# 4. ARBITRATION

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4.1 In 2015, Singapore courts continued to see a flow of arbitration cases coming before them for judicial assistance. The two stages of the arbitral proceedings most commonly besieged with such applications involve the (a) enforcement of the arbitration agreement; and (b) setting aside of the award. Based on reported decisions, Singapore courts had on seven occasions been asked to stay their own court proceedings in favour of arbitration (under s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), Art 8 of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ("MAL") or Art II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 3 (entered into force 7 June 1959) ("New York Convention")) and nine cases were brought to it to set aside arbitral awards. As always there was the occasional application for interim measures. Not surprisingly, several of the cases had references to the Singapore Arbitration Centre ("SIAC") and its rules. The year also witnessed a rare case of a challenge of arbitral jurisdiction arising out of a bilateral investment treaty ("BIT") being brought before a Singapore court for determination, by a state party.

## Enforcement of arbitration agreements

### *Applicability of dispute resolution mechanism in BITs*

4.2 Disputes arising out of claims relating to BITs are often non-contractual and non-commercial in nature. Such claims would include claims for breach of treaty obligations such as wrongful losses arising from expropriation, failure to accord national treatment or most-favoured nation treatment or for withdrawal of promised investment incentives. Depending on the agreed dispute resolution mechanism provided in the BIT, claims may be pursued directly by an

investor against a host-state in international arbitration. Unlike claims arising out of commercial contracts therefore and as investors are not parties to BITs, they need to bring themselves within the class of investors covered by the BIT and to show that the host-state has consented to the arbitration.

4.3 In *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] 2 SLR 322, the High Court dealt with issues such as (a) whether the BIT between the People's Republic of China ("PRC") and the Lao People's Democratic Republic ("Laos") ("PRC-Laos BIT") applies to the Macau Special Administrative Region of China ("Macau"); and (b) whether the court could admit new evidence after the tribunal's decision on jurisdiction has been made.

4.4 Sanum Investments Limited ("Sanum") is a company incorporated in Macau, who had made investments in the gaming and hospitality industry in Laos. Sanum commenced arbitration pursuing expropriation claims against the Government of Laos ("Government") pursuant to the dispute resolution mechanism in the PRC-Laos BIT. The Government challenged the jurisdiction of the tribunal on the basis that the PRC-Laos BIT does not apply to Macau. The tribunal ruled in favour of its own jurisdiction and the Government appealed against the tribunal's decision to the High Court under s 10 of the IAA (the amended version of Art 16 of the MAL). In the appeal, the Government filed an application for the admission of two diplomatic letters: (a) a letter from the Laotian Ministry of Foreign Affairs ("Laos Letter") to the PRC Embassy in Vientiane, Laos; and (b) the reply from the PRC Embassy in Vientiane, Laos ("PRC letter") (collectively the "Two Letters"). Both letters state that the PRC-Laos BIT does not apply to Macau. In seeking the non-admittance of the Two Letters, Sanum argued that the Two Letters had been issued after the arbitral proceedings had commenced and they could not be used as indicators of the intention of the PRC and Laos governments in relation to the applicability of the PRC-Laos BIT to Macau. What ought to be determinative of both governments' respective intentions, Sanum adds, was their intention at the time of the handover of Macau to the PRC in 1999, and not the PRC's present intention.

4.5 The High Court determined that on the face of the Two Letters alone, it was clear that Laos and the PRC are in agreement and their intention is for the PRC-Laos BIT not to apply to Macau. Under the Vienna Convention on the Law of Treaties 1969 ("VCLT"), subsequent agreements such as the Two Letters are allowed as between the contracting parties. The PRC's intention at the time of the handover of Macau in 1999 is thus irrelevant. Even if the PRC-Laos BIT were to apply to Macau, the High Court determined that Sanum's claim for expropriation falls outside the scope of the arbitration agreement set out

in the PRC-Laos BIT as the parties to that BIT had agreed that only disputes over the *amount of compensation* for expropriation could be submitted to arbitration.

4.6 Interesting arguments were raised in the course of the appeal, including whether a question of international law between two states should be justiciable by a court in Singapore which has no relation to the dispute save for the fact that the arbitration is seated in Singapore. The court answered this issue in the affirmative on the basis that the Government had sought the review of the tribunal's positive holding on jurisdiction and thus the issue had a bearing on the application of Singapore law. It is curious that the parties seemed to accept that the Government was entitled to bring a review of the tribunal's jurisdictional ruling under s 10 of the IAA simply on the basis that the arbitration was seated in Singapore.

4.7 BIT disputes may be arbitrated under the auspices of the International Centre for Investment Disputes ("ICSID") based in Washington in the US, and hosted by the World Bank or by other arbitral institutions and/or *ad hoc* arbitral tribunals. While ICSID arbitrations are a-national, other BIT arbitrations, whether institutional or *ad hoc*, like any other arbitration would need a place or seat of arbitration. This in turn brings into play the application of the *lex arbitri* and the jurisdiction of the court of the place or seat of arbitration. The parties in this case therefore, not surprisingly, assumed that the IAA empowers the Singapore court to review the tribunal's ruling upholding its own jurisdiction. The IAA is, however, a legislation based on and intended to give effect to the MAL, and is replete with references to the "commercial" nature of the relationship between the parties (see the long title: "conduct of international commercial arbitrations"; the title to Pt II: "International Commercial Arbitration"; and s 5(*b*)(ii) where, in relation to what "international" is, reference is made to "the obligations of the commercial relationship"). By its own terms, the MAL is intended to apply to "all relationships of a commercial nature" (see Art 1(1) and the footnote to the term "commercial").

4.8 While an agreement between a foreign investor and a host-state for the admission of certain investments into the territory of the host-state could sometimes be considered commercial, the claims made by an investor against the host-state based only on a BIT, absent any other agreement between them, could well not fall within the ambit of the IAA as it could hardly be said that the parties are in a "commercial relationship". It is doubtful therefore that a Singapore court could be asked to invoke its jurisdiction under s 10 of the IAA to review the tribunal's jurisdiction.

## Stay of court proceedings

### *Court's discretion under Arbitration Act*

4.9 The power of the court under s 6 of the Arbitration Act (Cap 10, 2002 Rev Ed) ("AA") to grant or refuse an application for stay of proceedings before it remains a matter of discretion by the court.

