4. ARBITRATION

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Enforcement of arbitration agreements

Stay of court proceedings – Incorporation by reference; conflicting jurisdiction and arbitration clause

4.1 An arbitration agreement may be in the form of a separate agreement or embedded in a clause within the underlying commercial contract. A reference in a contract to a document containing an arbitration clause could also constitute an arbitration agreement between the parties to the contract if the reference is such as to make that arbitration clause part of the contract. Singapore courts have been quite consistent in adhering to a strict requirement that to incorporate such arbitration clauses, the incorporating words must be specific and sufficiently clear (see, for example, *Star-Trans Far East Pte Ltd v Norske-Tech Ltd* [1996] 2 SLR(R) 196; *Concordia Agritrading Pte Ltd v Cornelder Hoogewerff (Singapore) Pte Ltd* [1999] 3 SLR(R) 618; *L & M Concrete Specialists Pte Ltd v United Eng Contractors Pte Ltd* [2000] 2 SLR(R) 852). There have also been situations where there were competing arbitration clauses in different but related documents as well as conflicting of choice of jurisdiction and arbitration clauses. In each of such situations, the court always had to decide which of these should prevail.

4.2 In *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] 2 SLR 821, the plaintiff and defendant were parties to a drilling contract under which the plaintiff had undertaken to supply a drilling vessel and related drilling services to the defendant. A condition of the drilling contract required the parties to establish an escrow account into which the defendant was to deposit funds prior to mobilisation of work. The defendant failed to deposit the required funds into the escrow account whereupon the plaintiff treated the failure as a repudiatory breach and terminated the drilling contract. The drilling contract contained an arbitration clause for the resolution of:

> [a]ny dispute, controversy or claim arising out of or in relation to or in connection with this Contract, including without limitation any dispute as to the construction, validity, interpretation, enforceability, performance, expiry, termination or breach of this Contract …

4.3 The escrow agreement, on the other hand, had a clause providing that:

> 6(1) Each of the Parties irrevocably submits to and accepts generally and unconditionally the non-exclusive jurisdiction of the courts and appellate courts of Singapore with respect to any legal action or proceedings which may be brought at any time relating in any way to this Agreement.
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> 6(2) Each of the Parties irrevocably waives any objection it may now or in the future have to the venue of any action or proceedings, and any claim it may now or in the future have that the action or proceeding has been brought in an inconvenient forum.

4.4 The plaintiff commenced action in the High Court claiming damages for breach of the escrow agreement. The defendant applied to stay the action on the basis of the arbitration clause in the drilling contract. A stay was initially granted by the assistant registrar but was set aside by Andrew Ang J. The plaintiff had also argued that the defendant must show exceptional circumstances amounting to a strong cause why the defendant need not be held to the jurisdictional agreement. Quite rightly, the court distinguished those cases involving competing jurisdictions and instead took the approach to see if the arbitration clause in the drilling contract applied to the subject matter in the pending action. Ang J held that specific incorporation of the arbitration clause from the drilling contract would be required to anchor such an argument. The learned judge took the view that in this instance, the parties had intentionally carved the escrow agreement from the drilling contract and expressly subjected the escrow agreement to a non-exclusive jurisdiction clause rather than an arbitration clause and thereby evinced a clear intention to subject claims arising from the escrow agreement to the dispute resolution clause found within that particular agreement and not the arbitration clause in the drilling contract. As the subject matter in the action arose out of the escrow agreement, and not under the drilling contract, the arbitration clause in the drilling contract had no application and thus no stay ought to be ordered.

4.5 Ang J's reasons for his decision are consistent with the usual tenets of interpretation adopted by the courts. There was a hint (*Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] 2 SLR 821 at [16]–[20]), however, that the court appeared to have also been persuaded by the plaintiff's argument that a chosen jurisdiction must not be departed from unless there are

"exceptional circumstances amounting to a strong cause" with the burden of showing such exceptional circumstances thereby lying with the defendant. Such an argument may be appropriate in a situation where there are competing competent jurisdictions with no interposing of an arbitration clause but where the contest is between choice of jurisdiction clause and an arbitration clause, no such issue should arise. In such situations, the court's primary consideration should be to ascertain whether the parties had intended arbitration or litigation at the named jurisdiction. If the arbitration clause is upheld as applicable to the parties and the subject matter before the court, the court is bound to stay the action pending before it unless the arbitration clause is "null and void, inoperative or incapable of being performed" (an obligation imposed under Art II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) (330 UNTS 38; entered into force 7 June 1959) ("the New York Convention").

Stay of court proceedings – In rem *and* in personam *actions*

4.6 Section 7 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") gives the court the power to order that property previously arrested be retained as security for the satisfaction of an arbitral award. Commencement of an action *in rem* in Singapore to arrest a ship of itself would not constitute a waiver or repudiation of the right to arbitrate but would instead enable the plaintiff to obtain security for an eventual arbitral award to be made. The parties to a court action would normally be the persons named in the proceedings. In admiralty *in rem* actions, however, the action is commenced not normally against a named entity but against an unnamed owner of the *res*. The traditional understanding of such actions is that they operate *in rem* against the *res* and *in personam* against the defendant owner of the vessel if and when it enters an appearance in the action. Vessel's ownership could change over time and it is not unusual that an *in rem* action may have been commenced after a change of ownership leading to the usual issues of whether the action was properly against the *res* of the ship and her new owners.

4.7 A slightly more complex situation occurs in *The Engedi* [2010] 3 SLR 409. The plaintiff as the disponent owner had let on charter the vessel *TS Bangkok* to the defendant. The charterparty provided for arbitration in London. A grounding incident occurred and the *TS Bangkok* was damaged. The registered owners of the *TS Bangkok* claimed against the plaintiff for damages and the plaintiff sought an indemnity from the defendant, EP Carriers Ltd. The plaintiff commenced an admiralty *in rem* action against the *Eagle Prestige* (then owned by the defendant). However before the writ was served, the *Eagle Prestige* was sold to Capital Gate Holding Pte Ltd (the "interveners"). The defendant went into liquidation and the plaintiff caused the vessel

Eagle Prestige (since renamed *Engedi*) to be arrested. The defendant entered appearance to the *in rem* action. The vessel was later sold and the proceeds held in court pending determination of priorities amongst various creditors, including the mortgagees and the plaintiff. The plaintiff then applied for a stay of the action, which it had earlier commenced on the basis of the arbitration clause in the charterparty. The interveners objected to the stay but the assistant registrar granted a stay in favour of arbitration. Judith Prakash J, however, reversed the assistant registrar's decision.

4.8 Her Honour was careful to point out that the court's obligation to grant stay of a pending action must be exercised only to the extent that the proceedings relate to the matter in the arbitration. In most instances where the owner of the *res* and the party liable *in personam* in the action are one and the same person, the court would normally grant a stay as the parties to the arbitration agreement and the action are the same. In the instant case, however, the person liable *in personam* (the defendant) was no longer the owner of the *res* (now owned by the interveners), and as such it could not be said that the action *in rem* against the *res* was a matter subject to the arbitration agreement. Simply put, the interveners as the new owner of the *res* was not a party to the arbitration agreement between the plaintiff and the defendant under the charterparty and could not be forced to arbitrate with the plaintiff.

4.9 Prakash J's decision makes clear that the right to arbitrate can only be exercised by and against parties to the arbitration agreement. Such rights must not be exercised in any manner that would impinge on the rights of any legitimate third party. The solution she had crafted balances the right of a claimant to proceed to secure its claim in appropriate cases by way of *in rem* actions at the same time ensures that third parties whose property may become embroiled in the action by virtue of the court's exercise of its admiralty jurisdiction against its property retains the avenue to defend its interest before the court.

Subject matter arbitrability

4.10 Section 11 of the IAA (above, para 4.6) provides that any dispute is arbitrable unless "it is contrary to public policy to do so" although it makes clear that the fact that any written law confers jurisdiction on any subject matter on any court of law but does not refer to the determination of that matter by arbitration does not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration. The issue of subject matter arbitrability may be brought by the opposing party before the court, on an application for stay of judicial proceedings to resist the enforcement of an arbitration agreement on the basis that the matter is not arbitrable and/or contrary to public policy. The challenge of jurisdiction based on arbitrability

addresses the question of what could be referred to arbitration as opposed to what falls within the scope of the arbitration agreement.

