3. ARBITRATION

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

Commencement of arbitration

Domestic arbitration and contractual time limitation – Scott v Avery *clause*

3.1 Parties are free to agree to any terms under a contract, including stipulating the time within which action or arbitration ought to be commenced. It is also not uncommon in insurance contracts as part of the policy conditions for insurers to stipulate that the obtaining of an award in arbitration be a condition precedent to commencing or maintaining an action against the insurer. Such clauses, normally known as *Scott v Avery* clause (following the leading marine insurance case of *Alexander Scott v George Avery* (1856) 5 HL Cas 811; 10 ER 1121), have been consistently upheld as valid and could operate as a defence to a suit by the insured who had failed to comply with the condition precedent: see *Lim Kitt Ping Lynnette v People's Insurance Co Ltd* [1997] 3 SLR 1018. Much, however, depends on the specificity of the covenant which the parties had entered into.

3.2 The plaintiff in *Tay Eng Chuan v Ace Insurance Ltd* [2008] 4 SLR 95 had suffered injury to his left eye as a result of an accident that occurred while carrying a wire mesh in his house on 12 November 2002. He subsequently submitted claims on his policies with several insurance companies, including the defendant. The plaintiff's claim against the defendant was for the amount of $300,000 for the loss of sight in his left eye. The defendant admitted liability on 29 July 2003 and paid the plaintiff $3,300 for the 11 days of hospitalisation. The insurance policy issued by the defendant also provided benefits for "total loss of lens in one eye" where 50% of the sum insured was payable. Similarly, for "total loss of sight in one eye", 50% of the sum insured was payable. On 11 December 2003, the defendant paid the plaintiff $300,000 (being 50% of the sum insured and payable for the loss of lens in one eye). The plaintiff acknowledged receipt of a cheque for $300,000 from the

defendant but wrote on the acknowledgment that he did not accept that the payment was in full and final settlement of the defendant's liability under the insurance policy.

3.3 The policy contained the following provisions on arbitration and right of action:

> 7. Arbitration
>
> If any dispute or difference arises between the Company and any of the parties hereto concerning any matter arising out of this Policy, such dispute or difference shall be referred to arbitration in accordance with the provisions of the Arbitration Act, Chapter 10 of Singapore and any statutory modification or re-enactment thereof then in force within three (3) months from the day such parties are unable to settle the differences amongst themselves.
>
> 8. Governing Law
>
> [The] Policy shall be governed by and interpreted in accordance with Singapore Law. The Singapore courts shall have exclusive jurisdiction.
>
> …
>
> 10. Legal Action
>
> Subject to Clause 7 of this Part [*ie*, the Arbitration Clause], no action shall be brought to recover on [the] Policy prior to the expiration of sixty (60) days after written proof of claim has been filed in accordance with the provisions of [the] Policy.

3.4 Part 9, cl 3 ("condition precedent") stated:

> 3 Terms and Conditions
>
> The due observance and [fulfilment] of the terms, provisions and conditions of this Policy insofar as they relate to anything to be done or complied with by the Insured Person, the Policyholder and/or the Policy Payer shall be a condition precedent to the liability of the Company to make any payment under this Policy.

3.5 The defendant having rejected the claim on 21 May 2004, the plaintiff should have commenced arbitration within three months thereafter. While actively pursuing his claim against the other two insurers in arbitration, the plaintiff took no steps on his claim against the defendant until November 2006 when he applied to the High Court for an order that the time for commencing arbitration proceedings be extended for three months after the conclusion of a pending arbitration against another insurer, UOI. The application was dismissed by V K Rajah J (as he then was). The plaintiff then commenced this action to claim against the defendant for the loss of sight under the policy.

3.6 The High Court dismissed the action, holding that cl 7 obliged the plaintiff to commence the arbitration within three months of the dispute having arisen. Compliance with the arbitration clause was a condition precedent to establishing liability on the part of the defendant under Pt 9, cl 3 of the insurance policy. As the right to arbitrate was extinguished by the contractual time limitation under cl 7, the plaintiff lost the basis for making a claim for payment under the policy. No alternative route by way of legal action in court was available to him.

3.7 On appeal to the Court of Appeal, Chief Justice Chan Sek Keong took the view that the failure by the plaintiff to commence arbitration within the time stipulated in Pt 9, cl 3 of the policy merely meant that he had lost his right to arbitrate and did not of itself deprive him of the right to pursue the claim by court action. The Court of Appeal referred to *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue) at para 20.049 which states that:

> Contractual time bars may apply to bar either the claim or the arbitration. Where a contractual time limit bars only the right to proceed to arbitration, the parties may nevertheless proceed to litigate the dispute in the forum where the jurisdiction could be established over the parties.

3.8 Examining Pt 9, cl 3 (condition precedent), Chan Sek Keong CJ found nothing in its text to suggest that the plaintiff's cause of action would be lost merely by failing to commence arbitration within the contractual time limit of three months. The condition precedent clause merely stated that a failure to comply with the terms and conditions was "a condition precedent to the liability of the Company to make any payment under this Policy" and, in the Court of Appeal's view, the insurer's liability to make payment under the Policy could not be equated with the plaintiff's right to sue on the policy.

3.9 Taking a *contra proferentem* approach, the Court of Appeal suggested that if the insurer had intended that these clauses should operate collectively as a *Scott v Avery* clause (*Alexander Scott v George Avery* (1856) 5 HL Cas 811; 10 ER 1121) depriving a party of the right to sue unless it had first commenced arbitration, they ought to have done so in clear and certain terms, and not in disparate provisions in the policy. In any event, the Chief Justice observed that cl 10 (legal action) did not state that the plaintiff's right to commence an action in court could only arise upon compliance with the arbitration clause.

3.10 This decision distinguishes the different impact of a time limitation that bars only the right to go to arbitration and a time bar that operates to extinguish a claim in its entirety.

