4. ARBITRATION

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Regime of arbitration "domestic" or "international"– Adoption of institutional rules

4.1 Singapore's dual regime approach in its treatment of arbitration is a deliberate one. Although the distinction between the "domestic" regime under the Arbitration Act (Cap 10, 2002 Rev Ed) ("AA") and the "international" regime under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") has become blurred due to the enactment in 2001 of the AA and the repeal of the Arbitration Act (Cap 10, 1985 Rev Ed), there still remains some significant differences between the two. These relate principally to the discretionary power (see s 6 of the AA) of the court over the granting of stay of pending court actions commenced in breach of an arbitration agreement (whereas in an arbitration falling within the IAA regime, the IAA mandates the court to grant a stay – see s 6 of the IAA) and the power of the court to review an award made under the domestic regime for "a question of law arising out of the award" (whereas no such power exists under the IAA). In formulating this approach, the Singapore Legislature was also conscious that parties should be given the full freedom to choose if they prefer a regime that involves more, or less, curial involvement by opting into or out of either of the legislative regimes. The power to "opt-in" to the IAA regime is thus given in s 5 of the IAA:

> *Application of Part II*
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> **5**.—(1) This Part and the Model Law shall not apply to an arbitration which is not an international arbitration unless the parties agree in writing that this Part or the Model Law shall apply to that arbitration.

4.2 The provision does not prescribe how such an agreement may be reached or the required specificity in the parties' agreement as regards the application of "this Part or the Model Law shall apply to that arbitration" to achieve the desired "opting-in" to the regime under the International Arbitration Act (Cap 143A, 2002 Rev Ed). Rules of arbitral institutions may at times contain references to a default *lex arbitri*; an

example of such is r 32 of the Arbitration Rules of the Singapore International Arbitration Centre (3rd Ed, 1 July 2007) in which it is provided that:

> Where the seat of arbitration is Singapore, the law of the arbitration under these Rules shall be the International Arbitration Act (Chapter 143A, 2002 Ed, Statutes of the Republic of Singapore) or its modification or re-enactment thereof.

4.3 This author did in *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue) at para 20.013 suggest that one of the methods of "opting-in" to the regime under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") is to adopt institutional rules which expressly make the IAA applicable. Judicial support for this was first expressed by V K Rajah JA in *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 at [52] where he said *obiter* that:

> [N]otwithstanding that domestic arbitration does not fall within the ambit of 'international' arbitration as defined under the IAA, the parties can expressly opt to have the IAA apply by either agreeing in writing to this effect or adopting institutional rules which expressly stipulate that the IAA shall apply … One instance of such an institutional rule is r 32 of the SIAC Rules (3rd Ed, 2007), which provides that where the seat of arbitration is Singapore, the law of arbitration conducted under the auspices of the [SIAC] shall be the IAA.

4.4 The issue of whether r 32 of the Arbitration Rules of the Singapore International Arbitration Centre (3rd Ed, 1 July 2007) is sufficient to constitute an agreement to "opt-in" to the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") eventually arose for consideration by the Court of Appeal in *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2010] 1 SLR 25 where the arbitration clause called for arbitration "in Singapore in accordance with the Arbitration Rules of the [SIAC] for the time being in force. The Arbitration Rules shall be deemed to be incorporated by reference into this Agreement". It was argued by Acclaim that the arbitration clause in the contract did not satisfy the requirement under s 5(1) of the IAA in that parties had not expressly agreed to adopt "Part II of the IAA" or "the Model Law". It further argued that the reference to the IAA in r 32 was not intended to mean that the IAA applied as a governing law of the arbitration as the Rules (including r 32) were primarily concerned with the procedural aspects of the arbitration and not the "substantive legislation" impacting the arbitration.

4.5 Andrew Phang JA in the Court of Appeal rejected these arguments, preferring to adopt the *dicta* of V K Rajah JA in *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008]

2 SLR(R) 565. He noted (*Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2010] 1 SLR 25 at [39]) that the parties had by the arbitration clause adopted the Arbitration Rules of the Singapore International Arbitration Centre (3rd Ed, 1 July 2007) "for the time being in force" and had also "deemed [the Rules] to be incorporated by reference into this Agreement". This, in the court's view, means that the parties were adopting the Rules not merely as regards the procedural aspects but the "legal substance" contained in the Rules, which ought to include the reference, via r 32, to the application of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"). The court accordingly concluded that the IAA applied to the arbitration by consensual adoption notwithstanding that it would have otherwise fallen within the regime under the Arbitration Act (Cap 10, 2005 Rev Ed).

4.6 The view taken by the Court of Appeal accurately reflects what the Legislature had intended when crafting the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") and the Arbitration Act (Cap 10, 2002 Rev Ed) ("AA"), *viz*, to give maximum liberty to parties to either "opt-in" or "opt-out" of the IAA or the AA.

4.7 The decision in *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2010] 1 SLR 25 was shortly followed by yet another case involving the application of r 32 of the Arbitration Rules of the Singapore International Arbitration Centre (3rd Ed, 1 July 2007). In *Car & Cars Pte Ltd v Volkswagen AG* [2010] 1 SLR 625, Andrew Ang J had to consider the case involving the dealership arrangement between the manufacturers of Volkswagen cars and its Singapore importer and dealer of its Volkswagen cars. The case arose following Volkswagen's decision to import and market the cars directly by themselves and incorporated its own Singapore subsidiary, the second respondent in the suit. As part of the process of unwinding their relationship, the parties entered into four agreements, namely: (1) termination of importer agreement; (2) termination of dealership agreement; (3) sale of assets and parts agreement; and (4) an assignment of the lease of the appellant's business premises made between the appellant, the second respondent and a third party company. The dispute resolution clause in the sale of assets and parts agreement contained a reference to arbitration under the Arbitration Act (Cap 10, 2002 Rev Ed), whereas the clause in the termination of dealership agreement made specific reference to arbitration in accordance with "the Rules of the Singapore International Arbitration Centre for the time being in force".

4.8 Volkswagen were late in making the payments due under the termination of importer agreement and the termination of dealership agreement whereupon the appellant elected to treat the failure as a repudiatory breach of the entire arrangements and commenced court action.

4.9 It was the appellant's case that the four agreements ought to be read together as part of a "global settlement", *viz*, one indivisible agreement, whereas the respondents took the view that each of the agreements was a separate and distinct "standalone" contract, with different rights and obligations. The suit was commenced by the appellant on the basis that the respondents were in breach of all four agreements. Volkswagen applied to stay the action under the arbitration clause in the termination of dealership agreement, arguing, *inter alia*, that the stay ought to be mandatorily ordered. The assistant registrar granted the stay order, ruling that the matter fell within the regime under the International Arbitration Act (Cap 143A, 2002 Rev Ed) which mandated a stay. He added that even if the Arbitration Act (Cap 10, 2002 Rev Ed) be applicable, there were no grounds to justify refusal of such a stay.