4.11 There is no specific reference in the Arbitration Act (Cap 10, 2002 Rev Ed) ("AA") which addresses the issue of subject matter arbitrability but Tan Lee Meng J in *Petropod Ltd v Larsen Oil and Gas Pte Ltd* [2010] 4 SLR 501 ("*Petropod Ltd*") took the view that this concept ought to be taken into consideration when a court is asked to exercise its discretion to stay a pending action under the AA. Petroprod Ltd ("Petropod") was a Cayman Islands company, which had a number of wholly-owned one-ship companies. It had no employees of its own. By a management agreement dated 21 December 2006 between Larsen and Petropod, Larsen was to provide management services to Petropod and its subsidiaries. The management agreement contained an arbitration clause. Petropod was placed in liquidation by the court of Cayman Islands in July 2009 and subsequently was also ordered to be wound up by an order of the High Court in August 2009. All the subsidiaries of Petropod, though not in liquidation, were technically insolvent. Petropod commenced action in Singapore against Larsen seeking avoidance of a number of payments made to Larsen on the ground that these payments amounted to unfair preferences or transactions at an undervalue within the meaning of ss 98 and 99 of the Bankruptcy Act (Cap 20, 2009 Rev Ed), read with s 329(1) of the Companies Act (Cap 50, 2006 Rev Ed); and the avoidance of a number of payments made by the subsidiaries to Larsen pursuant to s 73B of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) ("CLPA") on the ground that they were made with the intent to defraud it as a creditor of the subsidiaries. Larsen, relying on the arbitration clause in the management agreement, sought a stay of the action.

4.12 Tan J examined the provisions in the Bankruptcy Act and Companies Act respectively on the avoidance of certain transactions following insolvency and ruled that these were intended to protect the general body of creditors and would override transactions which were justifiably binding on the insolvent company under general law. He took the view that such a policy would be compromised if its enforcement was subject to private arrangements, including an agreement to arbitrate. The court also took the view that policy considerations also applied to Petropod's claims for allegedly fraudulent payments made by its subsidiaries to Larsen. Accordingly, he ruled that such claims were not arbitrable and the stay of Petropod's action was refused.

4.13 *Petropod Ltd* is probably the first local decision on subject matter arbitrability. In coming to its decision, the court had adopted a policy approach and considered whether it is desirable for such claims to be referred for arbitration. In the context of international arbitration, the term "public policy" has more often been understood to refer to

international public policy rather than any local rule of preference, economic policy or even national policy. Such would include subject matters that are generally abhorred by the international community or which would "shock the conscience of the court", such as money laundering, corruption, bribery, human trafficking, smuggling, *etc*. While Tan J did not explicitly say that it is against public policy to permit such claims to be arbitrated, his Honour could be understood to say that where the underlying policy of certain statutory provisions collide with private parties' right to arbitrate, to allow the latter would be against public policy. This could then lead some to adopt an expansive and undesirable interpretation (at least in the context of an arbitration under the AA) of what would come within the basket of matters "contrary to public policy".

4.14 Interestingly, in *Econ Piling Pte Ltd v Shanghai Tunnel Engineering Co Ltd* [2011] 1 SLR 246, which dealt with an appeal against an award in a domestic arbitration, no concern about any possible infringement of public policy was expressed although Econ Piling Pte Ltd was under a court sanctioned scheme of arrangement under which no creditor could commence or continue any proceedings against Econ Piling for the adjudication of any claim for recovery of debt or damages by civil action or arbitration without the consent of Econ Piling.

4.15 The issue confronting the court in *Petropod Ltd* (above, para 4.11) could well be approached from the angle of whether the subject matter in dispute before the court fell within the scope of reference of the arbitration clause without the need for the court to hold that the subject matter is not arbitrable or contrary to public policy. Such an approach was taken by the judge in the New South Wales case (*New Cap Reinsurance Corp Ltd v A E Grant, Lloyd's Syndicate No 991* [2009] NSWSC 662) referred to by Tan J in his decision, where Barrett J held that the liquidator's claim under the Corporations (New South Wales) Act (Act 3 of 1990) fell outside the scope of the arbitration agreement.

Time for making award

4.16 An arbitrator has a duty to make his award and to do so within the time set in the agreed institutional rules. There is no statutorily imposed time frame for a tribunal to make its award either under the AA (above, para 4.11) or the IAA (above, para 4.6) but must do so with reasonable dispatch. An arbitrator under the AA, however, risks being removed by the court if he fails to do so within a reasonable time. Where the time for making an award is set out or limited in the agreement or the rules adopted by the parties, the court may in an arbitration under the AA extend the time on the application of the tribunal or a party to the proceedings under s 36 of the AA.

4.17 In *Ting Kang Chung John v Teo Hee Lai Building Constructions Pte Ltd* [2010] 2 SLR 625 ("*Ting Kang Chung John*"), the plaintiff was an arbitrator appointed by the Singapore Institute of Architects ("SIA") to arbitrate a dispute between the defendant, a contractor Teo Hee Lai Building Constructions Pte Ltd, and its employers, Anwar Siraj and his wife. In accordance with the agreed SIA Rules, the arbitrator was required to make an award within 60 days from which the hearing was closed. It was not disputed that hearing was closed on 12 December 2003. The arbitrator was informed by the respondent on 7 April 2004 that the time for making the award had lapsed but the arbitrator did nothing until 15 April 2005 when he informed the parties that his award was ready for collection and seeking payment of his outstanding fees. The respondents in the arbitration did not agree to the extension of time and the arbitrator then applied to the court for an extension on 19 September 2006. As the arbitration was commenced before the coming into force of the AA, the application was based on s 15 of the Arbitration Act (Cap 10, 1985 Rev Ed) (repealed) which permitted the court to enlarge the time for making the award "whether time for making the award had expired or not". The court declined to extend time. In his decision, Quentin Loh JC (as he then was) affirmed the position that an arbitrator's mandate is at an end when the time limit set in the agreement or rules relating to his appointment had expired. The court took the view that while the statutory provision gave the court a wide discretion to extend time for making an award in a domestic arbitration, the court should be slow to do so if it overrides party autonomy. The arbitrator in this case had exceeded the time limit in making the award by some one year and two months, which the court considered "considerable" and had also delayed in making his application for extension of time by some two years and seven months after his mandate had expired. The court also did not accept the reasons given by the arbitrator which included the complex nature of the dispute, the failure of the respondents to participate at the final hearing or make final submissions, and the innumerable challenges launched by the respondents to his handling of the arbitration as well as the complaints lodged by the respondents to the police after the arbitrator employed a contractor to unload left exhibits, such as soiled mattresses and water pumps left behind by the respondents at the hearing premises after a preliminary hearing and refusing to remove them. The court ruled that these were not reasons, much less good reasons, to justify an extension of time.

4.18 The court also observed that the respondents were difficult, confrontational and obstructive parties who had made innumerable applications to the court, ten of which went up to the Court of Appeal. Nevertheless, the learned Judicial Commissioner exhorted arbitrators "to be of sterner stuff, believing in their own competence and objectivity to carry out their function and complete the arbitration fairly, with due

despatch and economy, undeterred by such tactics employed by a party": *Ting Kang Chung John* at [68]. The court found that the saga that had ensued was attributable to Mr Ting's lack of training, experience and competence to handle the arbitration as well as SIA's lack of transparency in appointing arbitrators with sufficient training and experience in handling arbitrations.

4.19 The case of *Ting Kang Chung John* is a timely call for industry-specific bodies which are providing arbitration services both in the adjudication and administration of the arbitration to consider seriously the need for professional training of its appointees as well as setting up a transparent process in the appointment and conduct of arbitrations.

Recourse against awards

Domestic arbitration awards under the Arbitration Act – Appeal on question of law

4.20 Parties to an arbitration under the AA (above, para 4.11) may seek recourse against the award by way of an appeal to the High Court on a question of law arising out of an award made in the proceedings: AA s 49(1). An appeal against an award may be brought only if the parties consent or with leave of the court. Where the parties have consented or leave has been granted by the court, the court may examine the question(s) of law decided in the award and make a determination as to its propriety. This right of appeal may be excluded by agreement of the parties: s 48(2). An agreement by the parties to dispense with reasons for the arbitral award shall be treated as an agreement to exclude the court's jurisdiction.