3.11 The strict approach adopted by the Court of Appeal when construing contractual provisions to deprive a party of its legal recourse is proper and assuring. This approach is also consistent with and easily justified by a strict application of the doctrine of separability in arbitration. If the arbitration clause – which is essentially a separate agreement within the policy – is to be referred to for some corollary effect, it ought to have been specifically referred to. In this regard, Pt 3 cl 9 (condition precedent) had referred only generally to the "due observance and [fulfilment] of the terms, provisions and conditions of this Policy". If the intention was to make the arbitration clause a condition precedent, the non-compliance of which was to extinguish the insured's rights under the policy, specific mention of the arbitration clause ought to have been made in Pt 3 cl 9 of the policy.

Choice of institutional rules and administering institution

3.12 Due to the historical development of arbitration over the last 70–80 years, common law jurisdictions tended toward the use of *ad hoc* arbitrations whereas continental or civil law countries adopted a more institutional approach to arbitration. In Singapore, with the founding of the SIAC (Singapore International Arbitration Centre) in 1991, however, institutional rules and processes have gained some following with the SIAC and ICC (International Chamber of Commerce) taking the lead. Rules of institutions when adopted in the arbitration would provide for a prescribed framework and procedure for the conduct of the arbitration, subject only to such modifications as may be agreed or the mandatory arbitration laws of the seat of arbitration. While the degree of institutional involvement may vary, such rules would normally provide for the institutions some supervisory and administrative roles, such as the appointment, confirmation and challenge of arbitrators, scrutiny of awards and financial management of the cases. In negotiating contracts, parties often reach compromises and craft terms which would be acceptable to all. It is, therefore, not uncommon to have clauses referring to an institution located in a country to administer cases in another jurisdiction. In most cases they are workable. More recently with the increasing international presence of the SIAC, arbitration clauses referring to both the SIAC and some other institutions have surfaced. In *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 1 SLR 23; Judith Prakash J was confronted with a clause (cl 18(*c*)) 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.

3.13 The plaintiff in that case had entered into a license 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 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 SIAC. The defendant subsequently withdrew the ICC proceedings and commenced arbitration at SIAC. The plaintiff then objected to the reference before the SIAC. The tribunal was constituted according to r 8 of the SIAC Rules. 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 ICC Rules. Dissatisfied with the tribunal's decision, the plaintiff applied to set aside the decision on jurisdiction under Art 16 of United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (Sched 1 of the International Arbitration Act (Cap 143A, 2005 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 ICC Rules.

3.14 Judith Prakash J put the crux of the issue thus (*Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 1 SLR 23 at [26]): "whether an arbitration agreement may validly provide for one institution to administer an *ad hoc* arbitration in accordance with the procedural rules of another". The learned judge's use of the term "*ad hoc* arbitration" may confuse some as the term is widely understood to mean an arbitration that is not administered by an institution. Read in its context of this case, the court intended it to mean that it was not an arbitration under the rules of the administering institution: see, *eg*, [25] ("By specifying a different set of procedural rules that was not the SIAC's in-house rules, the parties showed their desire for an *ad hoc* arbitration"); and [31] ("An *ad hoc* arbitration is one which is conducted pursuant to rules agreed by the parties themselves or laid down by the arbitral tribunal"). Prakash J dismissed the application, ruling that the parties did not bargain for an ICC-administered arbitration but a SIAC-administered one applying the ICC Rules. She took the view that there is in principle no objection to an arbitration being administered by the SIAC in accordance with ICC Rules. In doing so, the court took the literal approach in interpreting the clause, and attempted to give the fullest effect to the intention of the parties – that it should be an arbitration to be administered by the SIAC under the ICC Rules.

3.15 There is no doubt that such a hybrid arbitration clause is ill-advised and is fraught with practical difficulties but if, in spite of such difficulties, the parties exercise their autonomy and choose to do so,

there is no rule of law that should prevent them from so doing. In the court's words, "inefficiency alone cannot render a clause invalid so long as the parties had agreed and intended for the arbitration to be conducted in this manner": *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 1 SLR 23 at [35]. In upholding the clause instead of striking it down, the court had given primacy to the parties' intentions.

3.16 Although situations such as those in *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 1 SLR 23 are not widespread, they are not in fact uncommon. Drafters of arbitration clauses are, unfortunately, often not arbitration lawyers. It is to be expected that such problems will continue to give rise to interesting interplay of institutional rules and the specific institutional roles assigned. While institutions may prefer to insist that it is the only body qualified to administer its own rules of arbitration [ICC's view has always been 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" *Asia-Pacific Arbitration Review 2009: A Global Arbitration Review Special Report* (February 2009) at 3, there is really no mechanism to enforce or even validate such a view. Perhaps, a protocol amongst the leading international arbitral institutions such as the ICC, AAA, SIAC and CIETAC to address such hybrid clauses may minimise the uncertainties and practical difficulties.

Condition precedent – "Friendly consultation"

3.17 The dispute resolution clause in the *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 1 SLR 23 also stipulated that:

> Any dispute … shall be referred to executive representatives of the Parties for settlement through friendly consultations between the Parties. In case no agreement can be reached through friendly consultation within 40 days …, the dispute may be submitted to arbitration …

3.18 Relying on the reference to "friendly consultations", the appellant argued that no friendly consultations took place after the defendant issued its notification of breach and termination on 17 January 2006 before arbitration was commenced. The learned judge interpreted the "friendly consultations" as a direction to hold "friendly consultations" rather than a mandatory injunction to have recourse to a form of alternative dispute resolution and relied on the finding of the tribunal that such consultation had already taken place, leaving aside whether it was "friendly" or otherwise as a matter of perception.