4.10 Andrew Ang J affirmed the decision of the assistant registrar and dismissed the appeal. The learned judge took the view that the Rules of the Singapore International Arbitration Centre (3rd Ed, 1 July 2007) ("SIAC Rules 2007") were procedural in nature even though the rules could have substantive effect. Following the decision of the Court of Appeal in *Black & Veatch Singapore Pte Ltd v Jurong Engineering Ltd* [2004] 4 SLR(R) 19 at [19] in which the court had said that "a *prima facie* inference that where the rules contained mainly procedural provisions, then the rules in force at the time of commencement of arbitration would be the ones that applied to the arbitration", Ang J held that the SIAC Rules at the time of the commencement of arbitration applied to the proceedings (*Car & Cars Pte Ltd v Volkswagen AG* [2010] 1 SLR 625 at [30]). He also noted that although there was no provision like the one in the case of *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2010] 1 SLR 25 where the Rules were "deemed to be incorporated by reference" it would not in his view make a difference once the SIAC Rules 2007 were found to have been adopted and r 32 made applicable (at [42]).

4.11 The Court of Appeal decision in *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2010] 1 SLR 25 and the High Court decision in *Car & Cars Pte Ltd v Volkswagen AG* [2010] 1 SLR 625 acknowledged the important role arbitral institutions and their published rules and practices play in the conduct of international arbitration. Parties choosing an institution must realise that in most instances when naming an institution in the arbitration clause, they would, unless the clause expresses otherwise, be likely to be taken to have adopted its institutional rules of arbitration. Institutional rules should reflect international best practices while taking into account the institutional distinctives and regional or national practices. Frequent amendments to institutional rules may cause confusion and cast a shadow on their predictability. A longer period of usage of these rules

will engender better understanding and evolve better practices. A corpus of arbitral and judicial decisions over the interpretation of the rules also adds transparency and strengthens their acceptability to future users. One such example are the Rules of Arbitration of the International Chamber of Commerce which remain one of the most frequently used international institutional rules which were last amended in 1998.

Choice of institutional rules and administering institution – Hybrid arbitration clauses

4.12 The form and content of arbitration clauses vary widely due primarily to the varying levels of sophistication of the parties (and their advisers), the nature and complexity of the underlying commercial contract and the type of arbitration contemplated (*ad hoc* or institutional). Institutional arbitration, with published rules, fee scales and supervised processes, is gaining a strong following, in particular for larger and more complex transactions. The number of institutions offering international arbitration services has also grown over the years. It is, therefore, not uncommon to have arbitration clauses in contracts involving parties from different jurisdictions providing for an institution located in a country to administer cases in another jurisdiction, as these are often the product of negotiations between the parties. In most cases, these are workable. In others, complications may arise. In *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936, the Court of Appeal had to consider an appeal against Judith Prakash J's decision (reported in [2009] 1 SLR(R) 23) which concerned an arbitration agreement that read:

> [A]ny and all such disputes shall be finally resolved by arbitration before the Singapore International Arbitration Centre ('SIAC') in accordance with the Rules of Arbitration of the International Chamber of Commerce ('ICC') then in effect and the proceedings shall take place in Singapore and the official language shall be English …

4.13 The plaintiff in that case had entered into a licence agreement ("LA") with the defendant. A dispute arose regarding the calculation of annual royalties payable by the plaintiff to the defendant under the LA. Pursuant to the clause above, the defendant commenced arbitration before the International Chamber of Commerce ("ICC"), claiming unpaid royalties and damages against the plaintiff's breach of the LA. The plaintiff asserted that the ICC was the incorrect body for arbitration and requested the commencement of the arbitration before the Singapore International Arbitration Centre ("SIAC"). The defendant subsequently withdrew the ICC proceedings and commenced arbitration at the SIAC. The plaintiff then objected to the reference before the SIAC. The tribunal was constituted according to r 8 of the

Rules of the Singapore International Arbitration Centre (3rd Ed, 1 July 2007). The tribunal ruled as a preliminary question that cl 18(c) was a valid arbitration agreement and that the reference could be administered by the SIAC applying the Rules of Arbitration of the International Chamber of Commerce.

4.14 Dissatisfied with the tribunal's decision, the plaintiff unsuccessfully applied to set aside the decision on jurisdiction under Art 16 of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (First Schedule of the International Arbitration Act (Cap 143A, 2002 Rev Ed)) on the grounds that cl 18(c) was void for uncertainty and the tribunal was not validly constituted by the SIAC in accordance with the Rules of Arbitration of the International Chamber of Commerce. The court, nevertheless, granted leave to appeal. The High Court's decision attracted much discussion in various international forums and newsletters (ICC's stand is that only the ICC could administer arbitrations under its own rules; see Jason A Fry & James Morrison, "International Arbitration in South East Asia – Opportunities, Challenges and the ICC Experience" in *Asia-Pacific Arbitration Review 2009: A Global Arbitration Review Special Report* (February 2009) at p 3; see also this author's commentary in (2008) 9 SAL Ann Rev 70 at 75, para 3.16).

4.15 Before the Court of Appeal, the appellant raised the same arguments. The Court of Appeal unanimously dismissed the appeal and expressed entire agreement with Prakash J's decision. In his decision, Chief Justice Chan Sek Keong set out clearly the approach Singapore courts would take when interpreting arbitration agreements (*Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936 at [30]–[34]). The court reiterated its adherence to the principle that the fundamental principle is to give effect to the intention of the parties as expressed in the document. Where parties have evinced a clear intention to have their dispute resolved by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars (see *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue) at para 20.017), so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party. In this regard, Chan CJ adopted the "principle of effective interpretation" as described in *Fouchard, Gaillard & Goldman on International Commercial Arbitration* (Emmanuel Gaillard & John Savage eds) (Kluwer Law International, 1999). Under the principle of effective interpretation, an arbitration agreement should not be interpreted restrictively or strictly but should instead be given a commercially logical and sensible construction over another commercially illogical one to give effect to workable agreed arbitration arrangements.

4.16 The appellant, Insigma, had attempted in the appeal to pitch ICC against SIAC by suggesting that by allowing SIAC to administer the arbitration according to the Rules of Arbitration of the International Chamber of Commerce would result in the parties not getting an arbitration they had bargained for, *viz*, an arbitration with "ICC's hallmark of quality". Chan CJ rejected this suggestion, reasoning that the parties and all commercial lawyers who are familiar with international arbitration would be familiar with the ICC brand of arbitration, and also with SIAC arbitration, and that parties agreed to arbitrate their differences subject to the expressed terms of the arbitration agreement with knowledge of the quality of an ICC arbitration and also the quality of an SIAC arbitration on the advice of their legal advisers. There could not, therefore, be any justifiable suggestion that Insigma was getting an "inferior brand of arbitration" than they had agreed to (*Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936 at [36]).