Agreement to exclude appeal

4.21 The agreement to exclude appeals may be made in the arbitration agreement or by a provision embedded in the rules adopted by the parties. In *Holland Leedon Pte Ltd v Metalform Asia Pte Ltd* [2011] 1 SLR 517 ("*Holland Leedon Pte Ltd*"), Philip Pillai J had to consider an arbitration clause in a contract which also provided that the "award shall be final and binding" and that "[t]he parties agree to exclude any right or application to any court or tribunal of competent jurisdiction in connection with questions of law arising in the course of any arbitration." The plaintiff had sold its business to the defendant at a price based on a commonly used mechanism of applying a multiplier to the vendor's EBIDTA, *viz*, earnings before interest, depreciation, tax and amortisation. The purchaser alleged that the plaintiff had committed breaches of warranty of the sale and purchase agreement and claimed that it would be entitled to pursue a claim for the difference between the

purchase price it paid and the purchase price computed on the basis of a reduced EBIDTA. The arbitrator had made a summary determination allowing the purchaser to pursue such a claim. The plaintiff applied for leave to appeal against that decision. The purchaser argued that the tribunal's decision was not capable of appeal as the parties had agreed to exclude the court's jurisdiction in the arbitration clause. This argument was rejected.

4.22 In the court's view, the court's jurisdiction to consider an appeal "on a question of law arising out of an award made in the proceedings" under s 49(1) of the AA must be specifically excluded. The words in the arbitration clause was crafted to specifically exclude only appeal on "questions of law arising *in the course of any arbitration*" and did not exclude a right to appeal "on a question of law *arising out of an award made* in the proceedings".

4.23 Pillai J's decision highlights the difference between the court's power to determine a preliminary question of law arising in the course of the proceedings under s 45 of the AA and an appeal against an award made in the arbitration under s 49. The learned judge was certainly correct to point out that the arbitration agreement in the sale and purchase agreement did not prohibit an appeal against an award but merely an agreement to exclude determination of preliminary questions of law under s 45. It should be noted, however, that s 49 applies only to an appeal against an "award" made by the tribunal. Section 2(1) of the AA has defined an "award" to mean "a decision of the tribunal on the substance of the dispute". Procedural orders and directions are, therefore, not in the nature of awards. The question whether the decision by the tribunal to allow the purchaser to pursue its claim in the manner it had framed was a procedural order or a substantive award did not seemed to have been ventilated before the court. If the tribunal's decision was merely to allow the purchaser to pursue such a claim and whether or not it could succeed ultimately remained to be decided, such a decision would probably be a procedural matter in which a court would have no jurisdiction to intervene while the arbitration is still pending.

Leave to appeal

4.24 The granting of leave to appeal against a domestic award on a question of law arising out of an award would only be made if the conditions set out in s 49(5) are satisfied. These include satisfying the court hearing the application that the determination of the question will substantially affect the rights of one or more of the parties and that the decision of the arbitral tribunal on the question is obviously wrong; or if the question is one of general public importance, the decision of the arbitral tribunal is at least open to serious doubt. What matters are to be

considered of "general public importance" was considered in *Holland Leedon Pte Ltd* (above, para 4.21) and *Engineering Construction Pte Ltd v Sanchoon Builders Pte Ltd* [2011] 1 SLR 681.

4.25 In *Holland Leedon Pte Ltd*, Pillai J considered that the term EBIDTA, *viz*, earnings before interest, depreciation, tax and amortisation, was one commonly used in commercial pricing mechanisms for sale of businesses and as such, its meaning and purport was one of "general public interest". He then held that the arbitrator's decision was "at least open to serious doubt" and granted leave to appeal.

4.26 Quentin Loh J in *Engineering Construction Pte Ltd v Sanchoon Builders Pte Ltd* [2011] 1 SLR 681 had to deal with a subcontract which contained a set-off clause. It was submitted on behalf of the subcontractor that the clause was similar in purport to other standard forms of contract, such as those used by the Singapore Contractors' Association ("SCAL") and the Singapore Institute of Architects ("SIA") Conditions of Sub-contract form. It was also said that question of set-off often arose in construction contracts whereby a main contractor would often assert its right to set-off claims (whether quantified or unascertained) and as such the question of whether a contractor could actually set-off, against amounts owing to the subcontractor, its claims without ascertaining or quantifying the sums, would be a matter of public importance as it would give certainty to the construction industry. Loh J did not accept that submission and ruled that the subcontract was a 'one-off' contract and the clause bore no significant similarity to the standard forms used by SCAL or SIA. He applied the test of whether the arbitrator was "obviously wrong" implying that the question was not one of general public importance.

Substantive appeal

4.27 The appeal procedure contemplated in the AA (above, para 4.11) where consent of all the parties are not obtained is a two-stage process, *viz*, a consideration of the leave to appeal and the hearing of the substantive appeal. Judith Prakash J in *Motor Image Enterprises Pte Ltd v SCDA Architects Pte Ltd* [2011] 1 SLR 497 clarified that a court hearing an application of leave to appeal would not render any final and conclusive decision on the issues raised, as such decisions could only be given on the hearing of the appeal proper if the same issues arose for consideration. While the judge considering leave to appeal stage could well have formed some provisional view on merits, a court sitting in appeal must form its final and conclusive views on the merits. Prakash J, who had earlier granted leave to appeal to Motor Image Enterprises and refused SCDA Architects' consequent application for leave to appeal to the Court of Appeal against such grant of leave (under s 49(7) of the AA), subsequently also heard the substantive

appeal. SCDA, who had succeeded in the arbitration, argued that the question of law, which was the subject of the appeal, was not one that was based on a finding of facts made by the arbitrator. Motor Image protested that SCDA was estopped from raising issues that had already been raised when the court considered Motor Image's application for leave to appeal and that SCDA could no longer challenge the factual premises of the question of law that Motor Image had been granted leave to appeal on. The court rejected Motor Image's objections and allowed SCDA to reprise its arguments. The court went through the findings of facts and eventually came to the conclusion that the arbitrator did not make any finding upon which the question of law framed by Motor Image could be premised.

4.28 The liberty granted to parties to appeal against a question of law under s 49 of the AA is seldom resorted to because most successful parties would not normally agree to give such consent. In *Econ Piling Pte Ltd v Shanghai Tunnel Engineering Co Ltd* [2011] 1 SLR 246, both parties were dissatisfied with certain aspects of the arbitrator's Partial Award, on different grounds, and had therefore agreed pursuant to s 49(3)(*a*) of the AA to appeal to the court questions of law they considered to have arisen from the decision and omissions of the arbitrator. The claimant in the arbitration in that case was Shanghai Tunnel Engineering Co Ltd ("STEC") as subcontractor and Econ-NCC Joint Venture ("ENJV") was the main contractor. The contract related to the construction of a stretch of the Circle Line for the Mass Rapid Transit connecting the MacPherson and the Upper Paya Lebar stations. As no leave is required for appeal with consent of all parties to an arbitration, Judith Prakash J proceeded to examine each of the questions posed by the parties.

4.29 One of the questions posed related to the arbitrator's finding of when the subcontractor had achieved "substantial completion". The learned judge found that the arbitrator had in coming to his decision on the date for substantial completion of the subcontract works, relied on the provisions of the main contract (in particular, the commencement of the Defects Liability Period) instead of construing the provisions of the subcontract. In the court's judgment, under the subcontract, commencement of the defects liability period and date of completion of the subcontract works were not intended by the parties to coincide and the arbitrator had therefore made an error. The date for substantial completion of the subcontract works was thus remitted to the arbitrator for his reconsideration.

4.30 The parties had in the arbitration attempted to distinguish between the terms "delay" (a term referred to in the subcontract) and "interruption" (a term which was used by the ENJV's expert) when considering whether there was a delay event, which would excuse STEC from proceeding with the subcontract works. The arbitrator's ruling

that there was no distinction was challenged as a question of law. The court affirmed the view that there was indeed no distinction in these terms which were not defined in the contract and was astute to point out that the question was in reality not a question of law but a question of fact as it was for the arbitrator to ascertain whether the delay or interruption was caused by ENJV.

4.31 An interesting issue was raised by ENJV to contest the arbitrator's award for liquidated damages in favour of STEC. The arbitrator in an earlier stage of the arbitration made an "interim award" dismissing an application by STEC for an interim award of damages of some $5,910,000, which had included $1m less deducted by ENJV. The application was made under r 27 of the SIAC's Domestic Arbitration Rules (2002) (since repealed), which provided for a summary determination of claims in which an arbitrator could make a summary award if it determines that a respondent had "no valid defence" to the claim or any substantial part of its claim.