Constitution of the tribunal

3.19 A further complication that was raised in *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 1 SLR 23 was the method in which the tribunal was appointed. This came about when the claimant in the arbitration commenced the arbitration in the SIAC. The SIAC took a prima facie view that it had jurisdiction and proceeded to appoint the tribunal with the intention that the tribunal when appointed would determine the issue of jurisdiction as a preliminary issue. The issue of the tribunal's appointment was subsequently questioned by the appellant as part of the challenge to the tribunal's jurisdiction, being that as the tribunal was purportedly appointed by the SIAC in accordance with the SIAC Rules and not in accordance with the ICC Rules, the tribunal was wrongly constituted. The court, however, agreed with the tribunal that whatever the labels used (ie, whether the "SIAC" or "ICC") what was of real importance was whether the tribunal was constituted in accordance with the agreed procedure. An analysis of the rules of both the ICC and the SIAC showed that irrespective of whether the procedure was carried out by reference to only one set of rules, they had the same effect, namely, the parties had each nominated their arbitrator and the party-nominated arbitrator had nominated the presiding arbitrator and all three arbitrators were confirmed by the SIAC, a process similar to that under the ICC Rules. The tribunal was, therefore, properly constituted in accordance with the agreed procedure. There can be no doubt that the tribunal and the court's analyses accorded with the intention of the parties when the arbitration agreement was entered into. The court saw through the attempts to place labels on the institutional process, aimed at casting doubt or tarnishing the appointing process, and rightly rejected it.

Power to decide on number of arbitrators

3.20 Parties are at liberty to agree on the number and special qualifications (if any) of the arbitrators they require. In the absence of an agreed number, a single arbitrator is presumed under s 12 of the Arbitration Act (Cap 10, 2002 Rev Ed) ("AA") or under s 9 of the International Arbitration Act (Cap 143A, 2005 Rev Ed) ("IAA"). Parties are free to agree on the procedure for appointing the arbitrators whether in the arbitration agreement or subsequent to the dispute having arisen. Where institutional rules are adopted, the procedure set out in them must then be followed. As regards the number of arbitrators, some institutional rules provide for a default number if the parties have not agreed otherwise. Consistent with the AA and IAA provisions, until July 2007, the SIAC Rules had always maintained a single arbitrator as the default composition of the tribunal. The SIAC Rules 2007 have, however, given some degree of flexibility to the registrar of the SIAC to fix the number of arbitrators. Rule 5.1 of the SIAC Rules 2007 reads:

> Unless the parties have agreed otherwise or unless it appears to the Registrar giving due regard to any proposals by the parties, the complexity, the quantum involved or other relevant circumstances of the dispute, that the dispute warrants the appointment of three arbitrators, a sole arbitrator shall be appointed.

3.21 An issue regarding the extent of the power of the registrar of the SIAC to fix the number of arbitrators arose in *NCC International AB v Land Transport Authority of Singapore* [2009] 1 SLR 985. There, NCC International AB was the contractor for a project of the Land Transport Authority of Singapore ("LTA"), namely, the construction of the MacPherson and Upper Paya Lebar Mass Rapid Transit ("MRT") stations, including tunnelling, forming part of stage 2 of the MRT Circle Line, through a contract in 2002 ("Contract 822"). Contract 822 provided an arbitration clause that stated, *inter alia*, that:

> … [T]he dispute … shall be referred to *an Arbitrator* to be agreed by the parties, or failing agreement to be nominated … by the Chairman of the Singapore International Arbitration centre (SIAC) and any such reference shall be a submission on arbitration in accordance with the Arbitration Rules of the Singapore international Arbitration Centre ("SIAC Rules") for the time being in force …

3.22 In August 2007, NCC commenced arbitration proceedings against the defendant and sought the agreement of the LTA for three arbitrators to be appointed for the proceedings. Unable to agree on the constitution of the tribunal, the LTA applied to the Chairman of SIAC to nominate a sole arbitrator pursuant to the arbitration clause. NCC then applied to the registrar of the SIAC pursuant to SIAC Rules 2007 r 5.1 to exercise her discretion to appoint a three-man tribunal. LTA objected, taking the position that a single arbitrator having been agreed to in the contract, the registrar of the SIAC would not have the power to appoint more than one arbitrator. The registrar of the SIAC ruled that (a) the arbitration clause in Contract 822 provided for a single member tribunal; (b) SIAC Rules r 5.1 did not grant discretion to the registrar to vary the number of arbitrators where the parties have agreed to the number; and therefore (c) the issue of exercising the registrar's discretion to vary the number of arbitrators did not arise. NCC disagreed with the registrar's decision and applied to the High Court for a determination.

3.23 Tay Yong Kwang J upheld the registrar's ruling, holding that the arbitration clause was an agreement to a sole arbitrator. As regard r 5.1, the court agreed that the words "unless the parties have agreed otherwise" embodied the concept of party autonomy which means that if the parties have not agreed on the number of arbitrators, the default position would also be a sole arbitrator. The occasion to consider appointing a three-man tribunal would only arise if there was no such

agreement and the default position of one applied. As the parties had agreed on a sole arbitrator in the arbitration clause, the registrar had no occasion to appoint a three-man tribunal under the discretionary power given in the rule.

3.24 The court observed that it was unlikely to be within the parties' contemplation that their agreement on a sole arbitrator would be subject to the power of the registrar to direct otherwise. Tay Yong Kwang J had rightly pointed out that the parties' specific stipulation must necessarily take precedence over pre-existing institutional rules. To do otherwise would be to fundamentally alter the parties' agreement as regards the constitution of the tribunal.

3.25 An interesting aspect of the case arose with regard to a preliminary issue of the court's jurisdiction in relation to r 35.2 of the SIAC Rules 2007, which provides that:

> The provisions in these Rules shall insofar as they relate to the powers and functions of the Tribunal be interpreted by the Tribunal. All other provisions shall be interpreted by the Registrar.

3.26 The LTA's argument was that by the incorporation of these rules into their arbitration agreement, the parties had agreed that all provisions not relating to the powers and functions of the tribunal shall be interpreted by the registrar of the SIAC. Rule 5.1 was one such provision whose interpretation was reserved to the said registrar.

3.27 The learned judge took the view, however, that r 35.2 did not "oust the court's jurisdiction to construe an agreement between the parties. As Rule 5.1 has been incorporated into the contract, it is open to both parties to seek the court's construction of Rule 5.1 as one of the terms of the contract": *NCC International AB v Land Transport Authority of Singapore* [2009] 1 SLR 985 at [34]. It is very possible that this issue was not seriously contested by the parties, both of whom could have wanted to see a definitive judicial ruling. In taking the view that because r 35.1 was incorporated as a term of the contract, the parties were, therefore, entitled to seek the court's interpretation, his Honour probably had in mind the court's general inherent jurisdiction instead of the specific limited jurisdiction spelt out in Art 5 of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (Sched 1 of the International Arbitration Act (Cap 143A, 2005 Rev Ed)). The view of the learned judge, therefore, needs some further reflection.