4.10 Before 2012, NTUC Income Insurance Cooperative Limited ("NTUC Income") appointed agents to sell insurance policies under various contracts of employment. Having been alerted to non-compliance with regulatory requirements, NTUC Income sought to clarify the status of such agents and appointed them as independent contractors. It did so by terminating the contracts of employment and appointing them as financial consultants under financial consultant agreements ("FC contracts").

4.11 A representative action on behalf of these individuals was brought to court against NTUC Income alleging that the termination of the contracts of employment and entry of FC Contracts were done in breach of an implied term of mutual trust and confidence under the contracts of employment and they had been procured by economic duress. NTUC Income applied for stay in favour of arbitration under s 6 of the AA referring to the arbitration clause found in the FC contracts. The stay application was granted by the assistant registrar ("AR"). The plaintiffs appealed to the High Court averring that their claims arose out of their contracts of employment (where there is no arbitration agreement) and not from the FC contracts. The High Court affirmed the stay. The plaintiffs appealed to the Court of Appeal which dismissed the appeal as set out in *Sim Kay Choon v NTUC Income Insurance Co-operative* [2016] 2 SLR 871 ("*Sim Kay Choon*").

4.12 Before the Court of Appeal, the plaintiffs changed their case accepting that their disputes fell within the ambit of the arbitration agreement in the FC contracts. The plaintiffs then sought the court to consider circumstances that might enable the court to ignore the existence of the arbitration agreement found therein. They proffered arguments such as higher costs of arbitration as opposed to litigation, the nature of the statutes invoked by the plaintiffs such as the Central Provident Fund Act (Cap 36, 2013 Rev Ed) ("CPF Act"), Employment Act (Cap 91, 2009 Rev Ed) and Industrial Relations Act (Cap 136, 2004 Rev Ed), and the belief that the plaintiffs would get a better hearing in court. Chief Justice Sundaresh Menon, who delivered the judgment of the court *ex tempore*, did not consider such grounds sufficient for the court to exercise its discretion *not* to stay court proceedings in favour of

arbitration. There must be something substantial shown by the plaintiffs for the court to not hold the parties to that arbitration agreement.

4.13 The argument that the dispute implicates the application of the CPF Act, Employment Act and Industrial Relations Act is arguably the strongest point that could be made to have the court exercise its discretion under the AA not to stay the court proceedings. The court, however, remained unmoved indicating that it requires something more than just bare assertions. This decision indicates that to persuade the court to exercise its discretion to override the agreement to arbitrate, something more than just higher costs and the preference for a judicial interpretation of statutory provisions would be required.

**Mandatory stay under International Arbitration Act**

4.14 Which came first – the chicken or the egg? The tension between the court and the arbitral tribunal in deciding the tribunal's jurisdiction was once again at the fore in *Malini Ventura v Knight Capital Pte Ltd* [2015] 5 SLR 707 ("*Malini Ventura*").

4.15 The defendants agreed to grant a loan to a Singapore company ("Borrower") and the plaintiff's husband agreed that he and the plaintiff would guarantee the repayment of the loan. The guarantee was contained in a personal guarantee deed ("Guarantee"). The solicitors of the Borrower sent a letter to the defendants enclosing the Guarantee executed by the plaintiff with a signature appearing next to the plaintiff's name. Upon the Borrower's default of payment, the defendants gave notice to the plaintiff and her husband of the event of default and demanded payment but no payment was made. The defendants commenced arbitration against the plaintiff. The plaintiff filed her statement of defence alleging, *inter alia*, that there had been no valid arbitration agreement between her and the defendants as she did not sign the Guarantee and the signature found in the Guarantee next to her name was a forgery. The plaintiff applied for a stay of the arbitral proceedings which the tribunal did not grant. The plaintiff then commenced court action seeking, *inter alia*, a declaration that the plaintiff had not entered into any arbitration agreement with the defendants. The defendants sought the stay of the court action invoking s 6 of the IAA. Judith Prakash J dismissed the plaintiff's application and allowed the stay of the court action.

4.16 The plaintiff had questioned the applicability of s 6 of the IAA when what is in doubt is the "existence" *per se* of an arbitration agreement. In other words, if the existence of the arbitration agreement is at the core of the jurisdiction challenge, will the court have the power to stay the court action under s 6 on the basis of an "arbitration

agreement" the very existence of which is in question? Who then decides the question of existence or non-existence of an arbitration agreement? Prakash J referred to how s 6(2) of the IAA (read *vis-à-vis* Art 16 of the MAL) has been worded. It reads that a court to which an application for stay has been made, "shall" make a stay order "unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed", upholding the primacy of the tribunal to rule on its own jurisdiction. That power includes determining any objection relating to the "existence" of the arbitration agreement.

4.17 Prakash J took a *prima facie* approach in reviewing the evidence presented in court for her to determine whether an arbitration agreement existed between the parties. The court found that such *prima facie* evidence existed that the plaintiff had signed the Guarantee which contained the arbitration agreement. Prakash J, however, erred on the side of caution and remarked that her findings herein were only *prima facie* with much evidence that could still be fully explored by the tribunal itself.

4.18 This decision was handed down in August, just before the Court of Appeal issued its ruling in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 ("*Tomolugen Holdings*") in October affirming a similar *prima facie* approach in reviewing the validity and existence of arbitration agreements. The judgment herein further affirms that an arbitral tribunal ought to determine first such issues in relation to arbitration agreements. A party dissatisfied with the tribunal's ruling on jurisdiction can always resort and appeal to the Singapore courts pursuant to s 10 of the IAA.

4.19 Singapore's consistent *prima facie* approach in determining issues arising from enforcement of arbitration agreements is also Singapore's act of veering away from the English approach. While the relevant Singapore and English provisions are similarly worded, the context they have been drafted in is not the same. Singapore enacted its IAA to specifically incorporate the MAL to be made applicable to international arbitrations only. The English Arbitration Act 1996 (c 23), on the other hand, covers both international and domestic arbitrations and has not incorporated the entire MAL. The Singapore courts having adopted the MAL, while not undermining the significant role they have to play in the realm of international arbitration, have to give primacy to the role of the arbitral tribunal to rule first on challenges against its jurisdiction. The tribunal's power is wide enough to include consideration of issues on validity and the *existence* of an arbitration agreement.

4.20 Having affirmed the *prima facie* approach (as opposed to a full review) Singapore courts ought to take in determining whether an

arbitration agreement exists or not in the context of stay applications, the judgment in *Malini Ventura* and, subsequently, the judgment in *Tomolugen Holdings*, effectively put a stop to the chicken-and-egg situation that parties usually find themselves in when asserting (or resisting) the existence of an arbitration agreement before the courts.