4.32 ENJV argued that in dismissing STEC's application for damages in the "interim award", the arbitrator had in effect decided that ENJV could deduct liquidated damages of up to $1m for delay under cl 17.0 of the Letter of Award. The arbitrator had thus become *functus* on that issue and could not reopen the issue of whether cl 17.0 was a liquidated damages provision and that STEC was estopped from contending that cl 17.0 was not a liquidated damages provision since STEC had agreed in its submissions in relation to that application that cl 17.0 was such a provision. Prakash J considered the effect of the "interim award" made pursuant to the summary procedure under the SIAC's Domestic Arbitration Rules (2002) (since repealed) and ruled that the arbitrator had decided in that "interim award" nothing more than that ENJV had an arguable claim that was adequate to defeat STEC's application for a summary award. In the court's view, the "interim award" was not an award as it made no decision on any substantive matter relating to the disputes being arbitrated and that in any event the arbitrator had made clear that he made no final determination on the substance of the issue of how cl 17.0 should be construed.

4.33 The dispute between ENJV and STEC was also complicated by the fact that one of the joint venture partners, Econ Piling Pte Ltd, was placed in judicial management and a scheme of arrangement had been sanctioned by the High Court in 2005. Under the scheme, no creditor could commence or continue any proceedings against Econ Piling for the adjudication of any claim for recovery of debt or damages by civil action or arbitration without the consent of Econ Piling. As STEC had not submitted its proof of debt but had instead prosecuted the arbitration, ENJV was absolved from liability to STEC. The argument was flatly rejected by the court. Her Honour noted that the scheme of

arrangement was never pleaded, never mentioned, in the course of the arbitration even though it was in force throughout the arbitration proceedings but had instead fully participated in the arbitration and had brought its own counterclaim in the arbitration. Such an issue was therefore outside the scope of reference to arbitration before the arbitrator who had so rightly declined to consider.

4.34 The arbitrator in *Econ Piling Pte Ltd v Shanghai Tunnel Engineering Co Ltd* [2011] 1 SLR 246 was also found to have made an error in not awarding costs "thrown away" sought by ENJV by reason of STEC's amendment of its pleadings. To this, the court held that although it was an error of law, it was not, however, a "question of law" that could be appealed against under s 49 of the AA (above, para 4.11), a position clearly made in the Court of Appeal's decision in *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd* [2004] 2 SLR(R) 494 (see also (2004) 5 SAL Ann Rev 47 at 57–59, paras 3.29–3.35). Prakash J's diligent scrutiny of the award in *Econ Piling Pte Ltd v Shanghai Tunnel Engineering Co Ltd* [2011] 1 SLR 246 shows how a court ought to exercise its appellate powers under the AA. She was strict to ensure that where the arbitrator had erred on a question of law such as misapplying provisions from the main contract to determine the date of substantial completion in relation to a different phase of the project under the subcontract, by remitting the award in that respect for re-consideration, but was also careful not to disturb the finding of the arbitrator where questions of fact were framed to appear as questions of law or where errors of law were made which did not arise as a question of law.

Domestic arbitration under Arbitration Act – Setting aside

4.35 In domestic arbitration under the AA, a party who is dissatisfied with the award may, in addition to the right to appeal against an award under s 49 of the AA, apply to set aside the award on the grounds set out in s 48. These grounds are similar to those provided for in relation to awards made under the IAA (above, para 4.6) (see s 24; Art 34(2) of the Model Law, First Schedule of the IAA). Section 48(1)(*a*)(vi) and s 48(1)(*a*)(vii) of the AA provide respectively that the court is also empowered to set aside an award if "the making of the award was induced or affected by fraud or corruption" or 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".

4.36 In *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 ("*Front Row Investment Holdings*"), the parties had agreed to jointly organise and run a series of races across South East Asia ("Asian Cup Series") using 35 specially built light-weight Mercedes-AMG SLK 55 cars. Front Row was responsible for

financing the venture whilst Daimler was responsible for organising the Asian Cup Series. Mr Thomas Buehler ("Buehler"), an employee of Daimler, was to act as its general manager of Front Row. Under the agreement, Front Row was to purchase the cars and provide the funds to run the "Asian Cup Series" and Daimler was to organise, brand and promote the Asian Cup Series and organise up to 20 races per year for two years. The agreement provided for ICC arbitration in Singapore. Disputes arose between the parties after only three races. Daimler commenced arbitration claiming $610,506.06 for the sums invoiced as Buehler's salary while working for Front Row. Front Row denied liability and counterclaimed alleging that Daimler had breached the agreement by failing to organise, brand and promote the Asian Cup Series, or make reasonable efforts to organise up to 20 races promised; as well as damages for misrepresentation which induced Front Row to enter into the agreement. The representations were set out in the terms of reference signed by the parties as (a) that the AMG SLK 55 cars were appropriate for, had been specially designed and adapted and would be permitted for use in non-professional racing; and (b) that 20 races would be organised as the AMG-part of the Asian Cup Series. The arbitrator dismissed both Daimler's claim and Front Row's counterclaim. Front Row applied to set aside the award in so far as it related to the dismissal of its counterclaim. In his award, the arbitrator had found that Front Row had trimmed down its misrepresentation to one of the "race worthiness" of the SLK 55 cars and that Front Row had "ceased to rely on" the alleged failure to organise the 20 races. It argued successfully before Andrew Ang J that the arbitrator had breached the rules of natural justice by failing to consider the merits of Front Row's submissions and arguments made in relation to that alleged misrepresentation. Ang J set aside that part of the award dealing with the counterclaim and ordered that it be "tried afresh by a newly-appointed arbitrator".

4.37 In coming to its decision, the court proceeded by examining the award and found that Front Row did plead that Daimler had represented that it would organise 20 races as part of organising, branding and promoting the Asian Cup Series, that this representation was one of the grounds which Front Row had relied upon in its claim for misrepresentation. Extrapolating from the Court of Appeal's decision in *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491 that it would be a breach of natural justice if a court or tribunal decided a case on a basis not raised or contemplated by the parties, as an affected party would have been deprived of its opportunity to be heard or to address the issues upon which the case was decided, Ang J said (*Front Row Investment Holdings* at [31]):

> The corollary is plainly also true – that a court or tribunal will be in breach of natural justice if in the course of reaching its decision, it disregarded the submissions and arguments made by the parties on

> the issues (without considering the merits thereof). Otherwise, the requirement to comply with the maxim *audi alteram partem* would be hollow and futile, satisfied by the mere formality of allowing a party to say whatever it wanted without the tribunal having to address or even understand and consider whatever had been said."

4.38 Ang J's succinct words that an arbitrator's duty to give parties a hearing is not discharged by merely allowing a formal presentation by the parties and disregarding or ignoring it altogether are clearly indisputable. The learned judge had in his decision also referred to several Australian (New South Wales) construction adjudication cases (*Timwin Construction v Façade Innovations* [2005] NSWSC 548, *Lanskey v Noxequin* [2005] NSWSC 963 and *Brookhollow Pty Ltd v R & R Consultants Pty Ltd* [2006] NSWSC 1) to show that the duty to hear parties must be manifested in some effort to understand and deal with the issues raised by the parties. Drawing from these, the court then concluded that the arbitrator's "disregarding of the issue concerning Daimler's obligation to organise, brand and promote the Asian Cup Series because Front Row had ceased to rely on this issue" (*Front Row Investment Holdings* at [45]) breached the rules of natural justice. The learned judge was careful to make clear that this was not a case where the arbitrator had "accidentally omitted to state his reasons for rejecting the same or had found the same to be so unconvincing as to render it unnecessary to explicitly state his findings on it" (*Front Row Investment Holdings* at [45]) (distinguishing it from *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 where similar Australian cases were discussed but where Prakash J found that the adjudicator had in fact considered the parties' submission although he did not feel it necessary to discuss them in his reasoning).

4.39 While the principles enunciated by Ang J in *Front Row Investment Holdings* are uncontroversial and indeed laudable, it is curious that the court had considered such an omission as a breach of natural justice justifying a setting aside of part of the award. The Australian cases as discussed in the learned judge's decision were all concerned with the adjudicator's failure to understand, or to want to understand, or where he had clearly not read or considered, the submissions and then proceeded to make the rulings. What appears clear in *Front Row Investment Holdings* was that the arbitrator was under the impression (albeit wrongly) that Front Row had abandoned its other allegation of misrepresentation and thus he did not decide whether Daimler had made such a misrepresentation. That being the case, the arbitrator could not have been fairly said to have prejudged or misjudged the merits of Front Row's case for he had in fact made no decision on that particular plea of misrepresentation. It was not anything close to Front Row's counsel's persuasive rhetoric as to whether an award is immune from challenge if the arbitrator had

absented himself and asked parties to submit a recording of their arguments and then not listen to it.