3.28 Article 5 of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration mandates that "[i]n matters governed by this Law, no court shall intervene except where so provided in this Law".

3.29 It cannot be disputed that the number and composition of the arbitral tribunal is a matter governed by Arts 12 to 15 of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration ("MAL"). As such, to do what was being asked of the court, the court's jurisdiction would need to be founded upon a specific provision under the International Arbitration Act (Cap 143A, 2005 Rev Ed) ("IAA") or MAL. In so far as this author is aware, there is no provision in the IAA or MAL that would justify the exercise of the court's jurisdiction over such a matter. The learned judge had aptly described "[t]his originating summons, in seeking the proper interpretation of clause 71.4 and Rule 5.1" as "essentially seeking to overturn the findings of the registrar of the SIAC set out above": *NCC International AB v Land Transport Authority of Singapore* [2009] 1 SLR 985 at [8]. That being the case, NCC had the burden to justify how the court's jurisdiction could be invoked to overturn a decision of the registrar of the SIAC. If pressed, it probably would have some difficulty doing so. (See also *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565 and comments at paras 3.43–3.46 below.)

Enforcement of the arbitration agreement

Stay of court proceedings and the filing of defence

3.30 As part of the supportive role of the court in the enforcement of arbitration agreements, the International Arbitration Act (Cap 143A, 2005 Rev Ed) and the Arbitration Act (Cap 10, 2002 Rev Ed) have specific provisions to stay actions commenced in violation of a pre-existing arbitration agreement.

3.31 Section 6(1) of the Arbitration Act (Cap 10, 2002 Rev Ed) provides that an application for stay of the action may be made "at any time after appearance and before delivering any pleading or taking any other step in the proceedings". The filing of a defence, being an affirmation of the intention to defend an action on the merits, has always been considered a "step in the proceedings" that would bar a defendant from seeking the benefit of an arbitration agreement. The continuing dilemma that confronts a party seeking the right to arbitrate granted under an arbitration agreement which is statutorily protected under the AA and the obligation to file a defence under the Rules of Court (Cap 322, R 5, 2006 Rev Ed) which if done would defeat that right, came up again for consideration by the Court of Appeal in [2008] 4 SLR 460: see also this author's comments on the High Court decision (*Go Go Delicacy Pte Ltd v Carona Holdings Pte Ltd* [2008] 1 SLR 161) in (2007) 8 SAL Ann Rev 37 at 42–43, paras 3.20–3.25.

3.32 The dispute there arose from a "GoGo Franks" franchise ("the franchise agreement") granted by the first defendant to the plaintiff. Under the franchise agreement, the plaintiff was obliged to take food supplies from Foodplex Trading Pte Ltd, the third defendant. As part of the start-up operations, the plaintiff purchased various items from Carona Fast Food Pte Ltd, the second defendant. The fourth and fifth defendants were the directors in the first, second and third defendants. The writ of summons and statement of claim were filed on 20 March 2007. The statement of defence fell due on 18 April 2007, on which date the defendants filed the application for stay of the action under s 6 of the Arbitration Act (Cap 10, 2002 Rev Ed). On 25 April 2007, one week after the defence had originally been due, the plaintiff took out an application for judgment in default of defence.

3.33 The assistant registrar and the judge-in-chambers both adopted the approach in *Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2005] 1 SLR 168 [see author's comments on this decision in (2004) 5 SAL Ann Rev 47 at 52–53, paras 3.14–3.18] and took the view that the defendants ought not to have just simply relied on their application for stay but should have applied for an extension of time to file the defence or bring forward the hearing of the application for stay or add a prayer to the stay application for an order that they should not be compelled to file a defence during the pendency of the application. Judgment in default of defence was, accordingly, entered against the defendants. The defendants appealed to the Court of Appeal to set aside the judgment.

3.34 In the Court of Appeal, V K Rajah JA took the opportunity to reconcile the decisions of the Court of Appeal in *Samsung Corp v Chinese Chamber Realty Pte Ltd* [2004] 1 SLR 382 ("*Samsung Corp*") and *Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2005] 1 SLR 168 ("*Australian Timber*"). This author had suggested in (2004) 5 SAL Ann Rev 47 that both cases were at odds with each other and that *Australian Timber* had "unwittingly added a question mark to the practice in relation to the filing of the Defence, as suggested by the Court of Appeal in *Samsung Corp*." This view, however, did not find favour with Rajah JA. His Honour said that insufficient credit was given to the factual matrices of the cases and that, in any event, the Court of Appeal in *Samsung Corp* had not declared, or even suggested, that "all timelines should stop pending the outcome of a stay application": *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR 460 at [30]. In His Honour's analysis, the two decisions are reconcilable on the facts in that, whilst the main focus of the decision in *Samsung Corp* was on the issue of whether a defendant could be compelled to file his defence so as to enable a plaintiff to file an O 14 application, on the other hand, in *Australian Timber*, the plaintiff's application was for judgment in default of

defence under O 19 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed), which application was predicated on the absence of a defence. The question as framed by the Court of Appeal was "[w]hether a defendant should be compelled to file his defence in the event a stay application has been filed": *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR 460 at [17]. This was essentially the same question that was considered in *Yeoh Poh San v Won Siok Wan* [2002] 4 SLR 91, *Samsung Corp* and in *Australian Timber*, albeit in *Yeoh Poh San v Won Siok Wan* and *Samsung Corp* the question was raised in the context of an O 14 summary judgment application and in *Australian Timber* the application was for entering judgment in default of filing a defence. Both such applications were pitted against an application for stay of the action. In *Yeoh Poh San v Won Siok Wan* and *Samsung Corp*, Woo Bih Li JC (as he then was) and the Court of Appeal respectively had answered the question in the negative, namely, that the defendant must not be compelled to file its defence until the stay application had been finally disposed off. In *Australian Timber*, Belinda Ang Saw Ean J took the view that the absence of a defence would entitle the plaintiff to enter judgment, essentially taking the stand that a stay application would not prevent entry of judgment and, therefore, the defence ought to have been filed within time for doing so. The final responses to the common question were, therefore, difficult to reconcile except to say that the situation in *Australian Timber* must be read in the special circumstances of the case where the court was convinced that the defendant had no plausible defence and had done nothing to avert the entry of judgment.