### *"Claiming through or under"*

4.21 The questions of who is a party to an arbitration agreement and the treatment of assignees or endorsees to a bill of exchange were raised in *Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pte Ltd* [2016] 1 SLR 79 ("*Cassa di Risparmio*").

4.22 A supply agreement between Rals International Pte Ltd, a Singapore company as the buyer, and Oltremare SRL, a company in Italy as the seller, was entered into for the purchase of machines ("goods") to process cashew nuts ("Supply Agreement"). The Supply Agreement contained an arbitration agreement for the resolution of disputes in Singapore and provisions where the buyer was to draw promissory notes ("Notes") in favour of the seller and for the seller to negotiate the Notes to its bank in Italy, Cassa di Risparmio di Parma e Piacenza SpA ("Bank") without recourse. By a discount agreement, the seller then assigned to the Bank its contractual right to receive payment for the goods from the buyer, who had been made aware of such assignment. The Bank was also aware of the Supply Agreement containing an arbitration agreement. The Notes fell due for payment and were dishonoured upon presentation. The Bank brought a court action against the buyer to recover the value of the dishonoured Notes and sought a declaration that it was a holder in due course of the Notes and the buyer was liable to pay the Bank the value of the dishonoured Notes. The buyer applied for a stay under s 6 of the IAA which the AR granted. Vinodh Coomaraswamy J ruled that while the Bank was "claiming through or under" the seller and was thus made a party to the arbitration agreement within the extended meaning of that term in s 6(5)(*a*) of the IAA, the Bank's claim, having been confined to its rights as holder of the Notes, was *not* within the scope of the arbitration agreement in the Supply Agreement.

4.23 The court, in lifting the stay, also rejected the buyer's submission that it should apply the "validation principle" to allow a party to choose whichever law that upholds the assignee's obligation to arbitrate. Accepting the "validation" approach would be tantamount to putting the cart before the horse and allowing the intention of the parties at the time they entered into the Supply Agreement to be at the behest of the desired outcome of one party choosing a pre-ordained result.

**Arbitrability of subject matter**

4.24 Singapore courts have thus far been consistent in upholding the *prima facie* standard of review save for what could be perceived as a middle ground between a *prima facie* and a full merits approach or what could be referred to as the "more than *prima facie* approach" that the court adopted in the case of *R1 International Pte Ltd v Lonstroff AG* [2014] 3 SLR 166; *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521 ("*R1 International*") (see (2014) 15 SAL Ann Rev 47 at 53–56, paras 4.20–4.28). What triggered the court to undertake a "more than *prima facie* approach" in *R1 International* was the fact that one of the parties had raised as an issue, contractual formation and incorporation of terms outside of the subject contract by reference. The court had no other recourse but to look into the pre-contract and post-contract behaviour of the parties and correspondence between the parties in ascertaining whether a contract (and consequently, an arbitration clause) existed at all. For a brief moment, it may have been thought that Singapore courts may be inclined towards taking the full merits approach in reviewing arbitration agreements but this has since been disproved in the case of *Tomolugen Holdings* which relates to the appeals made against the judgment of the High Court in *Silica Investors Ltd v Tomolugen Holdings Ltd* [2014] 3 SLR 815 ("*Silica Investors Ltd*") (see (2014) 15 SAL Ann Rev 47 at 52–53, paras 4.15–4.18).

4.25 Silica Investors Ltd ("Silica Investors") acquired shares in Auzminerals Resource Group Limited ("Auzminerals") from Lionsgate Holdings Pte Ltd ("Lionsgate"), pursuant to a share sale agreement ("SSA") that contained an arbitration clause. Only Silica Investors and Lionsgate were parties to the SSA. Silica Investors commenced court action against eight defendants (including Lionsgate and Auzminerals) alleging that it had been oppressed as a minority shareholder of the eighth defendant, Auzminerals. Two of the four main allegations are relevant for these purposes, namely, that Auzminerals had issued shares which diluted Silica Investors' shareholding ("Share Issuance Issue"); and in breach of the SSA, Silica Investors had been denied its right to participate in the management of Auzminerals ("Management Participation Issue"). One of the reliefs requested by Silica Investors before the High Court was an order that Auzminerals be put into liquidation. Lionsgate filed a stay application pursuant to s 6 of the IAA alleging that *a part* of the dispute fell within the scope of the arbitration clause. It argued that the remainder of the disputed issues ought to be stayed as well in favour of arbitration for better case management purposes. The other defendants also filed stay applications invoking the court's inherent case management power. The stay applications were dismissed by the AR and affirmed by Quentin Loh J of the High Court. Loh J determined that the Share Issuance and Management Participation Issues were considered part of the "essential dispute" of the

parties and were thus within the scope of the arbitration clause. However, he took the view that the subject matter was not arbitrable on the basis that a claim for relief such as liquidation under s 216 of the Companies Act (Cap 50, 2006 Rev Ed) (*Silica Investors Ltd* at [120]) "[straddled] the line between arbitrability and non-arbitrability" and the totality of the dispute involved third parties who were not parties to the arbitration agreement, and the plaintiff had sought a remedy that a tribunal had no power to grant.

4.26 Before considering the main issues, the Court of Appeal addressed a threshold issue raised by the *amicus curiae* that any court confronted with stay applications ought to consider, *ie*, the standard of review of arbitration agreements in a stay application under s 6 of the IAA. The Court of Appeal referred to three previous decisions of the Singapore courts, namely, *Sim Chay Koon* (above, para 4.11), *The Titan Unity* [2013] SGHCR 28 and *Malini Ventura* (above, para 4.14). These cases took the *prima facie* approach in reviewing arbitration agreements. In the circumstances, the court found no cogent basis to depart from the *prima facie* approach when hearing a stay application under s 6 of the IAA. The court's decisions in *Tomolugen Holdings* and *Malini Ventura* have seemingly affirmed that the court's judgment in *R1 International* could only be deemed as an exception rather than the general approach Singapore courts ought to take.

4.27 Subject matter arbitrability was the main point of contention before the Court of Appeal in *Tomolugen Holdings*. The requirement of arbitrability, as set out in Art II of the New York Convention, is simply that the subject matter of an arbitration must be "capable of settlement by arbitration". Admittedly, there is no statutory provision (neither in Art 8 of the MAL nor in s 6 of the IAA) which expressly defines what makes a subject matter arbitrable or not arbitrable. It does not mean, however, that there is nothing at all to guide the courts, tribunals and counsel on this issue. Section 11(1) of the IAA helpfully provides a starting point. It states 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*" [emphasis added]. It would have to be on the basis of public policy considerations that this issue could be gauged, and nothing more. The test in Singapore is thus whether the subject matter in dispute is "contrary to [Singapore] public policy".