4.40 A court acting under s 48(3) of the AA (above, para 4.11), has the power to "suspend the proceedings for setting aside an award, for such period of time as it may determine, to allow the arbitral tribunal to resume the arbitration proceedings or take such other action as may eliminate the grounds for setting aside an award". The circumstances that led the arbitrator in *Front Row Investment Holdings* to decide as he did appeared to be one that could be addressed by allowing the arbitrator to resume the arbitration and consider Front Row's arguments afresh. Instead, the court not only set aside the award but also ordered that a new arbitrator be appointed.

4.41 It should also be noted that a court's power under s 48 does not extend to ordering a removal of an arbitrator or that the unresolved issue be "tried afresh by a newly appointed arbitrator". The AA provides for the removal of an arbitrator only in circumstances provided for in s 16. Quite clearly the court was not exercising its power to remove the arbitrator under s 16. If an award is set aside under s 48, otherwise than on grounds leading to a finding of lack of arbitral jurisdiction, it is only proper for that arbitrator to resume its role and exercise jurisdiction to resolve the remaining matters omitted. Front Row's rationale and basis for seeking the appointment of a new arbitrator was not disclosed in the decision but the court was obviously led to believe that it had the power to order a fresh arbitration to try Front Row's claim for misrepresentation. This unfortunately casts a shadow of uncertainty over the nature of the "fresh arbitration" and the jurisdiction of the "new arbitrator" together with the attendant issue of the enforceability of any subsequent decision that the "new arbitrator" would make.

International arbitration under IAA – Setting aside

4.42 Recourse against an award in international arbitration is only available by way of setting aside proceedings on the limited grounds set out in Art 34(2) of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration. Additional grounds based on fraud and breach of natural justice occurring in connection with the making of the award are provided for in s 24 of the IAA (above, para 4.6).

Award – Contrary to public policy

4.43 In *AJT v AJU* [2010] 4 SLR 649, AJT was a company incorporated under the laws of the British Virgin Islands and AJU was a public company incorporated under the laws of Thailand whose

principal business was that of the production of television programmes and the promotion of shows and events. Disputes between Company P (an associated company of AJT) and AJU were referred to arbitration commenced by AJU in August 2006. AJU also lodged a complaint against P, Mr O (AJT's sole director and shareholder) and Company Q alleging fraud, forgery and the use of a forged document to the Thai police ("the complaint"). Under Thai law, fraud is a compoundable offence whilst forgery and the use of a forged document are both non-compoundable offences. While the police investigations were ongoing, the parties reached a settlement of their disputes and entered into the concluding agreement dated 4 February 2008. The terms of the concluding agreement contemplated the "withdrawal and/or discontinuation and/or termination of all Criminal Proceedings" in Thailand and that AJU would pay AJT a sum of US$470,000 in settlement of all claims. Soon thereafter, AJU withdrew its complaint and consequently the Thai Special Prosecutor's Office issued a cessation order not to prosecute the three parties O, P and Q. It confirmed on 10 June 2008 that the no-prosecution order was issued because of insufficient evidence. AJU paid the agreed sum of US$470,000 to AJT and requested that the arbitration proceedings be terminated. AJT refused to terminate the arbitration, taking the position that a mere statement from the Thai Prosecution that there was insufficient evidence in respect of the forgery charges was unacceptable because the investigations could still be reactivated by new or additional evidence. AJU then applied to the tribunal for a termination order. AJT resisted the application alleging duress, undue influence and illegality. The tribunal found no evidence to suggest that the concluding agreement was procured by undue influence or duress and/or that AJU had bribed the Thai authorities in order to obtain the non-prosecution order. It ruled that the concluding agreement was not illegal. AJT applied to set aside that award of the tribunal on the ground that the award was against public policy in that (a) the concluding agreement, which the award seeks to uphold, sought to stifle the prosecution of a non-compoundable offence; (b) the award sought to enforce a contract that was illegal and unenforceable in Thailand; and (c) bribery and/or corruption of a public authority were involved in the performance of the concluding agreement.

4.44 Holding that the tribunal's decision that the concluding agreement was not illegal was not conclusive as the court in exercising its supervisory jurisdiction must safeguard public interest, Chan Seng Onn J held that the concluding agreement was an agreement "to stifle prosecution of non-compoundable offences which contravene public policy as they undermine the public interest in the maintenance of justice – particularly in the realm of law and order": *AJT v AJU* [2010] 4 SLR 649 at [33]. In the court's view, AJU in undertaking the obligation to withdraw its complaints, which it did and which led to the charges

being withdrawn due to lack of evidence, were steps stifling prosecution of non-compoundable offences of forgery and use of forged documents under Thai law. The concluding agreement was therefore illegal as being contrary to public policy and the award was accordingly set aside.

4.45 The decision in *AJT v AJU* [2010] 4 SLR 649 signals the Singapore court's strong stand against any attempted abuse of the arbitral process for improper purposes. Chan J recognised that there is some degree of tension between the public interest that the awards of arbitrators should be respected and the public interest that illegal contracts should not be enforced. In his clear and measured way, Chan J pointed out that agreements to stifle prosecution "may, on the one hand, expose innocent accused persons to extortion, and on the other, allow a guilty person to escape punishments by offering reparation to the victim. The basic purpose of criminal law, and more fundamentally, the entire administration of justice will be defeated if such agreements are upheld": *AJT v AJU* at [33]. As a result, the parties would have to resume the arbitration and the tribunal's jurisdiction revived to continue the arbitration on the basis that the concluding agreement was illegal.

Award – "Perverse, irrational or manifestly unreasonable"

4.46 In *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 3, two Pakistani companies entered into a gas supply agreement in 1996 under which the Sui Southern Gas Co Ltd ("SSGC") agreed to supply natural gas to Habibullah Coastal Power Co (Pte) Ltd ("HCPC") in order to allow HCPC to generate electricity for the Pakistan Water and Power Development Authority. Arbitration was commenced in which HCPC claimed that SSGC had breached the terms of the agreement by failing to supply sufficient quantities of gas, causing HCPC to suffer a loss and thereby entitling it to damages under the supply agreement. The arbitration was held in Singapore and the tribunal issued an award in favour of HCPC's claims. SSGC applied to set aside the award on the grounds that the award dealt with disputes or issues not contemplated by or not falling within the terms or was contrary to public policy of Singapore. In its submissions, SSGC contended that the award was "perverse, manifestly unreasonable and irrational", and was therefore outside the scope of submission to arbitration and contrary to Singapore's public policy. These arguments found no favour with Prakash J. Holding fast to the regime of arbitration as adopted from UNCITRAL Model Law, she held that it is not open to the court to set aside an award "on the freestanding ground that its substantive decision on the merits was outrageous or irrational": *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 3 at [21]. The learned judge observed that any allegation of perversity in the award would ultimately be an error of law (*eg*, irrational construction of a term in the agreement) or of fact

(*eg*, ignoring or misunderstanding the surrounding facts) even if they were gross or manifest errors. The fact that a tribunal made manifestly grave errors in coming to its decision would not take the matter which was within jurisdiction to be outside the scope of submission to arbitration.

4.47 SSGC's also argued that an award would be contrary to public policy if it contained decisions that were so perverse and manifestly unreasonable as would "shock the conscience of the court" (relying on the Court of Appeal decision in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [59]). The court rejected this argument holding that merely contending that the award was "perverse or irrational" could not of itself amount to a breach of public policy. To avail of this, there must instead be some demonstrably "egregious circumstances such as corruption, bribery or fraud which would violate the most basic notions of morality and justice": *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 3 at [48].