3.35 The Court of Appeal's decision in *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR 460 ("*Carona v Go Go*") is indeed a welcome affirmation of the views and practice set out in *Yeoh Poh San v Won Siok Wan* [2002] 4 SLR 91 and *Samsung Corp v Chinese Chamber Realty Pte Ltd* [2004] 1 SLR 382. Although V K Rajah JA said that the decisions as discussed were "plainly not irreconcilable", the Court of Appeal's final decision in the matter was to reverse the lower courts' decisions and set aside the judgment in default. The court explained that it did so because (*Carona v Go Go*, at [104]):

> [t]he merits of the defence ought to have been appraised separately. If there appeared to be a plausible defence, permission should not have been given for the entry of the default judgment. It is cold comfort to suggest that the Appellants could file a separate application to set aside the default judgment. That would have led to unnecessary costs being incurred and valuable time being lost.

3.36 These words are clearly consonant with the prescription of the Court of Appeal in *Samsung Corp v Chinese Chamber Realty Pte Ltd* [2004] 1 SLR 382 at [18] and the views of Woo Bih Li JC (as he then was) in *Yeoh Poh San v Won Siok Wan* [2002] 4 SLR 91, namely, that the defendant should not have been required to file the defence but should

instead have been granted time extension until the application for stay had been finally determined whereupon it would then be able to ascertain if the court was properly seised of the matter. The rationale for this is that the defendant ought not to be shut out of its right to defend the matter in the appropriate forum. V K Rajah JA had also very helpfully set out the procedure that should be followed in future cases of such a nature (*Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR 460 at [38]):

> First, within the stipulated 14 days under the Rules for the filing of a defence or within any extended time obtained from the court (where parties do not agree), a stay application should be filed. Second, in the event an application for a default judgment is filed (or even in anticipation of such an application), the application for a stay should include a prayer for the stay of the proceedings (including filing of a defence) until the court has ruled on the main stay application. Third, the Registry should endeavour to give early hearing dates to minimise attempts to abuse process by either party, especially if the plaintiff insists on the filing of the defence. Fourth, for parties and/or counsel that behave unreasonably and/or attempt to abuse the process, carefully calibrated costs sanctions may be appropriate.

3.37 V K Rajah JA's suggestion that in the application for stay the defendant "should include a prayer for the stay of the proceedings (including filing of a defence) until the court has ruled on the main stay application" only slightly modified Chao Hick Tin JA's prescription in *Samsung Corp v Chinese Chamber Realty Pte Ltd* [2004] 1 SLR 382, where he said (at [18]): "If it [stay application] should fail, the court would no doubt make the necessary consequential orders, including setting the time-limit for the filing of Defence." This pragmatic and logical process is certainly the proper approach to that of obliging the defendant to file a defence on pain of allowing judgment to be entered and for the defendant to then set it aside as was done in *Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2005] 1 SLR 168 and the High Court in *Go Go Delicacy Pte Ltd v Carona Holdings Pte Ltd* [2008] 1 SLR 161.

Imposing conditions for grant of stay

3.38 The court when ordering a stay of proceedings has the power to impose conditions such as directing the applicant to provide security for the claim in arbitration *(PT Budi Semesta Satria v Concordia Agritrading Pte Ltd* Suit 1332/1997 (20 April 1998) (unreported)), to commence arbitration proceedings within a given time frame and/or take certain steps to expedite the arbitration or direct parties to preserve the rights of the parties in relation to any property which is the subject matter of the dispute. The court should, however, be careful to ensure that the conditions imposed do not alter the substantive rights of the parties or

pre-empt the adjudication of the merits of the case by the arbitral tribunal. Notwithstanding this, Singapore courts had, in exceptional circumstances, ordered the applicant to waive an accrued time-bar defence as a condition for granting a stay in favour of arbitration: see *The Xanadu* [1998] 1 SLR 767; *Splosna Plovba International Shipping and Chartering d o o v Adria Orient Line Pte Ltd* [1998] SGHC 289.

3.39 The decision of Andrew Ang J in *The Duden* [2008] 4 SLR 984 further clarifies the situation in which a court would impose conditions which may impact the substantive rights of the parties. In *The Duden*, the cargo owners of a shipment of solar salt claimed losses for damage and contamination occurring during the discharge of the cargo at Qingdao, China on 3 November 2004. They commenced an in *rem* action on 5 July 2005 and arrested the ship in Singapore on 12 November 2007. The owners applied for stay of the action in favour of arbitration in London, relying on a reference in the bill of lading to "[a]ll terms and conditions, liberties and exceptions of the [Charter Party], dated as overleaf, including the Law and Arbitration Clause". The vessel was, however, deployed through a chain of sub-charters and there was no reference to any particular charterparty indicated on the front page of the bill of lading. It was not disputed that if the claim was to be arbitrated in London, the shipowners would have the defence of a one-year time bar pursuant to Art III r 6 of the Hague-Visby Rules. The assistant registrar granted the stay but imposed the condition under s 6(2) of the International Arbitration Act (Cap 143A, 2005 Rev Ed) that the shipowners waive the defence of time bar in the arbitration proceedings. The shipowners appealed.

3.40 Andrew Ang J dismissed the appeal holding that s 6(2) empowers the court to impose "such terms or conditions as it may think fit" when granting a stay of a pending court action in favour of arbitration. Such discretion is an unfettered one and would be exercised judiciously. The court noted the comment by this author on *The Xanadu* [1998] 1 SLR 767 in *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue) at para 20.044 that the waiver of a defence of time bar can only be justified in "very special circumstances as it takes away a substantive right of one of the parties".

