central Investindo v Franciscus Wongso* [2014] 4 SLR 978. The plaintiff, PT Central Investindo ("PTCI"), was in the business of leasing telecommunications towers. It entered into an arranger fee agreement with Franciscus Wongso and Chan Shih Mei, the defendants (the "claimants" in the arbitration), under which the claimants would secure a customer who would lease PTCI's towers in consideration of arranger fees. The defendants commenced arbitration against PTCI claiming arranger fees and a hearing was held in 2011. On 1 April 2013, the defendants notified the tribunal of some potential "fresh claims" they intended to make in the arbitration and the arbitrator directed PTCI to respond by 3 April 2013: at [12]. On 5 April, the arbitrator extended the time line to 8 April 2013, failing which the arbitrator "may" draw adverse inference on the facts asserted by the claimants ("the April directions"): at [12]. The April directions became the basis of the plaintiff's complaints against the arbitrator. A notice of challenge against the arbitrator was filed by the plaintiff with the SIAC which was dismissed by the chairman of SIAC.

4.74 The plaintiff commenced proceedings in court to remove the arbitrator on the basis of justifiable grounds to doubt the impartiality of the arbitrator ("the first action"). The arbitrator issued an award dated 4 October 2013. PTCI filed another action on 17 January 2014 ("the second action") to set aside the award under Art 34 of the MAL. Both applications were heard and subsequently dismissed by Belinda Ang Saw Ean J.

4.75 The learned judge pointed out (at [57]) that an Art 13 challenge is directed at the tribunal whereas a setting aside application in Art 34 is directed against the award. "Instant court control" over pending arbitral proceedings should not give way to "delayed court control" over the award when one party had invoked his choice of remedy under Art 13 and the matter was still pending when the award had been issued:

at [57]. The making of an award merely terminates the arbitration proceedings and renders the arbitrator *functus officio* but it does not terminate the arbitration agreement. Subsequent arbitral proceedings could still take place to pursue fresh claims: at [58].

Removal or termination of mandate

4.76 The court also held that the events leading to the April directions did not clearly show that the arbitrator was biased. Undue delay in issuing the award by itself does not suggest that the arbitrator is partial or biased. Both parties were affected by the undue delay. Any allegation of failure to conduct proceedings properly or with reasonable despatch ought to fall within Art 14 of the MAL and the proper application was for the arbitrator's appointment to be terminated therein rather than to seek his removal under Art 13 (read with Art 12(2)) of the MAL.

4.77 The complaints against the April directions fell within the realm of case management powers of the tribunal and were within the discretion of the arbitrator to make. The court considered the chain of events leading to the April directions which showed no semblance of bias or lack of impartiality. The plaintiff was given the opportunity to be heard on the claimants' potential "fresh claims". A tribunal may also draw an adverse inference as it is a power conferred on it by r 24.1(o) of the SIAC Rules 2007.

4.78 An adverse award, by itself, could not be evidence of bias unless there was some evidence of improper conduct on the part of the arbitrator. Having determined that there was no shred of evidence of improper conduct on the part of the arbitrator, there could be no breach of the rules of natural justice. Even if an error of law or fact had been alleged, the same is not capable of establishing a ground for the award to be set aside. Ang J reiterated the well-enshrined principle that the substantive merits of an award are outside the remit of the court.

Disqualification of tribunal and setting-aside

4.79 Would disqualification by removal have the consequential effect of annulling or setting aside the final award? The plaintiff advanced the proposition that the court's power to annul or set aside the award was "ancillary to the court's primary power to remove an arbitrator": at [106].

4.80 The court noted that Arts 12 and 13 of the MAL are silent on this question. Article 34(2) of the MAL does not also include removal of arbitrator as a ground to set aside an award. The learned judge pointed

out that the standards applicable for removal of arbitrator for lack of independence or impartiality are different from the standards applicable to annulment of an award because of arbitrator bias or partiality. The latter include standards which are less demanding of arbitrator impartiality and independence than those applicable under Art 12(2) of the MAL. The differences may not be so significant in cases which cover both applications, such as in a situation like the present case. An arbitrator can be removed based on "justifiable doubt" regarding his independence or impartiality and "justifiable doubt" as to biasness is equivalent to "reasonable suspicion" as to biasness, which is the test adopted to determine apparent bias in Singapore. The reasonable suspicion test is, thus, applied to determine apparent bias in Arts 13(3) and 34(2) applications: at [142].

4.81 The High Court's decision is expected. Procedural directions, whether erroneous or not, are not a ground for setting aside an arbitral award. While removal of arbitrator for apparent bias is not one of the express grounds for setting aside an arbitral award, Ang J's observation that removal of arbitrator for apparent bias is subsumed in Art 34(2) of the MAL is apt and logical. It is inconceivable that a court would uphold and/or enforce an award which it finds to have been made by an arbitrator who lacks impartiality and who has been or ought to have been removed.