Award which deals with matter not falling within the terms of the submission to arbitration

4.48 Belinda Ang Saw Ean J had another occasion to consider an application to set aside an award made under the IAA (above, para 4.6). In *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] 4 SLR 672, the dispute arose out of a pipeline construction contract entered into between PT Perusahaan Gas Negara (Persero) TBK ("PGN") and CRW Joint Operation ("CRW") for the construction of a 36-inch diameter pipeline and an optical fibre cable running from Grissik to Pagardewa in Indonesia. The contract adopted the *Federation Internationale des Ingenieurs Conseils* ("FIDIC") *Conditions of Contract for Construction* (1st Ed, 1999) ("the 1999 FIDIC") which provided for a tiered dispute resolution first by a Dispute Adjudication Board ("DAB") whose decision shall be binding "unless and until it shall be revised in an amicable settlement or an arbitral award" (sub-cl 20.4) and if a notice of dissatisfaction be filed against a DAB decision, the matter would then be referred to arbitration. A DAB decision would become final and binding if no notice of dissatisfaction was given within 28 days. The portion of the text referring to arbitration of dispute arising from the DAB read thus (sub-cl 20.6): "Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration … The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute."

4.49 CRW's claim for some variation orders were placed before the DAB who then directed PGN to pay US$17,298,834.57. PGN then filed

its notice of dissatisfaction. CRW commenced arbitration with the ICC seeking payment of the US$17,298,834.57 from PGN taking the position that notwithstanding filing of the notice of dissatisfaction, PGN remained liable to pay the amount directed by DAB and that, as a result of PGN's refusal to pay, this gave rise to yet another dispute. The issues that concerned the tribunal were whether CRW was entitled to immediate payment of US$17,298,834.57 and, whether PGN was entitled to request the arbitral tribunal to open up, review and revise the DAB decision.

4.50 The majority of the tribunal made its award holding that DAB decision obliged PGN to make immediate payment to CRW under the contract and directed PGN to make the payment of US$17,298,834.57. The majority ruled that the tribunal's power to open up and review the DAB decision would not operate as a defence to CRW's claim for immediate payment. The award did, however, reserve for PGN the right to commence a separate arbitration to open, review and revise the DAB decision.

4.51 In setting aside the majority award, Belinda Ang J took the view that sub-cl 20.6 required the tribunal to review the correctness of the DAB decision. Sub-clause 20.7 which provided for an enforcement mechanism by way of arbitration of a DAB decision that had already become "final and binding" (by a process which included the fact that no notice of dissatisfaction was filed), could not be relied upon by CRW to seek an award for immediate payment on a DAB decision which did not become "final" though "binding". By doing what it did, the majority of the tribunal acted in excess of its powers given under sub-cl 20.6 and sub-cl 20.7, infringing Art 34(2)(*a*)(iii) of the Model Law.

4.52 At first blush, Belinda Ang J could be misunderstood for delving into the merits of the tribunal's decision, examining to some extent the merits of the arguments advanced by the parties before the tribunal. What became clear, however, was that the court was concerned only with the scope of the reference sub-cll 20.6 and 20.7.

4.53 CRW had framed its claim on the basis that the DAB decision was binding and accordingly the tribunal ought to give it enforceability without need to inquire into and examine the DAB decision on the merits. CRW argued that not to do so would render the DAB decision effectively "not binding". This was an attractive but misleading argument in that the relief that CRW had sought was an award (which by its nature is final) which when rendered effectively shuts the doors on the same tribunal reviewing the DAB decision on the merits, a role clearly contemplated by sub-cl 20.6. By persuading the majority tribunal to make an arbitral award for payment based on the DAB decision, CRW had led the majority of the tribunal to ignore the temporary binding

nature of the DAB decision and clothe it with the force of a final binding award, thus exhausting the tribunal's jurisdiction, rendering it *functus*. The reservation of right made by the majority tribunal for PGN to challenge the award on the merits before another arbitral tribunal was indeed a novel innovation to mitigate the possible harm that could befall PGN in consequence of the majority award, but as pointed by out by the court, was one that would certainly raise questions of *res judicata*, or at the very least, issue estoppel. The very nature of awards dictates that they are final and binding on the parties. Unlike England, where there are specific provisions for the making of "provisional" awards (see s 39 of the English Arbitration Act 1996 (c 23) (UK)), Singapore, like other jurisdictions that have for good reasons adopted the Model Law, does not admit of arbitral awards having only a temporary binding force.

4.54 It is unfortunate that none of the parties appeared to have addressed the tribunal on the possibility of making an interim measure under s 12(1)(*g*) of the IAA (above, para 4.6), directing PGN to make immediate payment as per the DAB decision pending the tribunal's review of the DAB decision on the merits. An interim measure, not being an award, would not exhaust the tribunal's jurisdiction on the matters in dispute in the arbitration. This would then permit the tribunal to continue the arbitration under sub-cl 20.6 to open, and exercise its power to review and revise the DAB decision.

Enforcement of foreign awards in Singapore

4.55 Awards made outside Singapore may be enforced in Singapore under s 29 of the IAA, which incorporates the New York Convention, if the awards are made in a country which is a party to the New York Convention, or under s 46(3) of the AA (above, para 4.11) if the awards are not made in such a country. Section 46(3) of the AA (which was added in 2003) makes it also possible for awards made in non-convention countries to be enforced in Singapore subject to the similar conditions as if they are awards made in domestic arbitration in Singapore.

Role of enforcement court – A two-stage test

4.56 Courts have generally held that there should not be "strict formalism" when dealing with applications for enforcement of foreign awards, in particular when dealing with the documentary proof of the agreement to arbitrate and the award (see *Bergensen v Joseph Muller Corp* 710 F 2d 928 (2nd Cir, 1983); *Guangdong New Technology Import & Export Corp v Chiu Shing* (HKHC, 1993) *International Council for Commercial Arbitration Yearbook Commercial Arbitration* (1993); *R SA v*

A Ltd (Cour de Justice, Geneva Court of Appeal, 1999) ICCA Yearbook Com Arb XXVI (2001) Switzerland 33; *Investor v Republic of Poland* (Bundesgerichtshof Germany Supreme Court, 2000) ICCA Yearbook Com Arb XXVI (2001) Germany 52; *Kanto Yakin Kogyo Kabushiki-Kaisha v Can-Eng Manufacturing Ltd* (Ontario Court, 1992) CLOUT Case 369). Views, however, differ as to the extent of judicial consideration when considering whether a foreign award should be enforced. The decision of Judith Prakash J in *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR(R) 174 ("*Aloe Vera of America, Inc*") (see commentary in (2006) 7 SAL Ann Rev 51 at 71–72, paras 3.54–3.56) in which her Honour considered that the examination of the documents required under the IAA in an application to enforce an arbitral award was a formalistic or mechanistic one and did not require judicial investigation by the court as to whether the arbitral tribunal's finding that the second defendant was a party to the arbitration agreement was correct, have raised some discussions in several recent decisions.

4.57 In *Denmark SkibstekniskeKonsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd* [2010] 3 SLR 661 ("*Denmark SkibstekniskeKonsulenter*"), an award of the Danish Arbitration Institute made in favour of DSK was challenged by Ultrapolis when the former sought enforcement of the award in Singapore under s 29 of the IAA (above, para 4.6). The contract between the parties for the design of a yacht was first entered into on 29 August 2005, which included DSK's July 2001 standard terms. The parties rescinded the first contract and executed another contract on 21 December 2005 ("the second agreement"). By then, DSK had a November 2005 version of its standard terms (November 2005 terms), which included an arbitration clause. DSK's claim for remuneration for the contracted works was referred to arbitration pursuant to the arbitration clause in the November 2005 terms. Ultrapolis challenged the tribunal's jurisdiction on the ground that there was no agreement to arbitrate as the second agreement did not incorporate the arbitration clause in the November 2005 terms. It was not disputed that the November 2005 terms were earlier emailed to Ultrapolis although (unlike the earlier rescinded agreement) it was not actually attached to the second agreement. The tribunal ruled as a preliminary issue of jurisdiction that the November 2005 terms, including the arbitration clause, formed part of the second agreement and had established the tribunal's jurisdiction. Ultrapolis did not challenge the ruling on jurisdiction in the Danish court and did not thereafter participate in the arbitration. An award was eventually made in favour of DSK. The tribunal made a corrected award inserting the dates when such interest accrued and changing the name of the claimant in the arbitration on account of its voluntary liquidation.

4.58 Ultrapolis resisted the enforcement on several grounds, namely, that the arbitration did not comply with s 30(1)(*b*) of the IAA; that there was arbitration agreement; that the composition of the arbitral authority was not in accordance with the agreement of the parties; and the corrected award was made and passed at a time when the tribunal was *functus*.