4.17 The term "pathological clause" has often been bandied around whenever an arbitration clause with some flaws appears as a war cry to justify a party wishing to extricate itself from the agreement. The Court of Appeal in *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936 emphasised that not every defect in a clause negates the agreement it has constituted. The mere labelling of a clause as "pathological" does not change the legal character or the substance of the clause. The term should only be understood as merely descriptive and not prescriptive, thus the labelling of it by a party does not invalidate it. Chan CJ was probably generous in crediting the term "pathological" with a wider meaning than it deserves. The word "pathological" in its ordinary usage is often associated with something that is so "diseased", "defective" or "incurable", such as a pathological liar, pathological disorder, pathological fear, all of which suggest that it would have a paralyzing effect. To suggest that an arbitration clause is pathological must therefore mean that it is so diseased, so infected and defective that it would never work as the parties had intended it. That was not the case in relation to the clause in *Insigma Technology Co Ltd v Alstom Technology Ltd*. Without doubt, the Chief Justice had little difficulty in finding (at [40]) that the clause was certain and workable and could not be properly described as a "pathological clause".

4.18 The Court of Appeal decision in *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936 is another strong judicial endorsement of support for international arbitration. Understandably, arbitral institutions would prefer to promote their own services and the use of their own rules. However, there is realistically no mechanism to prevent anyone else from adopting or using their institutional rules without using the administrative services of that institution. It is far better that institutions work towards assisting parties caught in the mire

of hybrid arbitration clauses to give effect to their arbitration agreement rather than to leave them with no recourse but to resort to court litigation or to proceed to *ad hoc* arbitration.

Enforcement of the arbitration agreement

Stay of court proceedings – Pre-action discovery

4.19 As a party to the United Nations Convention for the Recognition and Enforcement of Arbitral Awards ("the Convention"), Singapore courts have a treaty obligation under Art II of the Convention to recognise and enforce arbitration agreements in which arbitration is contemplated in another Convention State. Article II(3) of the Convention requires courts of a Convention State to "refer the parties to arbitration". Such powers are usually exercised by a Singapore court by ordering a stay of pending court proceedings commenced in breach of a valid arbitration agreement.

4.20 Prior to the enactment of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), this obligation was given statutory force in the repealed Arbitration (Foreign Awards) Act (Cap 10A, 1985 Rev Ed) (repealed in 1994) ("FAA") where the court was only obliged to enforce "non-domestic arbitration agreements", *viz*, where one of the parties was not a national or resident in Singapore, or the place of arbitration contemplated in the agreement was outside Singapore (s 4 of the FAA). Following the repeal of the FAA, and the adoption of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration as having the "force of law in Singapore", Singapore courts are obliged under Art 8 of the Model Law to "refer the parties to arbitration" if the arbitration is an "international" arbitration (as defined in s 5(2) of the IAA). Section 6 of the IAA, however, provides that an application to the court to exercise its power thereunder should be made "at any time after appearance and before delivering any pleading or taking any other step in the proceedings".

4.21 In most instances, the issue is whether the application was made too late, *viz*, after filing the defence or having taken certain steps in the proceedings (see examples in *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460; *Samsung Corp v Chinese Chamber Realty Pte Ltd* [2004] 1 SLR(R) 382; *Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2005] 1 SLR(R) 168; and *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue) at para 20.035). A less usual situation arose in *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2010] 1 SLR 25, in the context of not a substantive action but a pre-action

discovery and pre-action interrogatories process commenced by Acclaim by way of an originating summons where no appearance was required to be entered. As such, when the application for stay of that application was raised, the court had to consider whether a pre-action discovery and pre-action interrogatories application comes within the ambit of s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") to enable it to order a stay of such application. The Court of Appeal made it abundantly clear that the mere fact that "no appearance" need be entered in an originating summons process does not mean that all proceedings commenced by that method would fall outside the ambit of s 6 of the IAA and thus cannot be stayed. Andrew Phang JA went on to examine the historical use of the term "appearance" and concluded that the concept of appearance should only occur when a substantive claim has been crystallised and the defendant is cognisant of a clear claim that has in fact been made (at [49]–[54]). He concluded that an application for pre-action discovery or pre-action interrogatories is by its very nature concerned with a situation where a substantive claim has yet to be crystallised or made, and as such, from the perspective of the rules of civil procedure, the power to order a stay against such an application would not arise under s 6 of the IAA (at [59]).

4.22 The Court of Appeal in *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2010] 1 SLR 25 appeared conscious that taking such a position may be viewed as being inconsistent with the Singapore Judiciary's robust pronouncements of support for the arbitration process. The court emphasised that it would adopt a strict approach and would scrutinise all such applications carefully to ensure that the arbitration process is not being circumvented or otherwise undermined. Where, for example, the arbitration clause is *prima facie* applicable to the subject matter and the parties involved are all parties to the arbitration agreement, the court would consider such an application as an abuse of process and refuse the application. Exceptions to this strict approach could include situations where a pre-action discovery was to ascertain whether it had a viable cause of action against the respondent (such as was done in *Woh Hup (Pte) Ltd v Lian Teck Construction Pte Ltd* [2005] SGCA 26) or an application was made with a view to possibly mounting a claim against persons who are not a party to the arbitration agreement, as was held to be the case in *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd*.

4.23 In answer to the concern expressed by counsel for Navigator Investment regarding the potential conflict between the court's approach to applications for pre-action discovery and the courts' support for arbitration, the Court of Appeal's response was that there would be no conflict as such an approach would in fact "aid" arbitration as it would, for example, "assist the applicant to ascertain if there is a

viable claim against the respondent" (*Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2010] 1 SLR 25 at [63]).

4.24 The court's decision to carve out from s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") all applications to the court for pre-action discovery, may appear justifiable from the perspective of rules of civil procedure and its interplay with s 6 of the IAA. What appears absent from the discussion is the overriding treaty-obligation imposed under Art II of the United Nations Convention for the Recognition and Enforcement of Arbitral Awards which obliges:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

4.25 Nevertheless, it is heartening to note that the Court of Appeal had painstakingly reiterated that it was very conscious that the liberty it has granted by this decision may lead to abuse and stressed that it would only be exercised in exceptional and special circumstances. It said (*Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2010] 1 SLR 25 at [67]):

> *Most importantly*, as we have already been at pains to explain (at [55] above), an application for pre-action discovery and/or pre-action interrogatories is *not* one that will be granted *automatically*. Indeed, if the applicant is guilty of an abuse of process, the application will presumably be nipped in the bud by the court concerned (if necessary, with, *inter alia*, an appropriate order for costs). *In particular*, we are of the view that if there is a total coincidence with regard to both the parties as well as the issues in dispute between them in so far as both the court and any ongoing or potential arbitration proceedings are concerned, the court concerned should be extremely reluctant to grant pre-action discovery or pre-action interrogatories, especially if it results in delay or stifles the proper conduct of arbitration proceedings. This would be *especially* the case if arbitration proceedings are already in progress. Where there are *separate court actions* involving third parties (as is the situation in the present case), the *precise facts and circumstances* will be of *crucial importance* to the court in arriving at its decision. The *key* general point to note is that the courts will constantly bear in mind the need to both *facilitate and promote arbitration* wherever possible between commercial parties (a point which we have already emphasised in some detail (at [61] above)). Any attempt to circumvent this ideal *via* court procedures will, *ex hypothesi*, be an *abuse of the process of the court* and will (as already mentioned) not be tolerated by the court concerned. At the same time, however, it is equally important to ensure that court procedures (which aim at achieving both procedural as well as substantive justice (see, *inter alia*, the Singapore High Court decision of *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR(R) 425 at [8]))

> are not undermined as a consequence. A *judicious balance* between court proceedings and arbitration proceedings (with the facilitation as well as promotion of the latter wherever possible) must always be the ultimate aim of the courts. [emphasis in original]

Stay application and the existence of "dispute"

4.26 The court hearing an application for stay under s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) is mandated to grant a stay of court proceedings commenced in breach of an arbitration agreement unless the agreement is "null and void, inoperative or incapable of being performed".