4.28 What made the issue on subject matter arbitrability in *Tomolugen Holdings* more interesting is the argument that the type of relief being sought, *ie*, the winding up of a company, being a relief which an arbitral tribunal has no power to grant, makes the subject matter of the dispute non-arbitrable. The authors could not agree more with the court when it determined that the type of relief sought could *not* be

made the primary consideration in determining whether the subject matter of a dispute is arbitrable or not. At the stage of a stay application, any desired outcome or relief would not as yet have been granted by the tribunal and there would be no guarantee that such relief would be granted at all. If the type of relief sought as set out in a notice of arbitration or in a pleading could dictate the nature of the claim, this would open a disconcerting situation where any claimant who is a party to an arbitration clause (and who may have changed its mind and now prefers to have its disputes brought before a court of its own choice) could easily circumvent its contractual obligation to refer its disputes to arbitration by claiming for such reliefs which a tribunal has no power to grant. National standards of public policy being so high a threshold in Singapore, the authors agree that the subject matter in dispute in this case, despite the type of relief being claimed, failed to be shown as so egregious as to be shocking to the conscience and affecting widespread public interest as to trigger the public policy exception of Singapore.

4.29 The Court of Appeal has through this decision provided predictability and certainty on issues relating to the standard of review of arbitration agreements and arbitrability of minority oppression claims, which will be instructive henceforth on whether the courts ought to adopt a *prima facie* or full merits review of arbitration agreements, and had further affirmed Prakash J's sentiments in *Malini Ventura* decided a few months before the judgment in *Tomolugen Holdings* was issued. The tension between the court's jurisdiction *vis-à-vis* an arbitral tribunal's jurisdiction to rule on the latter's jurisdiction ought to have been finally put to rest by this decision.

## Interlocutory orders

### *Court's power of property preservation extends to property outside Singapore*

4.30 The High Court has wide powers to grant interim measures under s 12A(1) of the IAA, including the preservation, interim custody or sale of any property which is or forms part of the subject matter of the dispute. Such powers may now be exercised irrespective of whether the place or seat of arbitration is in the territory of Singapore (readers may recall that the question of whether a Singapore court could order interim measures was rendered uncertain in the Court of Appeal decision in *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR(R) 629. This position necessitated legislative change resulting in s 12A of the IAA). In *Five Ocean Corp v Cingler Ship Pte Ltd* [2016] 1 SLR 1159 ("*Five Ocean-Cingler*"), another question arose for consideration in relation to the exercise of such a power over property located outside Singapore's territorial jurisdiction.

4.31 The case of *Five Ocean-Cingler* involved the tussle between the shipowners and time charterers of the vessel *Corinna* on one side, and the subcharterer and cargo interests on the other. The head voyage charterer Cingler, a Singapore company, was at the time the subject of winding-up proceedings. The owners and time charterers were left with unpaid charter hire and sought to exercise a lien over the cargo then laden on board while the *Corinna* was on the high seas outside Singapore. The time charterers had commenced arbitration against the head charterer who did not participate and had since obtained an order for a stay of all legal proceedings under s 210 of the Companies Act. The time charterers applied for a sale of the cargo on board the *Corinna* on the ground that the cargo had shown visible signs of heating damage.

4.32 Belinda Ang J allowed the sale application even though the vessel and her cargo were in international waters off the last nominated discharge port for months because of the ongoing dispute between the parties. Her Honour accepted counsel's submission that if the seat of the arbitration is in Singapore and the assets are overseas, the court would have the power to protect or preserve assets and evidence situated outside Singapore. In the court's view, the language of s 12A is wide enough and is not unlike the exercise of the court's powers and jurisdiction in granting an injunction that covered assets outside Singapore provided the court has *in personam* jurisdiction over the parties to the local proceedings.

**Setting aside of awards under International Arbitration Act**

4.33 A party against whom the award is made may seek to set aside the award on the specific grounds set out in Art 34 of the MAL for international arbitrations. Such grounds include the invalidity or non-existence of the arbitration agreement, inability to present one's case, the award having been made where the agreed procedure had not been followed, the tribunal's award exceeded the scope of the reference, wrong composition of the tribunal as well as subject matter arbitrability and public policy. Singapore law also provides as an overriding ground, that awards may be set aside for "breach of the rules of natural justice occurred in connection with the making of the award" (s 24 of the IAA and s 48(1)(vii) of the AA).

4.34 The existence or non-existence of the arbitration agreement being a basis for the exercise of the power to stay court action commenced in apparent breach of an arbitration agreement under s 6 of the IAA (or Art 8 of the MAL) and to challenge the tribunal's jurisdiction following its constitution, under s 10 of the IAA (and Art 16 of the MAL), is also one of the common bases to set aside any award subsequently made by such a tribunal.

4.35 Whether an arbitration agreement exists or not is also a question correlated with the manner by which such an arbitration agreement is made to exist. One of the elements of a valid and existing arbitration agreement is the requirement that it be "in writing" in some written form. Whilst the enforcement stage of a foreign award would require that the written form of an arbitration agreement "include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams" (Art II(2) of Sched II to the IAA), the writing requirement under the IAA has been expanded by the amendment adopted in 2012 such that "[a]n arbitration agreement is in writing if its content is *recorded in any form*, whether or not the arbitration agreement or contract has been concluded orally, by conduct or by other means" [emphasis added]. Simply put, the requirement for writing under the MAL has been reduced from a strict written form of agreement to arbitrate to an agreement reached orally or by conduct which is evidenced in some form of record (not necessarily made "in writing" in the form of a written text).

***Validity of arbitration agreement – Expanded definition of "in writing" under International Arbitration Act***

4.36 The requirement of an arbitration agreement to be made "in writing" was one of the issues raised in *AQZ v ARA* [2015] 2 SLR 972 ("*AQZ v ARA*").

4.37 The parties entered into a contract for sale and purchase of 50,000mt of Indonesian non-coking coal. The contract for the first shipment was entered into in January 2010 ("First Shipment"). Disputes arose as to whether the discussions leading to the First Shipment resulted in another contract for a second shipment of the same quantity of coal ("Second Shipment"). The buyer argued that the Second Shipment was concluded and the seller had subsequently breached the contract for the Second Shipment for failing to deliver coal for the Second Shipment. The seller maintained that the Second Shipment was never concluded.