3.41 The learned judge was satisfied that the given circumstances of the case justified imposing the condition of depriving the shipowners of the defence of time bar in the arbitration because the bill of lading did not contain any arbitration agreement and the only reference to an arbitration agreement was in the reverse side which provided, *inter alia*, for the incorporation of "[a]ll terms and conditions, liberties and exceptions of the [Charter Party], dated as overleaf, including the Law and Arbitration Clause". There was also no identification of *the relevant charterparty* on the front page of the bill of lading. The cargo owners

were only informed of the identity of the relevant charterparty after the expiry of time for instituting proceedings following much confusion as to which charterparty was being referred to and which arbitration clause was being relied upon to sustain the stay application. The court, therefore, found that it would be unreasonable to expect the cargo owners to comply with the arbitration clause in the charterparty when there were serious ambiguities as to which of the charterparties was applicable.

3.42 It appears clear that the imposition of the condition for the grant of stay was intended to address the balance of equities between the parties. It is noteworthy that the parties in this case appeared to have accepted that an arbitration agreement existed even though no charterparty was indicated on the face of the bill of lading. On these facts it could well be open to the cargo owners that notwithstanding the unequivocal incorporating words on the reverse side of the bill of lading, there was in fact no arbitration clause which could properly be incorporated and, therefore, there was no agreement to arbitrate whereupon the action need not be stayed.

Interim measures in aid of arbitration proceedings

3.43 The power to grant interim measures in aid of arbitration has been conferred upon the arbitral tribunal as well as the High Court in both the Arbitration Act (Cap 10, 2002 Rev Ed) ("AA") (ss 28 and 31) and the International Arbitration Act (Cap 143A, 2005 Rev Ed) ("IAA") (s 12). A tribunal in an arbitration which falls under the IAA has also the power of making restraining orders (injunctions) as well as ordering a party to do a positive act (mandatory injunction) (s 12(7) of the IAA). In the context of arbitration under the AA, this particular power is reserved only for the High Court. The interplay of the role of the court in these regimes in relation to the power to order interim measures was considered in the decision of the Court of Appeal in *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565 where the plaintiff, NCC, failed to obtain an interim mandatory injunction against the defendant, Alliance Concrete, to continue the supply of ready-mix concrete for the plaintiff's construction projects. This followed the sudden ban on the export of concreting sand by the Indonesian authorities in February 2007 that had affected all construction companies involved in the many on-going construction projects in Singapore. NCC had in July 2006 entered into a contract with Alliance Concrete for the supply of ready-mixed concrete to NCC. Sand being one of the essential ingredients of ready-mixed concrete, the Singapore government intervened via the Building and Construction Authority of Singapore ("BCA") which agreed to supply sand to contractors for onward delivery to ready-mixed concrete suppliers. However, the parties

failed to agree on how to collect and pay for the sand distributed by the BCA. As a result, the sand allocated to NCC went uncollected and the supply of ready-mixed concrete to NCC by Alliance Concrete was disrupted. Notwithstanding that the contract provided for arbitration in the event of a dispute, NCC applied to the High Court for an interlocutory mandatory injunction to compel Alliance Concrete to deliver the ready-mixed concrete. Kan Ting Chiu J rejected the application and NCC appealed against the decision to the Court of Appeal.

3.44 The Court of Appeal affirmed the decision of Kan Ting Chiu J in refusing to order the mandatory injunction. The Court of Appeal took the occasion to address the nature of the powers granted to the High Court under the Arbitration Act (Cap 10, 2002 Rev Ed) ("AA") and International Arbitration Act (Cap 143A, 2005 Rev Ed) ("IAA") in respect of the making of interim measures. V K Rajah JA carefully applied a contextual interpretation and examined the drafting and legislative intent of the provision and concluded that although the High Court has concurrent power with the arbitral tribunal under the IAA, it requires the court to "scrupulously avoid usurping the functions of the arbitral tribunal in exercising such jurisdiction and will only order interim relief where this will aid, promote and support arbitration proceedings": *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565 at [41]. Although he found that the High Court's power under the AA regime is wider – and, thus, has a relatively more interventionist role – in domestic arbitration, this wider role needs to be premised on the same principle that the court must intervene only where curial intervention is supportive (as opposed to obstructive) of the conduct of the arbitration. As such, whether the court is exercising powers under the AA or IAA, a limited and cautious curial approach ought to be adopted such that it (at [53]):

> … will intervene only sparingly and in very narrow circumstances, such as where the arbitral tribunal cannot be constituted expediently enough, where the court's coercive enforcement powers are required or where the arbitral tribunal has no jurisdiction to grant the relief sought in the matter at hand.

3.45 The Court of Appeal found that NCC had abused the court's process by improperly seeking the interim mandatory injunction to compel Alliance Concrete to continue the supply of the ready-mix concrete. Such a relief being in the nature of specific performance, fell squarely within the tribunal's jurisdiction and ought to have been sought from an arbitral tribunal and not the court.

3.46 The Court of Appeal's decision in *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565 re-affirms the court's non-interventionist but supportive role in arbitration. It also

settles the issue of how the concurrent powers of the court and the tribunal relating to interim measures should be properly exercised to avoid any possible trespassing upon the tribunal's adjudicative functions in the arbitration.

Anti-suit injunctions

3.47 The array of measures that a court could grant in support of an international arbitration are set out in s 12(1) read with s 12(7) International Arbitration Act (Cap 143A, 2005 Rev Ed) ("IAA") as well as in Art 9 of the UNCITRAL Model Law on International Commercial Arbitration (Sched 1 of the IAA) read with s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("CLA"), which may include the issuance of an anti-suit injunction (see *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603 where Lee Seiu Kin J used s 12(1)(*i*) of the International Arbitration Act (Cap 143A, 1995 Rev Ed) as the basis for doing so; see also *Japan Line Ltd v Aggeliki Charis Compania Maritima SA, The Angelic Grace* [1980] 1 Lloyd's Rep 288 (Court of Appeal, Eng); *Glencore International AG v Exter Shipping Ltd* [2002] EWCA Civ 528, [2002] 2 All ER (Comm) 1; *Noble Assurance Co and Shell Petroleum Inc v Gerling-Konzern General Insurance Co* [2007] EWHC 253 (Comm)).