4.27 The question whether a dispute exists has often been canvassed as one of the starting blocks for a party to seek a stay in favour of arbitration. For many years, Singapore courts have treated this question as applicable to both domestic and international arbitration agreements: see *Sintal Enterprise Pte Ltd v Multiplex Constructions Pty Ltd* [2004] 4 SLR(R) 841; *MAE Engineering Ltd v Dragages Singapore Pte Ltd* [2002] 1 SLR(R) 853; *JDC Cor v Lightweight Concrete Pte Ltd* [1999] 1 SLR(R) 96; *Kwan Im Tong Chinese Temple v Fong Choon Hung Construction Pte Ltd* [1998] 1 SLR(R) 401; *Batshita International (Pte) Ltd v Lim Eng Hock Peter* [1996] 3 SLR(R) 563; *Aurum Building Services (Pte) Ltd v Greatearth Construction Pte Ltd* [1994] 2 SLR(R) 805; and *Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd* [1992] 3 SLR(R) 595. Singapore courts had hitherto laboured under the impression that the stay provisions under the Singapore legislation were similar to the English Arbitration Act 1950 (c 27). In fact, English courts were able to consider in each case whether there was a dispute before allowing a stay application because of the specific extending words in s 1(1) of the English Arbitration Act 1950: "or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred". These extending words have never been in the Singapore statute. In England, the Arbitration Act 1996 (c 23) has since removed these extending words and with that, English courts have since taken the view that whether or not there is a dispute is a matter to be considered by the arbitral tribunal and not the courts (see s 9 of the English Arbitration Act 1996; *Halki Shipping Corp v Sopex Oils Ltd* [1998] 1 Lloyd's Rep 465; Lord Saville, "The Arbitration Act 1996" [1997] LMCLQ 502.)

4.28 It was in Woo Bih Li J's decision in *Dalian Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd* [2005] 4 SLR(R) 646 that this long-held belief that a court can in all cases examine the validity of the defence, such as whether there is "a genuine dispute", "no real dispute", "a case to which there is no defence" or "there is no arguable defence", or whether it can be said that the claim "is indisputably due", as if it is an

application for summary judgment, was finally abandoned in relation to agreements under the International Arbitration Act (Cap 143A, 2002 Rev Ed). There was, however, still lingering uncertainty as to whether Woo J's approach is fully representative of the Singapore court's position (see, *eg*, *Merrill Lynch Pierce, Fenner & Smith Inc v Prem Ramchand Harjani* [2009] 4 SLR(R) 16 where Lee Seiu Kin J was led by counsel to accept the propositions set out in several pre-1996 English Arbitration Act decisions, leading him to examine evidence and consider the existence of disputes or disputability of the claims; whereas Choo Han Teck J in *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 1 SLR(R) 861 adopted Woo J's view in *Dalian Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd*, holding that a positive assertion by the defendant in an action commenced in breach of the arbitration agreement is sufficient to constitute a dispute, ruling that the court has no power to investigate the reality of or whether in fact a dispute exists if it finds that the arbitration agreement covers a matter which is before the court).

4.29 The position has finally been made clear and consistent by the Court of Appeal in *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732. That case arose from an agreement for the sale and purchase of shares ("SPA") between the appellants as vendors and the respondent, Antiq, as purchaser, of shares in an Indonesian coal mining company. The SPA provided for SIAC arbitration for "*all disputes, controversies and conflicts arising out of or in connection* with this Agreement or its performance". The parties then entered into four other supplemental agreements (each referred to as "SSPA"), each of which was "supplemental to and an integral part of the SPA and the terms and conditions of the SPA are hereby amended, modified, added to and/or varied accordingly to the extent provided herein". Under the fourth SPPA, Antiq was instructed and agreed to pay part of the balance of the purchase price of US$8.5m, namely, US$2m within 12 months and another US$3.7m within 24 months from completion date, to Aventi Holdings Limited ("Aventi"), a company incorporated in the British Virgin Islands, which was controlled by the original owner of the shares sold by the respondent to the appellants. At the requests of Aventi, Antiq made earlier payments in both instances in return for discounts for early settlement, without notifying the appellants. The final payment of the balance of the purchase price was paid to the first appellant, Mr Sumito, on 12 November 2007. Some six months later, the appellants' solicitors wrote asking for payment of US$3.7m to be made to them and not to Aventi. Antiq did not respond to the demand. On 8 May 2008, the appellants commenced proceedings seeking an injunction preventing Antiq from effecting payment of the US$3.7m to any party other than the appellants, as well as for damages. Antiq's lawyers responded with a denial of the claim and sought arbitration to which the appellants replied saying that the invocation of arbitration was not *bona fide* and

was intended to evade judgment. The application for stay under s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) was dismissed by the assistant registrar on the basis that the dispute in question was not referable to arbitration because it did not arise in connection with the SPA, the contract which contained the arbitration agreement. Choo Han Teck J reversed the assistant registrar's decision (*Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 1 SLR(R) 861), and granted a stay. The Court of Appeal affirmed Choo J's decision.

4.30 The issue before the court was essentially whether the dispute came within the arbitration clause in the SPA even though it arose out of the arrangements set out in the fourth SPPA. To this question, the court had no difficulty concluding that the arbitration clause applied to any disputes arising out of the payment arrangement under the fourth SPPA because the fourth SPPA was "supplemental to and an integral part of the SPA" and that cl 2.2 of the fourth SSPA, providing for the respondent to make payment to Aventi and *expressly authorising* Aventi to receive such payment, was an integral part of the same agreement between the appellants and the respondent which provided for all disputes, controversies and conflicts to be resolved by arbitration" (*Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [65]).