4.38 The parties were in agreement that there had been discussions between them that the terms of the Second Shipment would be the same as those in the First Shipment, save for the laycan. Certain amendments had been proposed, the seller asking for an increase in the price of coal whereas the buyer requested for changes to be made in the coal specifications to meet the requirements of its sub-buyer. The seller rejected the proposed changes in the coal specifications but the buyer continued to pursue the seller on its proposed changes in coal specifications at a meeting in Jakarta. The buyer thereafter sent an

e-mail to the seller attaching a draft contract to reflect the amended coal specifications and the increase in price, as the seller had suggested. The seller responded saying it would not be able to undertake the job under the Second Shipment and it did not sign the contract for the Second Shipment.

4.39 Arbitration proceedings were commenced under SIAC's expedited procedure. Before the tribunal, the seller argued that the Second Shipment was never entered into by the parties, and that even if it was, there was no arbitration agreement made "in writing" that satisfied the requirement of s 2 of the IAA prior to December 2009 (which was before the year 2012 when changes were made in the IAA and which took effect on 1 June 2012). The seller challenged the jurisdiction of the tribunal on the basis that there was no arbitration agreement between the parties satisfying the writing requirement.

4.40 The tribunal issued an award finding in favour of its own jurisdiction, ruling that the expanded writing requirement under the IAA in 2012 applied in this case by virtue of the fact that the arbitration was commenced after the coming into effect of the 2012 amendments to the IAA. It ruled that the parties had entered into the terms for the Second Shipment which included the arbitration clause set out in the contract for the First Shipment. The seller applied to set aside the award under s 10(3) of the IAA or Art 16(3) of the MAL averring that the tribunal lacked jurisdiction for want of a valid arbitration agreement, and alternatively, under s 3(1) of the IAA read with Arts 34(2)(a)(i) and 34(2)(a)(iv) of the MAL that the arbitration was invalid or that the tribunal was wrongly constituted. The seller argued that it should continue to have the benefit of being able to rely on the definition of an arbitration agreement contained in s 2(1) of the IAA in 2009 notwithstanding any subsequent amendments to that definition because of the principle against the retrospective application of laws as provided in s 16(1)(*c*) of the Interpretation Act (Cap 1, 2002 Rev Ed) which could deprive it of "any right, privilege, obligation or liability acquired, accrued or incurred under any written law".

4.41 Prakash J rejected the seller's application and upheld the award. In the court's view, the 2012 amendment applied and the seller's "right" (if it could be so called) to resist the arbitration accrued only after the commencement of the arbitration. The intention set out in the amending legislation was clear that it was intended to deprive parties of any rights that may have accrued to them under the prior provision of the law by stipulating that the amendments shall apply to all arbitral proceedings commenced on or after 1 June 2012.

4.42 Elaborating then on the new requirement, the learned judge ruled that the writing requirement "would be satisfied if one party to the

agreement unilaterally records it in writing. It would not matter that the written version of the agreement is neither signed nor confirmed *by all the parties involved*" [emphasis added]: *AQZ v ARA* at [119].

***Review of jurisdiction "at any stage of the arbitral proceedings"***

4.43 An interesting argument that was raised by the seller in *AQZ v ARA* was whether it was entitled to the relief under s 10(3) of the IAA and Art 16(3) of the MAL notwithstanding the fact that the tribunal had made its decision on jurisdiction, not as a preliminary issue, but together with the merits. Prakash J also rejected this argument and maintained that under Singapore law, while Art 16(3) of the MAL allows an applicant-party to request for the relief of having a court of law determine issues of arbitral jurisdiction, such relief is only available *after* the tribunal had ruled on a challenge to its jurisdiction *as a preliminary question* and not together with the merits of the case. She rightly rejected the seller's argument that the words "at any stage of the arbitral proceedings" in s 10(3) of the IAA gave the seller the right to challenge the ruling on jurisdiction if such a ruling was made together with an award on the merits. In her view, s 10(3) modifies Art 16(3) of the MAL only to the extent of allowing parties to seek a review of the *negative* jurisdictional rulings by arbitral tribunals.

4.44 While the argument of the seller was not well made and rightly rejected, the current text of s 10(3) of the IAA is indeed not without its flaws. While there is no doubt that the original intention in introducing this amendment was to allow a negative jurisdictional ruling by a tribunal to be reviewed by the court (the rationale and wisdom of which remains highly debatable), the text of the provision in s 10(3) goes beyond that. Indeed it appears that the legislative intent was to expand Art 16(3) of the MAL so that an arbitral tribunal may rule on a plea that it has no jurisdiction "at any stage of the arbitral proceedings and an appeal against both positive or negative" rulings lie with the High Court (see IAA Amendment Bill, Explanatory Note). The text of s 10(3) of the IAA, however, specifies that while a positive ruling on jurisdiction may be appealed against only if it is made on a plea as a preliminary question of jurisdiction (under Art 16(3) of the MAL), a negative ruling may be appealed at "any stage of the arbitral proceedings". Simply put, a party dissatisfied with any negative ruling of the tribunal made at any stage of the arbitration, may appeal against such a decision to the High Court. The introduction of this additional recourse could encourage a dissatisfied party to seek judicial intervention each time a tribunal rejects an application for want of jurisdiction in the course of the arbitration proceedings.

4.45 Another interesting aspect of this case is the court's consideration of whether in exercising its power to consider the question of arbitral jurisdiction, the court ought to do so *de novo*. The court referred to the procedure prescribed in O 69A r 2 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) and noted that such applications are to be made by originating summons, suggesting that it does not envisage a *de novo* rehearing of all the evidence. The court may, in certain circumstances, allow the taking of oral evidence, as necessary. Prakash J noted, however, that with the use of modern electronic verbatim transcription in arbitration, the need for rehearing of evidence has been greatly reduced.

## Breach of natural justice

### *Delay in making award and failure to declare closure of proceedings*

4.46 A novel attempt at setting aside an award on the basis of the tribunal's failure to declare the arbitral proceedings closed under the SIAC Rules 2007 was considered in *Coal & Oil Co LLC v GHCL Ltd* [2015] 3 SLR 154 ("*Coal & Oil*").