3.48 A novel attempt to use the Singapore court's power to issue an anti-suit injunction against a party who had obtained security through an interim measure obtained in a US court was considered by the High Court in *Regalindo Resources Pte Ltd v Seatrek Trans Pte Ltd* [2008] 3 SLR 930.

3.49 In that case, the defendant, Seatrek Trans Pte Ltd ("Seatrek"), commenced arbitration proceedings in Singapore against the plaintiff, Regalindo Resources Pte Ltd ("Regalindo"), over an alleged breach of a time charterparty. On 23 January 2008, prior to the commencement of arbitration, the defendant filed an action in the New York District Court ("the New York Proceedings") and obtained a pre-judgment attachment under the Federal Rules of Civil Procedure Supplemental Rules for Certain Admiralty and Maritime Claims, Rule B ("Rule B attachment") for up to US$3,777,200. On 5 February 2008, when Regalindo directed a transfer of US$249,975 from its Singapore bank account to one of its suppliers in Jakarta, Indonesia, the Bank of New York, which was an intermediary bank for the transaction, attached the said sum pursuant to the Rule B attachment notice. When informed of the attachment and the New York proceedings, Regalindo applied to the Singapore High Court for an anti-suit injunction restraining Seatrek from continuing with the New York proceedings and to release all moneys attached pursuant to the Rule B attachment. Regalindo also applied to the New

York District Court to vacate the Rule B attachment order but was rejected.

3.50 Before the Singapore court, Andrew Ang J refused the application. His Honour adopted the principle that such injunctions should only be granted to meet the "ends of justice" (see *Bank of America National Trust & Savings Association v Djoni Widjaja* [1994] 2 SLR 816, where the Court of Appeal adopted the principles enunciated by the Privy Council in *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871) or where the foreign proceedings were "vexatious or oppressive" (see *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 3 SLR 121). Regalindo had argued, *inter alia*, that the New York proceedings were in breach of the agreement to arbitrate in Singapore and that the Rule B pre-judgment security was only available in the New York proceedings and not in Singapore, the effect of which was highly disruptive to the ordinary and proper conduct of its business. Ang J did not accept Regalindo's submission. He ruled that the fact that the remedies sought in the New York Proceedings were not available in Singapore should not automatically mean that an anti-suit injunction ought to be granted against Seatrek to deprive it of the juridical advantage it had obtained. Noting that following the termination of the charterparty upon which disputes had arisen, Regalindo had incorporated several companies probably as a "defensive measure taken by the plaintiff's (Regalindo) shareholders to pre-empt the consequences of the plaintiff's insolvency in the event the defendant prevailed in the time charter dispute", the court refused the application notwithstanding that the Rule B attachment would have a disruptive effect on the plaintiff's business.

3.51 The decision in *Regalindo Resources Pte Ltd v Seatrek Trans Pte Ltd* [2008] 3 SLR 930 was no doubt founded on just and equitable grounds. It is unclear which statutory provision Regalindo had relied on to seek the exercise of the court's power to grant an anti-suit injunction granting the Rule B attachment in favour of the Singapore arbitration. Quite clearly, such an order if granted cannot be described as "supportive" of the arbitration (see discussion in para 3.44 above) as it is in fact seeking to annul the effect of an order given by a court in support of an arbitration in Singapore (see also *Mitsui Engineering and Shipbuilding Co Ltd v Easton Graham Rush* [2004] 2 SLR 14, where Belinda Ang Saw Ean J refused to grant an injunction against an arbitrator from continuing the arbitration). The process adopted by Seatrek is also wholly permissible under Art 9 of the UNCITRAL Model Law on International Commercial Arbitration, which provides that:

> It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

3.52 In any case, an arbitral tribunal in an IAA arbitration in Singapore does have the power under s 12(1)(*g*) of the International Arbitration Act (Cap 143A, 2005 Rev Ed) (and, thus, the High Court – under s 12(7)) to grant an order "securing the amount in dispute", although such powers are rarely exercised and the basis for granting pre-judgment security must necessarily be strong and compelling.

Injunctions in aid of foreign arbitration

3.53 Article 9 of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration ("MAL") (as well as the revised Art 17J of the 2006 MAL Revision) was intended to allow a court to grant measures in support of an arbitration to be held outside its jurisdiction. Singapore courts have, however, thus far taken a restrictive view that while Art 9 is permissive, it is, nevertheless, not an empowering provision and that the current statutory provision permits a Singapore court to grant measures only in support of arbitrations seated in Singapore (see *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629; as well as the author's comments in (2006) 7 SAL Ann Rev 51 at 57, para 3.16–3.17).

3.54 The only apparent window in which a Singapore court may extend assistance to arbitration seated outside Singapore by way of interim measures is where there is an accrued cause of action against the defendant that is justiciable by a Singapore court (see Belinda Ang Saw Ean J's decision in *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR 854 at [43]; and Court of Appeal's *Swift Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 at [96]). There remains some uncertainty if the Court of Appeal had definitively approved of Belinda Ang J's views as regards the applicability of s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed), in particular with regard to the situation where the substantive action is not actually to be adjudicated in Singapore.