4.31 V K Rajah JA devoted much of his decision to what constituted a "dispute" and revisited the decision of Woo Bih Li J in *Dalian Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd* [2005] 4 SLR(R) 646 ("*Dalian*"), adopting and endorsing much the position (see also this author's comments on the *Dalian* decision in (2005) 6 SAL Ann Rev 49 at 49–52, paras 3.2–3.7) that once a party asserts that a claim is a dispute, that would warrant a stay of court proceedings without any inquiry into the genuineness or merits of the defence. The court added that "the question of whether there is a dispute is not entirely redundant even when it can be shown that there has been an admission" (*Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [46]). Rajah JA also emphasised (at [53]) that in doing so: "The merits of the case, … have absolutely no bearing on the granting of a stay unless the defendant actually admits (by unequivocal words or conduct) the claim." In the court's view, the only exception to the scrupulous enforcement of arbitration agreements by grant of stay under s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) is where "*there has been a clear and unequivocal admission, and it can thus be said that there exists no dispute mandatorily referable to arbitration*" [emphasis in original] (at [59]).

4.32 The Court of Appeal's decision in *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 is undoubtedly the most authoritative exposition and stand on the role of the courts when

considering applications for stay under the International Arbitration Act (Cap 143A, 2002 Rev Ed). The long-held erroneous belief that a court can in all cases examine the validity of the defence, such as whether there is "a genuine dispute", "no real dispute", "a case to which there is no defence" or "there is no arguable defence," or whether it can be said that the claim "is indisputably due" as if it is an application for summary judgment, should, following this decision, be finally abandoned.

Arbitration agreement and non-signatories

4.33 The parties to an arbitration agreement must necessarily be those persons who have agreed to be bound by the arbitration agreement in respect of matters falling within the scope of the reference. Strangers to the agreement are therefore not entitled or obliged to participate in the arbitration or be joined as parties to the arbitration. This principle is a natural offspring of the privity of contract rule that a stranger cannot enforce rights arising under a contract to which he is not a party. Such a question, being one that impeaches on the jurisdiction of the tribunal over the person sought to be included in the arbitration, can be determined by the tribunal itself when considering its own jurisdiction, or the court of the seat of arbitration as a ground for setting aside the award, or by the court of secondary jurisdiction when considering whether to allow the enforcement of the award (such as *Aloe Vera of America Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR(R) 174). It can also be considered by the court where an action has been commenced and before which a respondent seeks the benefit of an arbitration agreement to which it is not a signatory.

4.34 Such a situation arose in the case of *Jiang Haiying v Tan Lim Hui* [2009] 3 SLR(R) 13. In that case, the plaintiff, Jiang, had set up a shipping company in Singapore known as Dehai Marine Shipping (Singapore) Pte Ltd ("Dehai Singapore") with the assistance of the defendant, Tan Lim Hui. Through the introduction of Tan, the plaintiff got to know Sim Poh Ping ("SPP"), another defendant who ran Vita Holdings Pte Ltd ("Vita"). In August 2001, the plaintiff transferred 50,000 and 490,000 shares in Dehai Singapore to Tan and SPP as part of the preparation for the listing of Dehai Singapore which he said the defendants were to hold on trust for him. The defendants denied that they were holding the shares on trust. Sim subsequently sold the 490,000 shares to his sister Sim Poh Heok ("SPH"). The Dehai shares were thus held by the plaintiff (43.9%), Tan (5.6%) and SPH (50.5%). In June 2004, all the shares in Dehai Singapore were then transferred to Vita, as part of the listing process for Vita. In return, Vita shares were issued to another company, Kingley Agents Ltd ("Kingley"), whose shares were then held by the plaintiff (31.2%), Tan (21.6%) and SPH (47.2%). The plaintiff was dissatisfied with the percentage of holding in Kingley after the exchange. By a sale and purchase agreement ("SPA"),

the plaintiff sold his shares in Kingley to SPH and two other individuals for S$7m. The SPA contained an arbitration agreement referring all disputes to arbitration at the SIAC.

4.35 Following the completion of the sale of his Kingley shares, the plaintiff commenced three actions in court: (a) against Sim for conversion of the shares he said was to be held on trust for him; (b) against Tan for a declaration that Tan held the Vita shares on trust for him; and (c) against SPH for return of Vita warrants that he contended were held on trust for his benefit. The defendants applied for stay of the actions on the basis of the arbitration clause set out in the SPA between the plaintiff and SPH. SPH succeeded in staying the action before the assistant registrar. Stay of the actions commenced against Tan and Sim were refused. Their appeal was dismissed by Andrew Ang J.

4.36 Before Ang J, the defendants submitted several grounds in their attempt to show that the arbitration clause in the SPA ought to be extended to apply to their disputes with the plaintiff. The learned judge considered several of the possible exceptions to the non-signatory rule, including whether there was intertwining of the agreements, transactions and parties that would operate as an estoppel to justify extending the arbitration clause to the defendants' benefit; as well as whether the defendants were third-party beneficiaries under the SPA. Although Ang J discussed several US decisions cited by counsel (*Sunkist Soft Drinks, Inc v Sunkist Growers, Inc* 10 F 3d 753 (11th Cir, 1993) and *Choctaw Generation Limited Partnership v American Home Assurance Co* 271 F 3d 403 (2nd Cir, 2001)), he observed that in both the cases cited, the US courts found a close nexus and intertwining of relationship when the plaintiff relied on the underlying contract in framing its claims against the non-signatory giving rise to the operation of estoppel. Interestingly, without elaborating, his Honour expressed the view that these US decisions may not be representative of Singapore law.

4.37 The court quite rightly distinguished these cases on the facts in that the claims of Jiang against the defendants, Tan and Sim, were clearly separate and independent of the SPA and there was no relationship, much less a close or "intertwined" relationship, to justify the operation of an estoppel against Jiang.

4.38 On the defendants' arguments that they were third-party beneficiaries of the SPA and thus parties to the arbitration agreement, the court quite easily found that they were total strangers and were never contemplated as beneficiaries under the SPA. In the course of considering the concept of third-party beneficiary as a possible exception to the privity rule that only signatories to an arbitration agreement could be considered a party, his Honour referred to two US decisions cited by counsel (*Wesley Locke v Ozark City Board of Education*

910 So 2d 1247; 2005 Ala Lexis 55; and *Franklin Fire Ins Co v Howard*, 230 Ala 666 at 667–668; 162 So 683 at 684 (1935)) distinguishing each of them on the facts and holding that the defendants, Tan and Sim, were never contemplated as possible beneficiaries under the SPA. In any event, the SPA expressly excluded the application of the Contracts (Right of Third Parties) Act (Cap 53B, 2002 Rev Ed) and thus Tan and Sim could not avail themselves of its terms.

4.39 Although Ang J took the view (*Jiang Haiying v Tan Lim Hui* [2009] 3 SLR(R) 13 at [45]) that the third-party beneficiary is not a recognised exception in Singapore outside the Contracts (Right of Third Parties) Act (Cap 53B, 2002 Rev Ed), it is clear that the underlying principle of the Contracts (Right of Third Parties) Act is a legislative step intended to create an exception to a common law rule and to plug a *lacuna* in many commercial transactions where the intended third parties, although not signatories (and who may even be non-existent at the time of the contract), may be given the right to enforce the contract if rights have been created for their benefit. (This author accepts responsibility for causing some confusion to the learned judge with the wrong numbering made in the footnotes 3 and 4 to para 20.020 of *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue) where the references intended for "estoppel" in footnote 3 should have been those set out in footnote 4 and those for "third-party beneficiary" in footnote 4 should have been those in footnote 3.)