4.47 Coal & Oil Company LLC ("Coal & Oil") was a company based in Dubai and engaged in the business of trading coal. The defendant, GHCL Limited ("GHCL"), a company registered in India, was a customer of Coal & Oil. The parties entered into an agreement (containing an arbitration clause) where Coal & Oil agreed to supply coal to GHCL in multiple shipments. Coal & Oil separately contracted with Noble Resources Pte Ltd ("Noble") to obtain some of the coal it required to fulfil the terms of its contract with GHCL. The price of coal rose dramatically and Noble attempted to renegotiate its contract with Coal & Oil. In the interim, GHCL was informed that Coal & Oil would not be able to deliver the third shipment unless an increase in price of the coal was agreed. By an addendum, GHCL agreed to a price increase for the third shipment. A few months thereafter, GHCL demanded that Coal & Oil repay the additional sums it had paid under the addendum as they had been procured through coercion and were thus illegal. Coal & Oil refused to repay and GHCL commenced arbitration. In its final award, the tribunal decided in favour of GHCL and held that the addendum was vitiated by duress and ought to be set aside. The award was received by the parties one year and seven months after they made their final reply submissions.

4.48 Coal & Oil applied to have the award set aside pursuant to, *inter alia*, s 24 of the IAA on the basis of the tribunal's alleged breach of natural justice for breach of duty to declare the proceedings closed

under r 27.1 of the SIAC Rules 2007, and inordinate delay of 19 months in the release of the award.

4.49 Steven Chong J declined to set aside the award, rejecting all the grounds proffered. The learned judge examined the history of the SIAC Rules and discerned that the drafters wanted to strike a balance between tribunal autonomy and institutional oversight. In his view, the rule to declare the closure of proceedings does not impose upon the tribunal a duty but a power to do so before the issuance of an award. It is a tool of case management to prevent the award drafting process from being disturbed by last minute submissions and to serve as a signal to parties that the award is forthcoming. Unlike the requirement to submit the draft award to the SIAC Registrar for scrutiny, the declaration of closure of proceedings was not intended to be a critical requirement as to warrant setting aside of the award for the tribunal's failure to make such declaration.

4.50 Indeed Chong J's analysis of the SIAC Rules and the underlying rationale for the rule on closure of proceedings is most illuminating. It is unfortunate that the draft amendments to the SIAC Rules 2016 now propose to impose a time limit within which the tribunal ought to declare the proceedings closed. If the proposed r 30.1 of the 2016 draft mandating a closure to be made within "30 days after the last hearing concerning matters to be decided in the award or the filing of the last submissions" is indeed adopted, an award made without a declaration of closure or if such is made outside the time limit to do so, would be subject to a legitimate challenge that the tribunal has failed to follow the procedure agreed to by the parties.

4.51 On the issue of whether the period of 19 months after the last submission could be deemed an "inordinate delay" in the issuance of the award, the learned judge pointed out that while an arbitrator whose mandate had expired would no longer have any jurisdiction to render an award and thus any award made thereafter would have no effect (see *Ting Kang Chung John v Teo Hee Lai Building Constructions Pte Ltd* [2010] 2 SLR 625), the SIAC Rules do not specify any time limit for the release of an award. Time would only start running after the declaration of closure of proceedings. Having made no such declaration in this case, the award made was not made out of time. The court's decision in this regard is of course not an endorsement that arbitral tribunals may delay issuing an award for an inordinate length of time. The remedy in such a case is to apply for the termination of the tribunal's mandate prior to the issuance of the award. It also observed that neither of the grounds sought to be relied upon would constitute a breach of sufficient gravity to trigger the ground that the tribunal had failed to follow the procedure agreed to by the parties. In the court's view, to sustain the ground and engage the court's intervention, the procedural breach complained of

"cannot be of an arid, technical, or trifling nature; rather, it must be a material breach of procedure serious enough that it justifies the exercise of the court's discretion to set aside the award": *Coal & Oil* at [51].

4.52 The bases advanced by the plaintiff in *Coal & Oil* attracted the court's observation that parties who have lost their cases in arbitration have been rather creative in attempting to expand the defined boundaries of the various permissible grounds to seek recourse against the awards adversely made against them. Quite clearly, Singapore courts have been assiduously conscious not to yield to such attempts.

***Lack of pleaded case, late admission of evidence***

4.53 Where facts or documents had occurred or had been made after the commencement of arbitration and were put in or referred to by the parties in the course of the arbitration, a party could not seek to set aside an award by the mere fact that such facts or documents were not formally pleaded. This was the case in *AYH v AYI* [2015] SGHC 300 ("*AYH v AYI*") where an agreement which was entered into by the plaintiffs with a third party just a week before the hearing and after the agreed issues were settled, was adduced in evidence at the hearing without objection from the appellant. The parties had previously entered into a deed of settlement where the appellant was to transfer legal title to various assets in exchange for his release from said potential claims by such third party. The agreement adduced by the plaintiffs was to show the appellant that they had the capacity to make that third party release the appellant from potential claims. The tribunal in its award referred to and relied on the said agreement in rejecting the appellant's defence that the deed it had entered into with the plaintiffs was impossible to be performed. Following the decision in *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 ("*Kempinski*"), Prakash J said (*AYH v AYI* at [33]):

> [A]ny new fact which arises after submission to arbitration, which is *ancillary* to the dispute submitted for arbitration and which is known to all the parties to the arbitration is part of that dispute and need not be specifically pleaded. It may be raised in the arbitration proceedings as long as the other party is given sufficient notice of it and the opportunity to meet it. [emphasis added]

4.54 The decision makes clear that evidence in support of a pleaded case can be allowed by the court even when such evidence has not been specifically pleaded. A claim by an unsuccessful party in an arbitration that the tribunal had made decisions on matters which were not pleaded or not argued have often been used to support the ground that a breach of natural justice had occurred in the making of the award, in order to set aside the award. Such an argument could also be brought under the

ground that the tribunal had decided on matters beyond the scope of the reference (see *Kempinski* and *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597).

***Tribunal's failure to apply its mind to plaintiff's evidence***

4.55 A rather peculiar situation, however, arose for consideration in *AMZ v AXX* [2016] 1 SLR 549 ("*AMZ v AXX*") (for confidentiality reasons, the parties were given fictitious names) where the tribunal dismissed the claim for repudiatory breach while recognising that the respondent in the arbitration had committed breaches, and yet did not proceed to consider or hear remedies for such breach.