Enforcement of awards

Single economic entity

4.82 Arbitral awards only operate and affect *in personam* rights. While there are cases (being exceptions rather than the rule) where non-signatories of arbitration agreements are held to be parties to the arbitration, could participate and/or be impleaded in arbitration and be bound by the award subsequently made, an award may only be enforced against the parties to the arbitration. The question whether an arbitral award may be enforced against an entity (other than the party) on the basis that the said entity and the award debtor are a "single economic entity" has been put to the fore in *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 ("*Manuchar v Star Pacific*").

4.83 Manuchar Steel Hong Kong Ltd ("Manuchar"), a global logistics services provider, chartered the vessel, *Fusion 1*, from SPL Shipping Ltd ("SPL Shipping"). Disputes arose and Manuchar claimed moneys and commenced arbitration against SPL Shipping. SPL Shipping did not participate in the said proceedings and two arbitral awards ("the Awards") were obtained by Manuchar against SPL Shipping. Manuchar sought and obtained enforcement of the Awards from the High Court

against SPL Shipping. SPL Shipping, however, made no payment. Manuchar then sought to enforce the Awards against Star Pacific Line Pte Ltd ("Star Pacific") or its servants or agents on the basis that SPL Shipping and Star Pacific should be "regarded at law as having the same corporate personality on the ground that they were part of a single economic entity": at [18]. Star Pacific's case was that it was only an agent of SPL Shipping as evidenced by an agency agreement.

4.84 Lee Kim Shin JC dismissed the application. In his analysis, the concept of single economic entity ought not to be construed in an absolute manner and it could mean "different things in different contexts": at [25]. A single economic entity as understood for statutory purposes (*eg*, taxation and competition laws) is different as it ought to be understood in the present scenario, which considers a dispute between companies "over liability under a contract": at [25].

4.85 It is not disputed that Manuchar's intended cause of action was to enforce the Awards against Star Pacific. Indeed, Star Pacific was not only a stranger to the arbitration agreement between Manuchar and SPL Shipping, it was also not a named respondent and, therefore, not the award debtor. Star Pacific did not have the benefit of contesting Manuchar's claims in the arbitration. It would be in gross violation of the fundamental right of Star Pacific should it be now made to pay for SPL Shipping's obligation under the Awards.

4.86 The single entity argument sought to be relied upon by Manuchar is similar to the concept of a "group of companies" because the latter constitutes the same "economic reality" and (at [72]):

> … one company in the group can bind the other members to an agreement if such a result conforms to the mutual intentions of all the parties and reflects the good usage of international commerce.

Such an argument, if successfully argued, would be an exception to the usual principles of company law that a company and its shareholders are separate legal entities and so subsidiaries too are separate from their parent companies. In exceptional circumstances, the separate legal personality could be ignored or what is commonly known as piercing the corporate veil: at [93]. Such a limitation consists of the presence of abuse behind the veil of separate legal personality, that is, where the separate legal personality is used to "evade the law or refuse its enforcement": at [95], citing *Prest v Petrodel Resources Ltd* [2013] 2 AC 415 at [34].

4.87 Manuchar, in this case, was not asserting that Star Pacific was in control of SPL Shipping or that there was any abuse on the part of Star Pacific in the use of SPL Shipping, which could be made to launch the

argument that the corporate veil of SPL Shipping ought to be lifted to make Star Pacific liable for SPL Shipping's obligations. Manuchar's case was simply that Star Pacific ought to be liable for SPL Shipping's obligations on the basis that both were effectively a "single economic entity" and nothing more. The court expressed the view that a "single economic entity concept [is not] recognised under common law … [and] … Singapore law" (at [101]) to make a subsidiary liable for the obligations of its affiliated companies or parent companies on the sole basis that they belong to the same corporate group or, as it had aptly put it, "[o]ne for all and all for one": at [99].

4.88 As could be seen in this and many other cases, no award could be enforced against a party who is not a party to the arbitration: see *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 and *Javor v Francoeur* 2003 BCSC 35. The court's decision in *Manuchar v Star Pacific* serves as a reminder that it would be extremely difficult for any award creditor to seek to enforce its award against a non-party and even if the court could be convinced at that stage that the non-signatory is a party to the arbitration agreement, enforcing such an award against a party who had never participated or had not been given the opportunity to do so would be something any court would have difficulty doing.

4.89 The dilemma of an award creditor not being able to realise the fruits of an award is a real one. If a party anticipates such a possibility, and believes that the party named in the contract and the arbitration agreement are so related to or controlled by a non-signatory, the question of whether the relationship of the non-signatory to the contract/arbitration agreement is such should best be raised before the tribunal for determination. Singapore courts would, if the tribunal makes a finding that a non-signatory is in fact a party to the contract and the arbitration agreement, enforce such an award without the need to go into the merits: see *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR(R) 174 where the court enforced a foreign award against a non-signatory whom the tribunal had ruled to be a proper party to the contract and the arbitration agreement.