4.40 Singapore courts, as well as other common law courts, have thus far been treating contracts almost always as a "bargain" (a transaction with consideration passing from one to the other). The enactment of the Contracts (Right of Third Parties) Act (Cap 53B, 2002 Rev Ed), the limitations notwithstanding, presents to the courts the opportunity to revisit and see if contracts ought always to be viewed that way and consider questions such as why promisors ought not to be held to their promises just because the promisee is not a party to the original contract.

4.41 The question of estoppel as a basis for establishing jurisdiction was also raised in the decision of Prakash J in *Yokogawa Engineering Asia Pte Ltd v Transtel Engineering Pte Ltd* [2009] 2 SLR(R) 532. There, the plaintiff, Yokogawa, which was engaged to provide data acquisition, telecommunications and metering works in Thailand and Malaysia for the onshore pipeline system of the Trans Thailand Malaysia ("TTM") Gas Project, subcontracted part of the works to the defendants, Transtel, in January 2004. The subcontract provided that: "All disputes and differences which arise between the CONTRACTOR and the SUB-CONTRACTOR in connection with or arising out of the SUB-CONTRACT or the carrying out of the SUB-CONTRACT WORKS which cannot be settled amicably between the parties shall be

settled by arbitration, all in accordance with the provisions of Clause 20 of the General Conditions of SUB-CONTRACT, which shall be deemed to have been set out in full in this Agreement." The General Conditions of the subcontract were not attached to the subcontract but during the tender process the plaintiff had given to the defendant a copy of the General Conditions (which, the plaintiff later contended, was an outdated and invalid version) ("outdated Conditions") that had contained a dispute resolution clause in cl 19, which provided for arbitration in Singapore in accordance with the Rules of Arbitration of the International Chamber of Commerce. Disputes subsequently arose between the parties, and the defendant filed a notice of arbitration with the ICC. The plaintiff unsuccessfully challenged the ICC's jurisdiction on the ground that the arbitration agreement in cl 19 of the outdated Conditions was incorrect and that the arbitration agreement was the one set out in cl 20 of its new version of the General Conditions ("new Conditions") that provided for arbitration in Thailand "in accordance with the rules of the Arbitration Institute of the Ministry of Justice, Thailand". The plaintiff commenced action in the Singapore High Court seeking a stay of the ICC arbitration and for an order that all disputes which arose between the plaintiff and the defendant be referred to arbitration in Thailand in accordance with the rules of the Arbitration Institute of Thailand. Prakash J dismissed the application.

4.42 The court found that the plaintiff had led the defendant to believe that the correct dispute resolution clause was that in the outdated Conditions and had during the four years prior to the commencement of the arbitration, failed to provide the defendant with an updated version of the Conditions or take any step to correct the defendant's erroneous view. The plaintiff had, even subsequent to disputes having arisen, referred the defendant to follow the procedure "that any dispute shall be referred to arbitration in Singapore under the Rules of Arbitration of the International Chamber of Commerce" (*Yokogawa Engineering Asia Pte Ltd v Transtel Engineering Pte Ltd* [2009] 2 SLR(R) 532 at [15]). The court, therefore, held that "the plaintiff's conduct in so misleading the defendant constituted an operative representation capable of supporting an estoppel by representation" (at [9] and [13]). This decision represents one of the clearest cases in which arbitral jurisdiction could be established based on the doctrine of estoppel arising out of conduct. An interesting aspect of the case is that it involves the contest of two competing arbitration clauses calling for arbitration before two separate institutions (and thus different rules of procedure) and two different seats (and thus different *lex arbitri*). The contest may still not be over, however, for if the plaintiff fails on the merits in the arbitration, it could still launch a challenge as to the enforceability of the award in the courts of Thailand.

Costs of successful application for stay

4.43 Parties to an arbitration agreement are bound by its terms. It follows that, like any contract, a breach of such an agreement should entail consequences to ensure compliance. However, not being a commercial contract, it is naturally difficult to quantify or prove the damages that flow from such a breach. A party who has commenced court proceedings in breach of the arbitration agreement may or may not be penalised in costs as cost orders are matters of discretion for the court. In clear cases, most courts would order costs on the standard basis to be borne by the party in breach, leaving the innocent party having to bear part of the costs incurred in the improperly commenced court proceedings. If an anti-suit injunction is filed and granted improperly, an innocent party who is located outside the court's jurisdiction may have to submit to jurisdiction (which it challenges) for the purpose of claiming damages against the party in breach.

4.44 It was Colman J in the English decision of *A v B (Costs)* [2007] 1 Lloyd's Rep 358 who had observed that such a situation is "fundamentally unjust" and suggested that in such cases the party in breach should bear the costs on an indemnity basis. Choo Han Teck J in the High Court decision of *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 1 SLR(R) 861 was quick to pick up this same observation and expressed concurrence with this view. Although Choo J did not make such an order in that case as the point was not fully argued before him, he did, however, indicate that he would in future order costs against the party in breach on an indemnity basis. Choo J's attitude on costs was fully adopted when the matter went on appeal to the Court of Appeal in *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 where V K Rajah JA confirmed such an approach as proper and just and did order costs against the plaintiffs on an indemnity basis.

Recourse against award – Setting aside

4.45 A party who has lost a case on the merits in an international arbitration may apply to set it aside under very limited procedural grounds provided in Art 34 of the First Schedule to the International Arbitration Act (Cap 143A, 2002 Rev Ed) and the additional grounds provided in s 24, which include the broad concept of "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". Although stated to be an "addition" to the grounds in Art 34 of the First Schedule, this is probably no more than a restatement of the right of a party to be heard covered under Art 34(2)(*a*)(ii) – "otherwise unable to present its case". Attempts to utilise this provision (and its equivalent provision in the Arbitration Act (Cap 10, 2002 Rev Ed) – *viz*, s 48(1)(vii)) to advance

a challenge against an award have notably failed in many instances due mainly to the robust stand that Singapore courts have taken in support of arbitration (see, *eg*, *Soh Beng Tee & Co Pte Ltd v Fairmont Development Pte Ltd* [2007] 3 SLR(R) 86; *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597; and *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR(R) 871).