4.56 The plaintiff agreed to sell to the defendant 600,000 barrels of Dar Blend (the "Supply Contract"), a type of crude oil originating in South Sudan. At the time of the negotiations for the Supply Contract, the defendant did not have a crude oil import licence and without such licence it could not import crude oil onto the shores of Bespin. The plaintiff still agreed to enter into the Supply Contract upon assurances made by the defendant that the import licence would be issued. At the same time, the parties entered into a buy-back contract where the plaintiff agreed to buy back the Dar Blend on FOB terms if the defendant was not able to take delivery during the delivery window due to its inability to secure timeously a crude oil import licence. The plaintiff took the necessary steps including chartering a vessel to transport the Dar Blend from South Sudan to ports including Alderaan and Cloud City in Bespin but the defendant failed to open a letter of credit to pay the plaintiff within the timeline stipulated. Despite the absence of a letter of credit or payment undertaking, the plaintiff proceeded to load the Dar Blend onto a vessel at Port Sudan but did not instruct the vessel to sail directly to Cloud City but instead to sail to Alderaan and to remain there while awaiting further instructions. While the vessel was at Alderaan, the plaintiff was informed that the defendant had failed to secure an import licence and would not be able to take delivery of the Dar Blend. The defendant suggested that the plaintiff attempt to sell the Dar Blend to a third party. At that point, the plaintiff took the position that the defendant's failure to secure an import licence and to issue the letter of credit and to take delivery of the Dar Blend, amounted to a repudiatory breach of the Supply Contract and ordered the vessel to set sail for Cloud City. The plaintiff commenced arbitration under SIAC procedure on the basis that the defendant had failed to open an irrevocable letter of credit in the plaintiff's favour within a contractual timeline and that the same amounted to a repudiatory breach of the Supply Contract which the plaintiff had accepted. In its award, the tribunal found the defendant in breach but ruled that the same did not amount to a repudiatory breach of contract. In the absence

of an alternative claim for damages, the tribunal dismissed the claimant's claim in its entirety. Dissatisfied, the plaintiff applied to have the award set aside on the ground that a breach of natural justice had occurred under s 24(*b*) of the IAA as it was unable to present its case in the arbitration, and the award dealt with a dispute outside or beyond the scope of submission to the arbitration.

4.57 Coomaraswamy J dismissed the application. The learned judge pointed out that the matter raised by the plaintiff was not about breach of natural justice by depriving the plaintiff of the opportunity to put evidence, submissions and arguments on the issues before the tribunal, but a case that the tribunal had denied it natural justice by not applying its mind to the plaintiff's evidence, submissions and arguments but instead favoured the defendant's case. The plaintiff had staked its entire case on liability on being able to persuade the tribunal to find that the defendant was in repudiatory breach of the Supply Contract. Having failed to so persuade the tribunal, the plaintiff could not be allowed to say that the tribunal had failed to consider damages for the breach it had found. If the tribunal had in fact done so, it would have gone beyond the case which the plaintiff had presented. The tribunal's finding that it suffered no recoverable loss was therefore not a breach of natural justice.

***Tribunal's finding not argued by parties***

4.58 Section 48(1)(*a*)(vii) of the AA also provides for, as a ground for setting aside an award made in a domestic arbitration, a breach of natural justice. In *AQU v AQV* [2015] SGHC 26 ("*AQU v AQV*"), the contract involved supply and delivery of stone finishing in a construction project ("Project"). The contractor having failed to pay the supplier for the tiles supplied to the Project, the supplier commenced arbitration. The tribunal found in favour of the supplier in all of its claims and dismissed the contractor's counterclaims. The contractor filed an application to set aside the award in the High Court pursuant to s 48(1)(*a*)(vii) of the AA on the ground of breach of natural justice. Prakash J found no breach of natural justice and did not set aside the award. She ruled that while it could be a breach of natural justice if a tribunal makes a determination on an argument invented by the tribunal itself, this does not automatically mean that arbitrators cannot make any findings not argued upon by the parties. It is also not essential for any tribunal to deal with all arguments put forward by a party in the course of the arbitral proceedings. If a finding on a particular argument satisfactorily disposes of an issue, then it is no longer necessary for the tribunal to consider further other arguments relating to that issue.

4.59 In refusing to set aside the award, Prakash J had maintained Singapore's high threshold even in relation to domestic arbitration. This

decision is also consistent with the view of Chan Seng Onn J in an earlier case, *TMM Division Maritime SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972, where it was said that the principles of natural justice are not breached on the basis that an arbitrator comes to a conclusion that has not been argued by either party, so long as that conclusion reasonably flows from the parties' arguments.

## Role of court when reviewing awards in setting-aside proceedings

### *Setting-aside process not an appeal process*

4.60 One of the rare cases in which the High Court had set aside an international arbitral award was to be found in the case of *AKM v AKN* [2014] 4 SLR 245 where Coomaraswamy J uncharacteristically set aside an award in its entirety on the ground that the tribunal failed to consider the arguments both on liability and quantum of loss and thereby breached the rule of natural justice.

4.61 The facts in the case, guised under fictional names, are as follows. A company named Moria ("Company"), the largest regional producer of Mithril, had a production facility in a city called Erebor. The Company went into liquidation, and the liquidator, the secured creditors, the shareholders and the purchasers 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 purchasers issued 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 purchasers 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 in this case. The defendants included the purchasers, the special purpose vehicle in Moria and subsidiaries of the purchasers. 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". At the time the APA was entered into, the Company owed taxes to the authorities of Erebor. The APA contained a condition precedent before 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") with the tax authorities 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.

4.62 The defendants succeeded in the arbitration where the tribunal awarded, *inter alia*, (a) US$80m in damages for loss of opportunity to earn profits; (b) US$23.7m as indemnity on the property claims or referred to as the "Lost Land Claims"; (c) 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; and (d) the tribunal also found the Funds liable alongside the secured creditors for breaches of the APA.

4.63 The learned judge in setting aside the award effectively combed the tribunal's award and substituted its own decision for that of the tribunal. As the authors had previously observed (see (2014) 15 SAL Ann Rev 47 at 65, para 4.61), he examined the transcripts and the submissions made before the tribunal, criticised the tribunal for having misunderstood the defence advanced, expressed that he could not accept that the tribunal had found "not a shred of contemporaneous evidence" and criticised the tribunal for reaching a conclusion "by rejecting an argument that was never made to it, and thereby ignoring the arguments that were made to it".