4.59 Section 30(1)(*b*) of the IAA is a replication of Art IV(1)(*b*) of the New York Convention, and requires a party seeking enforcement of a foreign award to furnish the original arbitration agreement or a certified copy thereof. Ultrapolis had argued that in the second agreement, the November 2005 terms had not been not attached and were not signed by the parties and therefore the arbitration clause in the November 2005 terms was not incorporated into the second agreement. It maintained that Clause 13 of the second agreement which read "[t]he clauses of this contract prevail on the enclosed standard conditions that are applicable only if the matters are not regulated between the Parties by this contract" was not sufficient to incorporate the arbitration clause.

4.60 Belinda Ang Saw Ean J adopted the approach of Prakash J in *Aloe Vera of America, Inc* (above, para 4.56) accepting that at the first stage of enforcement, when considering whether a document produced as the arbitration agreement under which the award had been made would be capable of constituting an arbitration agreement should be a mechanistic and formalistic one. The learned judge also observed that the reference in Art II(1) of the New York Convention to an agreement "signed by the parties" was merely illustrative and not exhaustive of what constitute an agreement in writing.

4.61 In considering the grounds for resisting enforcement, the court also referred to the English Court of Appeal decision in *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755 ("*Dallah Estate*") where the court took the approach that when considering a challenge to the enforcement of a foreign arbitration award, the court would be entitled to require proof to the standard ordinarily required in proceedings before it. In that case, the English Court of Appeal (later affirmed by the Supreme Court on 3 November 2010) after examining the transaction held that the Government of Pakistan was not a party to the contract and the arbitration agreement and accordingly enforcement of the award was refused.

4.62 Belinda Ang J accepted that both the decisions in *Dallah Estate* and *Aloe Vera of America, Inc* did allow Ultrapolis the right to challenge the enforcement of the award before it even though it had failed before the tribunal. The court would re-hear their arguments but would also take into consideration the tribunal's reasoning for their holding. In

considering the question of the validity of the arbitration agreement, the court pointed out that the burden laid with Ultrapolis to show that, under the foreign law for which the agreement was subjected to, the arbitration agreement was invalid. After considering the arguments, Belinda Ang J held that Ultrapolis failed to discharge that burden. Ultrapolis' argument that the reference to the "General Court of Arbitration in Denmark" in the arbitration clause was unclear was also rejected by Belinda Ang J, who accepted the opinion of DSK's expert that the reference was to the Danish Arbitration Institute.

4.63 On the issue whether the tribunal was *functus* when it made the corrected award, the court ruled that Danish law, like Singapore law, permitted a tribunal to make corrections of a clerical or typographical nature and that the start dates of when interest to run which were omitted from the award were clerical errors properly corrected. Similarly, the change of name of the claimant, which happened after arbitration commenced, was necessary to clarify or remove any ambiguity. The tribunal was thus not *functus* when making the corrected award.

4.64 Belinda Ang J's decision in *Denmark SkibstekniskeKonsulenter* (above, para 4.57) sets out the markers for a party resisting enforcement of a foreign award must be conscious of. The learned judge made clear that the burden of resisting enforcement laid with the party resisting the enforcement and that although a party will not be estopped from re-arguing the same grounds it made before the tribunal, an enforcement court would take into consideration as well the tribunal's reasoning and basis for coming to its decision on any of the available grounds for challenge under the New York Convention.

4.65 The decision of Belinda Ang J in *Denmark SkibstekniskeKonsulenter* was subsequently discussed in *Strandore Invest A/S v Soh Kim Wat* [2010] SGHC 151 ("*Strandore Invest*") where Quentin Loh JC (as he then was) considered the enforcement of another Danish award.

4.66 In *Strandore Invest*, Danish companies Strandore Invest A/S ("Strandore"), LKE Electric Europe A/S ("LKE Europe") and MS Invest Odense A/S ("Odense"), who were shareholders in Malaysian company LKE Electric (M) Sdn Bhd ("the company") had individually entered into a share sales agreement ("agreements") with Soh Kim Wat ("Soh") to sell their shares in the company to Soh. All the agreements contained a similar arbitration clause providing that Danish Law was the governing law and any dispute was to be resolved "before Copenhagen Arbitration according to the Rules of Procedure of Copenhagen Arbitration". Soh failed to make certain payments under the agreements. The applicants initially commenced action in Singapore in 2006 but the same was ordered stayed on Soh's application that the matters should be

referred to arbitration in Denmark. The applicants Danish companies then commenced arbitration with the Danish Institute of Arbitrators ("DIA") seeking reliefs. Soh's initial challenge that he was not properly served with the Request for Arbitration was ruled upon in his favour. The DIA thereafter re-constituted a tribunal comprising the same arbitrators. Soh protested that he was not given the opportunity to appoint his own arbitrator but when he was later invited, he did not propose any arbitrator. The applicants, however, confirmed that they had no objections to the arbitrators proposed by DIA.

4.67 The tribunal issued directions for the filing of claims and defence. Soh did not file any defence despite several extensions granted but repeated his objections to the arbitration proceeding ahead and the composition of the tribunal. The tribunal convened a hearing in Copenhagen but Soh did not turn up for the hearing. The tribunal issued its award on 30 April 2008. Soh's challenges against the award in the Danish courts were all dismissed. While the challenges in the Danish courts were going on, Soh commenced action in Singapore to challenge the award alleging that the agreements were unenforceable, void or voidable, that there would be unjust enrichment to the applicants as the shares could not be transferred to Soh even if he paid for them, and thus the disputes were not capable of settlement by arbitration, and accordingly enforcement of the final award would be contrary to public policy. Soh also alleged fraud and fraudulent misrepresentation. The applicants subsequently sought enforcement of the award in Singapore under the New York Convention.

4.68 Quentin Loh JC had no hesitation in rejecting Soh' challenges and enforced the award against him. However, while doing so, the learned Judicial Commissioner took the opportunity to express his disagreement with the decision of Judith Prakash J in *Aloe Vera of America, Inc* (above, para 4.56) where counsel's submission that an applicant must *prove* at the first stage of the enforcement process that there was a written arbitration agreement (*ie*, that there must be a two-step substantive examination of the award) was rejected. Loh JC expressed his understanding of that decision as follows (*Strandore Invest* at [27]):

> The restrictiveness of 'public policy' set out in s 31(4)(*b*) IAA can be seen in *Aloe Vera* itself. There an award made by an Arizona arbitrator, holding the manager of a Singapore company personally liable, even though he had signed an agreement made between a Singapore company and a US corporation, in his capacity as manager of the Singapore company, was held nonetheless enforceable against him in Singapore. My reservation arises because it must follow from this that if a foreign arbitrator, applying a foreign governing law of the contract, were to hold not only the company which was a party to that contract liable but also its holding companies up to the ultimate

> holding company also liable, on the basis that the foreign governing law treats all the different companies in the group as one, then when enforcement of that award is sought in Singapore, the Singapore courts will enforce that award as it stands, mechanistically, against all the companies.

4.69 With respect, not only was the reference to *Aloe Vera of America, Inc* not directly relevant to Loh JC's decision in *Strandore Invest*, the learned Judicial Commissioner's extrapolation from Prakash J's approach in *Aloe Vera of America, Inc* was to some degree unnecessarily alarmist when he expressed his view that Prakash J's approach would somehow mean that Singapore courts would have to enforce all awards made by foreign arbitrators even if the legal principles or theories applied were contrary to the principles normally applied in Singapore. It is worth also noting that Prakash J's decision in *Aloe Vera of America, Inc* has since been cited with approval by the New South Wales Supreme Court in *Altain Khuder LLC v IMC Mining Inc* [2011] VSC 1 at [46]–[51] and [74].

4.70 Admittedly Prakash J's use of the term "mechanistic and formalistic" could be understood in the wider context. Read carefully, the learned judge was directing the term particularly to the documentary stage of the process of enforcement and more specifically to the formal requirements of O 69A r 6 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed). In reaching her decision to enforce the award in *Aloe Vera of America, Inc*, Prakash J was conscious of the possible ramifications of extending liability under an agreement to its shareholders or holding companies and had in fact examined the substantive bases of the argument advanced by the defendant. This was evident in that decision, when she said (*Aloe Vera of America, Inc* at [76]):

> Firstly, strictly speaking, it is not accurate to describe Mr Chiew as a 'non-signatory' to the Agreement. He did in fact sign it although he did so as the manager of Asianic. That was evidence that he had something at least to do with the Agreement. Secondly, in Singapore, legal principles exist which allow liability for breach of contract to be imposed on a person who, ostensibly, is not a party to the contract concerned. Singapore legal principles also recognise that a person who is not named in a particular contract may in fact be a party to it and responsible for the obligations purportedly undertaken by somebody else. Such liability can be imposed on the basis of theories such as alter ego and agency. So the findings on Mr Chiew's position *vis-à-vis* the Agreement and the arbitration are not strange to us.