"[U]nable to present its case"

4.46 Another attempt to use this ground to set aside an award was made in the case of *Sobati General Trading LLC v PT Multistrada Arahsarana* [2010] 1 SLR 1065 which involved an exclusive distributorship agreement for the sale and distribution of certain brands of tyres in Iran. Sobati, the claimant in the arbitration, which was a company from the United Arab Emirates, was the distributor and the respondent was the Indonesian company Multistrada, which was the manufacturer of the tyres. The agreement was stated to be "valid up to 1 (one) year effective from 7 March, 2003 until 7 March 2004 and renewable annually automatically if both [Multistrada] and [Sobati] have fulfilled [the] terms and conditions". Sobati had commenced arbitration alleging that the distributorship agreement had been renewed annually, the last being on 7 March 2006, and that in breach of the distributorship agreement, Multistrada had terminated it on 12 August 2006 by appointing another distributor. Sobati sought damages and specific performance in the arbitration. Multistrada denied the claim, alleging, *inter alia*, that there was a valid distributorship agreement and that the arrangement with Sobati had been on a case-by-case basis. The tribunal dismissed both that claim and the counterclaims, holding that the distributorship agreement was validly made in March 2003, and was extended up to 31 March 2005. Thus, when the new distributor was appointed in August 2006, the distributorship agreement had already ended. The respondent was thus not in breach. Sobati applied to set aside the award on the basis that the tribunal in coming to its decision that the distributorship agreement terminated on 31 March 2005 was a conclusion that was "completely unexpected, illogical in the circumstances and/or contrary to available evidence" (at [19]), and that in doing so, the tribunal had breached natural justice in not giving Sobati the right to be heard on the issue.

4.47 Tay Yong Kwang J dismissed the application. Following the clear principles enunciated in the Court of Appeal decision in *Soh Beng Tee & Co Pte Ltd v Fairmont Development Pte Ltd* [2007] 3 SLR(R) 86 (see also the author's commentary in (2007) 8 SAL Ann Rev 37 at 53–55, paras 3.57–3.63), the learned judge considered whether the question of 31 March 2005 being the termination date of the distributorship agreement was a "live" issue that would require the parties attention and consideration. He had no difficulty in finding that it was so because it

was Sobati who had tendered a fax transmission of October 2004 in its reply in an attempt to show that the distributorship agreement existed. The October 2004 fax was the evidence that led the tribunal to make the finding that the distributorship agreement had been expressly terminated on 31 March 2005. The court held that Sobati's failure to avail itself fully of the opportunity to rebut the argument could not be sustained. It could not be allowed to rely on its own neglect and claim that it had been denied such an opportunity.

"[A]ward was induced or affected by fraud or corruption"

4.48 Another additional ground provided in s 24 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) for the setting-aside of awards is that the "making of the award was induced or affected by fraud or corruption". There can be no doubt that "fraud unravels all" and that there can be no better ground to set aside an award than if the award was obtained through the corrupt or fraudulent act of the tribunal. What actions or inactions should lead a court to rule that an award has been "obtained by fraud" is less settled. Uncertainty also arises over whether the fraud referred to ought to mean the fraud of anyone connected with the arbitral process, such as a witness, or whether it should be limited to a party or acts or omissions attributable to or to which a party is privy (see *Elektrim SA v Vivendi Universal SA* [2007] 1 Lloyd's Rep 693).

4.49 In *Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd* [2010] 1 SLR 573, Prakash J had to deal with an application under s 24 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) under this head and under Art 34(2)(*b*)(ii) of the First Schedule that the award was procured in a manner contrary to the public policy of Singapore. The applicant in that case had lost in arbitration and an award had been made by Mr Vangat Ramayah against it for some US$1.2m, being damages for breach of a contract for the purchase of 40,000mt of iron ore fines from the defendant in South India. The tribunal in that case had quantified the damages based on the defendant's evidence that it had sold the goods which the applicant had failed to take up, to alternative buyers (Terapanth Food and Susmi Impex) at a price substantially lower than the contracted price, incurring losses of US$1.2m. In support of their application to set aside the award, the applicant tendered a declaration from one of the supposed buyers, Terapanth Food, that it did not fully complete the purchase from the defendant as the defendant did not have enough goods to complete the sale. The applicant suggested that this indicated that the defendant probably did not have the 40,000mt iron ore to complete the sale to the applicant. The defendant responded with an affidavit by Susmi saying that its contract with the defendant was fully completed and that it was asked by the applicant to affirm an affidavit

stating otherwise, which it declined. The defendant also responded to the allegation relating to the contract with Terapanth Food, clarifying that although there was a reduction in the delivered quantity, the failure was because Terapanth Food had asked for a reduction of the quantity contracted. The dispute with Terapanth Food was subsequently settled with a refund of rupees 7.5m to Terapanth Food.

4.50 Prakash J considered various English decisions (*Elektrim SA v Vivendi Universal SA* [2007] 1 Lloyd's Rep 693; *Thyssen Canada Ltd v Marianan Maritime SA* [2005] 1 Lloyd's Rep 640 at 644; and *Profilati Italia SrL v PaineWebber Inc* [2001] 1 Lloyd's Rep 715) on the term "obtained by fraud" as used in s 68(2)(g) of the English Arbitration Act, as well as the decision of Chan Seng Onn J in *Dongwoo Mann+Hummel v Mann+Hummel Gmbh* [2008] 3 SLR(R) 871, and distilled the following principles to be followed when an allegation of fraud is being relied upon to set aside an award (*Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd* [2010] 1 SLR 573 at [30]):

> (a) if the fraud alleged is the [*sic*] shape of perjury, the applicant must prove that its new evidence could not have been discovered or produced, despite reasonable diligence, during the arbitration proceedings;
>
> (b) the newly discovered evidence must be decisive in that it would have prompted the arbitrator to have ruled in favour of the applicant instead of the other party;
>
> (c) if the fraud was in the shape of non-disclosure of a material document, the document must be so material that earlier discovery would have prompted the arbitrator to rule in favour of the applicant; and
>
> (d) negligence or error in judgment in failing to discover a crucial document would not be sufficient to justify a setting aside of the award and for that purpose, the non-disclosure must have been deliberate and aimed at deceiving the arbitrator.

4.51 The court found that the facts as adduced before it showed that the defendant always had sufficient goods to supply Terapanth Food and that it was Terapanth Food who had breached the contract and did not take up the goods in full which it had contracted with the defendant to do. The refund of less than half the moneys paid was a settlement reached between the defendant and Terapanth Food. The court also found that these facts were not disclosed to the tribunal. The court, however, held that none of these would have affected the tribunal in finding for the defendant in the arbitration that the applicant was in breach of the contract and that the defendant would have been able to supply the 40,000mt of iron ore as contracted. As regards the quantum, the learned judge noted that as the defendant had sold only one-third of the goods to Terapanth Food in mitigation of loss, the remainder could

probably have been sold for a higher price and therefore the loss to the defendant would be lesser. The court, however, held that in assessing damages, the tribunal would have regard to "the value of the goods to the seller as at the date of the breach and in determining that value at the date of the breach, it can have regard to re-sales which take place within a reasonable period thereafter" (*Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd* [2010] 1 SLR 573 at [80]) and further loss or gain sustained by the innocent party subsequently would be irrelevant to the calculation of the damages. In awarding the damages, the tribunal was entitled to take into account the available evidence, including the resales made by the defendant to Terapanth and Susmi in June 2005 to ascertain the loss naturally and directly flowing from the applicant's breach. In the court's view, the defendant did not mislead the tribunal, and the facts and evidence that were not disclosed could not have impacted the outcome in this case, both on the finding of breach and the quantum of damages. The application was therefore dismissed.