4.64 It is therefore not surprising that when the matter came before the Court of Appeal in *AKN v ALC* [2015] 3 SLR 488 ("*AKN v ALC*"), the decision was set aside save for the decisions on the quantification of damages for "the loss of a chance" and the decision that the tribunal acted in excess of jurisdiction in granting relief under the Notes. The Court of Appeal reiterated that courts "do not and must not interfere in the merits of an arbitral award and, in the process, bail out parties who have made choices that they might come to regret, or offer them a second chance to canvass the merits of their respective cases" (at [37]) and that "the courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award" (at [39]). The Court of Appeal's affirmation that the need for analysing the merits of the parties' respective cases lies within the province of the tribunal and not the courts, is indeed reassuring as the setting-aside process was never intended to be an appeal process for challenges relating to the tribunal's own jurisdiction.

### *"Provisional" awards*

4.65 The question of what is the nature of an "award" arose for reconsideration once again before the Court of Appeal in the case of *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)* [2015] 4 SLR 364 ("*Persero 2015*"). This is a sequel to the court's previous decision in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*Persero 2011*"). At the centre of

it is the question of whether a dispute adjudication board ("DAB") decision which requires a party against whom it is made to make immediate payment and which is often accepted as binding but not final could be embodied in an award by an arbitral tribunal constituted for that purpose and whether such an "award" is an award capable of enforcement in Singapore. The High Court rejected the application for enforcement and set aside the "award" on the basis that such could not be an award as the tribunal had not reviewed the same on the merits and would not be doing so. The Court of Appeal, in *Persero 2011*, affirmed that decision.

4.66 CRW commenced the second round of arbitration in 2011 ("2011 arbitration") where the tribunal (by a majority) issued an interim award holding PGN's obligation to pay *promptly* the sums so awarded by DAB to CRW ("DAB Decision") pending resolution of the primary dispute ("Interim Award"). PGN maintained its argument that it could not be compelled to pay the sums ordered by DAB to be paid 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". PGN added that the IAA did not allow any tribunal to issue such "provisional awards". In the High Court (*PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia)* [2014] SGHC 146), Coomaraswamy J granted enforcement of the Interim Award holding that s 19B of the IAA does not prohibit a tribunal from issuing a "provisional award", *ie*, an award granting relief and which is intended to be effective for a limited time only. Even if it were so, the Interim Award was *not* a "provisional award" in a strict sense as its subject matter was CRW's undisputed substantive (but provisional) right to be paid immediately. Such an award was final and binding, and as such, it had complied with s 19B(1) of the IAA and was capable of enforcement in Singapore. The tribunal could then proceed to determine the primary dispute without having to vary the Interim Award and s 19B(2) would thus *not* be breached. When a final award was made subsequently on the primary dispute, it would merely supersede the Interim Award but it would not alter the Interim Award.

4.67 The Court of Appeal (by a majority, Menon CJ and Quentin Loh J; Chan Sek Keong SJ ("Chan SJ") dissenting) affirmed the decision. Menon CJ (with Loh J) delivered the judgment of the majority and held that s 19B of the IAA operated to render the Interim Award "final and binding" (as opposed to provisional) as regards the particular issue which that award decided on, namely, PGN's obligation to make prompt payment of the adjudicated sum awarded to CRW. The Interim Award was thus not inconsistent with the provision of s 19B of the IAA. It was to have the finality required of s 19B of the IAA on the basis that it would "finally resolve" the parties' respective positions for a certain

period of time until it would be altered by a subsequent award in the arbitration with respect to the parties' underlying primary dispute. The majority also stated that it was not the Interim Award *per se* that would be subsequently revised but the inevitable monetary consequences and effects of that award once the final award on the merits of the underlying primary dispute had been made. What the majority of the 2011 tribunal did in the Interim Award was to give prompt effect to the DAB Decision for it to be finally dispositive of the "prompt compliance" issue. The fact that the Interim Award ceases to be binding once any award on the primary dispute is made does not automatically render the Interim Award unenforceable or liable to be set aside.

4.68 Chan SJ took a diametrically different view. He observed that the Interim Award was issued with respect to PGN's failure to pay CRW the sums so awarded in the DAB Decision and the majority of the 2011 tribunal had no mandate under cl 20.6 of the conditions of contract to issue the Interim Award to enforce the DAB Decision pending the 2011 tribunal's final adjudication on the parties' dispute over the merits of such decision. Even if the 2011 majority arbitrators had the mandate, the Interim Award was, in substance, intended to be a "provisional" award that fell outside the ambit of an "award" as defined in s 2 of the IAA and therefore it was not enforceable under s 19 of the IAA in the same manner as a judgment. Chan SJ primarily relied on the terms of cl 20.6 of the conditions of contract which required that "[u]nless 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". Such "dispute" that could be referred to arbitration only included a DAB decision that had *not* become final and binding and, where no amicable settlement had been reached, clearly referred only to the "primary dispute" between the parties. The enforceability dispute of the DAB Decision, Chan SJ concluded, did not fall within the scope of the arbitration agreement and the majority of the 2011 tribunal had no mandate to make an "award" in relation thereto but its mandate was confined to deciding the parties' underlying primary dispute only.

4.69 There is much logic in Chan SJ's dissenting opinion. While it is wholly understandable that the Court of Appeal is intent on upholding and enforcing tribunals' decisions, where the subject matter of the dispute falls outside the scope of the arbitration clause or where the decision is not final in its terms, the same should be refused enforcement on the basis that it falls short of the criteria for enforcement set out in s 19B of the IAA. It is difficult to accept that an "award" could be attributed with "finality" when it is clearly intended to be superseded by a subsequent decision of the tribunal. Such an argument is fictional and is indeed difficult to justify when it is clearly beyond doubt that the Legislature had, in enacting s 19B of the IAA,

rejected the concept of "provisional" awards as having a place in Singapore. Chan SJ's robust dissent indicates that the issues raised in this case have not seen, as yet, their final resolution.

### Injunction in aid of enforcement of arbitral award

4.70 Interim measures in support of arbitration may be availed of by parties either through the courts (under s 12A of the IAA; s 31 of the AA) or from the tribunal (s 12(1) of the IAA; s 28(2) of the AA). These are, however, intended to be measures in support of an ongoing arbitration. Following the making of the award, the tribunal is *functus* and assistance can only be sought from the court wherever the assets of a party are located or where the award debtor may be found.

4.71 Prakash J in *AYK v AYM* [2015] SGHC 329, while dismissing the application for setting aside (see *AYH v AYI* (above, para 4.53)), also made an injunction order preventing the award debtor from dissipating his assets, on the basis that there was a real risk that he might dissipate his assets or move them around to frustrate attempts to satisfy the final award. Such a power is ancillary to the court's power to enforce the award and is justified as part of the enforcement and execution process.