4.71 There is no doubt that the New York Convention permits enforcing courts to exercise an independent judicial inquiry as to whether there are grounds to refuse enforcement of the award. Where issues such as the validity of the arbitration agreement or whether a

person is a party to the arbitration agreement arise for consideration, the same must be dealt with in accordance with the law of the arbitration agreement or, in the absence of such indication, in accordance with the law where the award was made. This means that a Singapore court enforcing a foreign award should not impose its own standards or substitutes its own legal principles against those of the law or legal principles of the law of the arbitration agreement or the seat of the arbitration.

4.72 Choo Han Teck J in *Galsworthy Ltd of the Republic of Liberia v Glory Wealth Shipping Pte Ltd* [2011] 1 SLR 727 ("*Galsworthy Ltd of the Republic of Liberia*") was asked to reconcile the views of Prakash J in *Aloe Vera of America, Inc* (above, para 4.56) and Loh JC's decision in *Strandore Invest* (above, para 4.65). There a London arbitral award in favour of Galsworthy was sought to be enforced in Singapore. Enforcement was granted by the assistant registrar and Glory Wealth Shipping ("GWS") appealed, raising first, that the final award contained a decision on the matter beyond the scope of the submissions to arbitration (see s 31(2)(*d*) of the IAA (above, para 4.6)); second, the arbitral procedure was not in accordance with the agreement of the parties (see s 31(2)(*e*) of the IAA) and third, the enforcement of the final award would be contrary to the public policy of Singapore (see s 31(4)(*b*) of the IAA). Galsworthy urged the court to adopt a "mechanistic" approach while GWS submitted that Loh JC's views in *Strandore Invest* represented the correct approach in view of the English Court of Appeal decision in *Dallah Estate* (above, para 4.61).

4.73 Choo J did not see any contradiction in the decisions of *Aloe Vera of America, Inc and* Loh JC's decision in *Strandore Invest*. He accepted a bifurcated approach, *viz*, that a mechanistic approach applies to the first documentary stage while at the second stage where the substantive challenge is to be heard, the party resisting would be heard and must then prove that grounds exist to justify refusal of enforcement. In doing so, Choo J had in fact adopted the approach and analysis of Belinda Ang J in *Denmark SkibstekniskeKonsulenter* (above, para 4.57) (with which Loh JC expressed reservation), but had mistakenly attributed it to Loh JC's decision in *Strandore Invest*.

Setting aside at seat or resisting enforcement of the award – Cumulative or alternative rights?

4.74 In *Galsworthy Ltd of the Republic of Liberia*, GWS had, following the issuance of the award, applied to the English court to set aside the award as well as to appeal against the award on a question of law under the English Arbitration Act. The application to set aside was not proceeded with following an order for security made against GWS and was dismissed. GWS' appeal on a question of law was also dismissed by

the English High Court. Before Choo J, it was argued by Galsworthy that GWS had elected to pursue its right before the English court to set aside the award and should not be permitted to do so on the same grounds before the court. The learned judge took the view that a party dissatisfied with an award has two courses of action: one is to apply to the supervising court to set aside the award, the other is to apply to the enforcement court to resist enforcement of the award. The court cited Woo Bih Li JC's decision in *Newspeed International Ltd v Citus Trading Pte Ltd* [2003] 3 SLR(R) 1 ("*Newspeed International Ltd*") for the support that these options were alternatives and not cumulative rights (see author's views on this case in (2001) 2 SAL Ann Rev 24 at 31–33, paras 3.28–3.34).

4.75 Until Choo J's decision in *Galsworthy Ltd of the Republic of Liberia*, Woo JC's (as he then was) decision in *Newspeed International Ltd* was the sole voice that stood for such a proposition. The practice in other jurisdictions have consistently permitted challenges to the enforcement of a foreign award to be made, albeit without much success, even after the court at the place of arbitration had refused to set aside the award (see decision of United States Court of Appeal, 2nd Circuit decision in *Baker Marine (Nig) Ltd v Chevron Corp Inc* (1999) ICCA Yearbook Com Arb XXIV 909; English High Court in *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315; English Court of Appeal in *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] 2 Lloyd's Rep 65; *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39). The Court of Final Appeal Hongkong SAR weighed in too on the matter in *Hebei Import and Export Corp v Polytek Engineering Co Ltd* (1999) ICCA Yearbook Com Arb XXVI 652 at [43]–[44], saying that it would be inconsistent with the New York Convention to hold that a refusal by a court of the supervisory jurisdiction to set aside an award debars an unsuccessful applicant from resisting enforcement of the award in the court of enforcement.

Award – As a basis for statutory demand in winding-up proceedings

4.76 Apart from the enforcement process provided for under the IAA (above, para 4.6) and the New York Convention, foreign awards may be enforced by way of an action or as provided in s 29(2) as follows:

> … recognised as binding for all purposes upon the persons between whom it was made and may accordingly be relied upon by any of those parties by way of defence, set-off or otherwise in any legal proceedings in Singapore.

4.77 This would include using the same award as proof of debt in a pending action commenced by the debtor or in a bankruptcy or winding-up proceedings. In *Pacific King Shipping Pte Ltd v Glory Wealth*

Shipping Pte Ltd [2010] 4 SLR 413 ("*Pacific King Shipping Pte Ltd*"), the defendant, who had obtained an interim arbitral award in London against the first plaintiff, commenced winding-up proceedings against the first plaintiff for moneys due to them, including part of the unsatisfied amount due under the award. Another application was also filed against the second plaintiff on the basis that it had failed to honour its obligation as guarantor of the first plaintiff's obligations. The applications were filed after the plaintiffs failed to meet the statutory demands issued under s 254(2)(*a*) read with s 254(1)(*e*) of the Companies Act (Cap 50, 2006 Rev Ed).The plaintiffs applied to stay the winding-up proceedings, contending abuse of the winding-up process because there was a *bona fide* dispute over the debt on substantial grounds. The plaintiffs alleged that the interim award was obtained in circumstances where the first plaintiff was denied an opportunity to, and was thereby unable to, present its case and that the first plaintiff had a genuine cross-claim exceeding the debt allegedly due against the defendant. As against the second plaintiff, who was the guarantor, the award was not enforceable as it was not a party to the arbitration. Phillip Pillai J rejected both the applications.

4.78 One of the plaintiffs' principal arguments was that the defendant ought to have sought enforcement of the interim award under the IAA (above, para 4.6) as a New York Convention award whereby they could then launch a full and proper challenge against it. Not having done so, the winding-up application amounted to an abuse of process. Pillai J rejected this argument. He ruled that there was no authority for the proposition that a successful party of a foreign arbitration award was obliged and confined to enforce an award only by way of enforcement proceedings under the IAA and would be precluded from issuing a statutory demand based the award, and thereafter file a winding-up application on grounds of the presumption of insolvency. While the IAA provides a "platform which a party may have an award in its favour recognised and enforced, but [*sic*] it is not the only means by which a party may seek to utilise the award it has obtained": *Pacific King Shipping Pte Ltd* at [12].

4.79 The court pointed out that the plaintiffs' objections concerning the arbitration and the interim award were matters that ought to have been raised at the arbitration or at the court of the seat of arbitration. The plaintiffs having taken no steps in that regard and having continued to participate in the arbitration relating to the remainder of the claims showed that there were no *bona fide* disputes relating to the debt upon which demands were made. On the first plaintiff's alleged cross-claim, the court noted that it did not place the same before the arbitral tribunal and made no counterclaim in that regard. As such, it could not have any bearing on the debt comprised in the interim award.

4.80 Pillai J also held that a winding-up application could lie against the second plaintiff even though it was not a party to the arbitration as the basis of the winding-up was that the second plaintiff was unable to pay its debts as evidenced by the statutory demand and not by reason that it was a party to the arbitration. The demand made against the second plaintiff was that the first plaintiff had failed to make payment of its debt (evidenced by the arbitral award), which the second defendant guaranteed. Such a demand was not an enforcement of an arbitral award.