4.52 Prakash J had set a high but realistic bar for the use of this ground to set aside an award. The underlying rationale for such an approach is that fraud must not only be alleged but proved. To do otherwise will make every award fair game to a party who is dissatisfied with a tribunal's decision to simply muddy the waters again with some tenuous contradictory evidence to create an alternative crime scene to attract re-investigation of the merits.

Appeal against award under the Arbitration Act – Time for filing

4.53 An arbitral award made in a domestic arbitration under the Arbitration Act (Cap 10, 2002 Rev Ed) may be appealed against on a question of law, upon notice to the other parties and to the arbitral tribunal. An appeal process from an arbitral tribunal to an appellate arbitral tribunal is statutorily recognised, but to date, there is no known institution in Singapore which employs such a mechanism. An appeal to the court may only be made after the applicant has exhausted all available arbitral process of appeal or review and any available recourse for a correction or interpretation or an additional award. The application for leave must be made within 28 days after the award has been made, or if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process. This time requirement for making the appeal as specified in s 50(3) of the Arbitration Act is expressly linked to the date of the award and the date of the decision of arbitral process of appeal or review. A question arose as to whether it is also linked to the date a correction is made to the award in *Tay Eng Chuan v United Overseas Insurance Ltd* [2009] 4 SLR(R) 1043. The applicant in that case, Tay Eng Chuan, was involved in disputes with the defendant insurer arising out

of his claims under six insurance policies issued by the defendant which were referred to arbitration in November 2004 under the SIAC Domestic Arbitration Rules (2nd Ed, 1 September 2002; since repealed). The tribunal rendered an award in his favour on 18 December 2008, ordering payment by the insurer of S$754,500 together with interest and costs. The SIAC notified the parties of the award on 23 December 2008. The parties were able to collect the award only on 15 January 2009 when the costs were fully paid. The applicant made demand for payment of the award on 16 January 2009 and the next day filed an originating summons for enforcement of the award against the insurer. An order for enforcement was made on 19 January 2009 but was subsequently set aside. On 23 January 2009, the insurers made payment to the applicant of $754,500, and on 29 January 2009, a further sum of $126,827.40 as interest. On 29 January 2009, the applicant served a notice for interpretation, correction and additional award pursuant to s 43 of the Arbitration Act seeking to correct six "mistakes" in the award. The insurer made payment of $57,968.34 as costs of the arbitration on 2 February 2009. The next day, the applicant filed the application for a declaration that the time limit for appeal prescribed under s 50(3) of the Arbitration Act should begin to run from the time the result of his request for correction under the notice be notified to him. On 10 February 2009, the applicant was informed that the tribunal had made corrections on two of the six requests. The remaining four requests which were directly related to the substantive findings of the tribunal were not changed.

4.54 The applicant relied on the decisions in *Al Hadha Trading Co v Tradigrain SA* [2002] 2 Lloyd's Rep 512 at 525 and *Blackdale Ltd v Mclean Homes South East Ltd* (TCC 2 November 2001, unreported) to support his contention that the time for an appeal against an award starts to run from the time the corrected award was made and not from the original date of the award. He argued that the arbitrator did not in his award make any finding as to whether the claims fell within or outside the scope of cover and that these omissions constituted ambiguities that the tribunal should clarify.

4.55 Prakash J, however, rightly pointed out that the corrections that were made in those cases were not corrections of accidental slips but of substantive clarifications and removal of ambiguities which could affect the parties' position with regard to their decision whether to appeal. The court also noted that the tribunal's views on the policies' coverage were clear and unambiguous and there could not be any confusion. The tribunal had corrected only two clerical errors and had declined those that could affect the substantive findings. In this regard, Prakash J reiterated that a tribunal's power to correct its award is limited to correction of "obvious errors in calculation or phraseology or reference" and it is not permissible for a tribunal to go beyond that to "correct

mistakes in his findings whether those mistakes are mistakes of fact or mistakes of law" (*Tay Eng Chuan v United Overseas Insurance Ltd* [2009] 4 SLR(R) 1043 at [16]).

4.56 A court's power to grant an extension of time for leave to appeal against an award made under the Arbitration Act (Cap 10, 2002 Rev Ed) was endorsed by the Court of Appeal in *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd* [2000] 1 SLR(R) 510 at [33] with the proviso that to promote greater finality, such extensions must not be "freely granted". Prakash J in *Tay Eng Chuan v United Overseas Insurance Ltd* [2009] 4 SLR(R) 1043 at [26] interpreted this to mean that there must necessarily be compelling reasons before a court would do so.

4.57 Although the applicant had sought only a declaration as to when time should start to run, the court was aware that what the applicant was in fact seeking was an extension of time to file the application for leave to appeal. Adopting the principles earlier settled (see *Pearson Judith Rosemary v Chen Chien Wen Edwin* [1991] 2 SLR(R) 260), Prakash J found the applicant's delay of 14 days (outside the 28 days limit imposed by s 50 of the Arbitration Act (Cap 10, 2002 Rev Ed)) to be substantial. The learned judge also rejected the reason given by the applicant that he was then too busy being engaged in another case in court where the defendant was another insurance company. Her Honour, however, expressed support for a case to say that the tribunal had misconstrued the terms of two policies in contention, adding that the decisions "were open to serious doubt" (*Tay Eng Chuan v United Overseas Insurance Ltd* [2009] 4 SLR(R) 1043 at [48]). Notwithstanding this, however, the court ruled that the applicant could not show that these errors had "substantially affected the rights" of the applicant because even if the tribunal had ruled in the applicant's favour, it would have resulted only in another $5,000 and $12,000 under the two policies for which the tribunal had earlier awarded some $130,000 and $110,00 respectively and the aggregate award was for $754,500 plus interest and costs. Allowing recourse for such insubstantial amounts would not further the aims of protecting party autonomy and finality in arbitration (at [50]–[51]).

4.58 A fact in this case that remained unexplained was the time taken by the tribunal in making its award. Under r 26.1 of the SIAC Arbitration Domestic Rules (2nd Ed, 1 September 2002; since repealed) <http://www.siac.org.sg/cms/pdf/RulesDomestic.pdf> (accessed 10 May 2010), the tribunal is required to do so within 45 days after close of hearing, unless the Registrar on the application of the tribunal allows otherwise. The tribunal had taken 19 months to render its award. An arbitrator who makes an award outside the time limited for him to do so would be acting outside the mandate given and would have violated the procedure agreed to by the parties, both of which could form the

basis to justify setting aside the award under s 48(1)(*a*)(v) of the Arbitration Act (Cap 10, 2002 Rev Ed). Quite understandably, the applicant in *Tay Eng Chuan v United Overseas Insurance Ltd* [2009] 4 SLR(R) 1043 would not want an award in its favour to be set aside. What he wanted was to seek a variation of the award by enhancing the amount awarded. The insurer too did not seek to set aside the award on the basis of the tribunal's apparent expired mandate.