3.55 In *Petroval SA v Stainby Overseas Ltd* [2008] 3 SLR 856 ("Petroval"), Tay Yong Kwang J had before him an action involving a plaintiff based in France and defendants with addresses in British Virgin Islands ("BVI") and Switzerland. There was an earlier action pending in the BVI courts and the action in Singapore was commenced for the purpose of obtaining interim relief against the defendants' assets in Singapore to support the action in the BVI. The plaintiffs had also sought a stay of the Singapore action concurrently with the grant of the interim relief with the intention that the merits of its claims against the defendants be heard in BVI. His Honour interpreted the Court of Appeal's decision in *Swift Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 as "re-affirming and applying the principles in *Siskina v Distos Compania Naviera SA* [1979] AC 210 ('*The Siskina*')", one of which is that "*The Siskina* doctrine contemplated that the substantive

claim must not only be justiciable in an English court but should also terminate in an English judgment" (*Petroval SA v Stainby Overseas Ltd* [2008] 3 SLR 856 at [13]) which essentially means that so long as there is no substantive action pending in a Singapore court (or in relation to an arbitration, its seat in Singapore), then the High Court has no jurisdiction to grant measures in support of an action pending in a foreign court under s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed). He, accordingly, set aside the interim injunction and the writ. The plaintiffs subsequently succeeded in their appeal to the Court of Appeal. Unfortunately, no grounds of decision are available.

3.56 Chan Seng Onn J in *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR 1000 at [75]–[89] was dealing with a case where the plaintiffs had commenced an earlier action in Malaysia against 12 defendants, five of whom were in Singapore before the filing of the suit in Singapore against them and where a Mareva injunction was obtained against three of the defendants. On the application of the three defendants against whom the injunctions were obtained, the court ordered a stay of the action on the ground of *lis alibi pendens* as well as on the ground of *forum non conveniens*. Upon allowing the action to be stayed, the court had to decide if the injunction earlier granted ought to have also been discharged.

3.57 His Honour took a different view from that of Tay Yong Kwang J in *Petroval SA v Stainby Overseas Ltd* [2008] 3 SLR 856. He interpreted the Court of Appeal's view in *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 as supporting the contention that "s 4(10) of the CLA conferred a general power on the court to grant Mareva relief, even though the Singapore action was stayed and the continuation of the Mareva relief against the assets in Singapore of the defendants was in a sense in support of foreign court proceedings which were continuing": *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR 1000 at [85].

3.58 Although both the *Petroval SA v Stainby Overseas Ltd* [2008] 3 SLR 856 and the *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR 1000 decisions did not arise out of any pending arbitration, they were both interpreting the scope of the Court of Appeal's decision in *Swift Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 regarding the court's jurisdiction in relation to the availability of judicial assistance over actions or arbitrations held outside Singapore. Pending a clear legislative change reflecting the policy to be adopted or a definitive Court of Appeal decision on the ambit of s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed), more divergent judicial views may have to be expected.

Recourse against award

Setting aside – Breach of natural justice

3.59 Recourse against an award in international arbitration is only available by way of setting aside proceedings on the limited grounds set out in Art 34(2) of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration. Additional grounds based on fraud and breach of natural justice occurring in connection with the making of the award is provided for in s 24 of International Arbitration Act (Cap 143A, 2005 Rev Ed) ("IAA").

3.60 In *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR 871, the plaintiff Dongwoo had entered into an agreement with Mann+Hummel GmbH ("M+H") to supply Dongwoo with technical information for the manufacture of filtration products. Disputes arose between the parties resulting in Dongwoo terminating the agreement. The termination was contested by M+H and the dispute was referred to arbitration. The tribunal ruled in favour of M+H, declaring that the purported termination of the agreement by Dongwoo was invalid. Aggrieved by the ruling, Dongwoo commenced an action to set aside the award under s 24 of the International Arbitration Act (Cap 143A, 2005 Rev Ed) ("IAA") and Art 34 of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration. Dongwoo's complaints included one in which it alleged that various documents which it had requested for were shown only to the tribunal but not presented to Dongwoo. This was because M+H had objected to such disclosure to Dongwoo on the basis that they contained proprietary information belonging to a major customer and was bound to a covenant of confidentiality. Dongwoo also claimed that the tribunal in making the award was infected by the information in the documents and had thereby deprived Dongwoo of the opportunity to be heard. Further, the tribunal had not drawn any adverse inference against M+H for its flagrant disregard of the discovery order, breaching the obligation to treat the parties with equality.

3.61 Chan Seng Onn J dismissed Dongwoo's application. He made clear that a failure to produce documents *per se* does not automatically constitute a ground for setting aside under Art 34(2)(*a*)(ii) of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration ("MAL") by reason of the party being unable to present its case. The learned judge pointed out that if after hearing parties' arguments, the tribunal decided wrongly that it was not appropriate to draw any adverse inference, it would then be a mere error of fact finding and/or of law, which cannot be a ground for setting aside the award under Art 34(2)(*a*)(ii) of the MAL.

3.62 His Honour also examined the tribunal's decision and found that the tribunal in its award had considered the evidence as a whole and found that the claim by M+H to be bound by confidentiality in that instance was sufficiently established and, therefore, declined to draw an adverse inference in advance of the hearing. He was satisfied that the tribunal did not refer to or make use of any information disclosed in the documents (design standard drawings of the CCV oil filter) in arriving at its decision not to draw any adverse inference. He also found no evidence to suggest that the tribunal had indeed relied on what it saw on these design standard drawings.

3.63 A useful observation was made by Chan Seng Onn J in relation to the procedure for deciding "threshold questions" in disclosure processes in arbitration. He noted that both the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (Sched 1 of the International Arbitration Act (Cap 143A, 2005 Rev Ed)) and the SIAC Rules do not have specific rules addressing the procedure as to how "threshold questions' should be dealt with. His Honour expressed his support for the use of the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration ("the IBA Rules") (June 1999).

3.64 Most institutional rules do not prescribe detailed procedure for evidence or disclosure of documents. Where parties have not agreed on any particular procedure in advance, the tribunal is entitled under Art 19(2) of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration to "conduct the arbitration in such manner as it considers appropriate" and under SIAC Rules 2007 r 15.2 to "conduct the arbitration in such manner as it considers appropriate to ensure the fair, expeditious, economical and final determination of the dispute". The adoption by the tribunal of the IBA Rules is, therefore, not inconsistent with the agreed procedure in the arbitration.

Breach of confidentiality and issue estoppel

3.65 The grounds for setting aside an award stipulated in Art 34 of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration and s 24 of the International Arbitration Act (Cap 143A, 2005 Rev Ed) ("IAA") are exhaustive. Attempts have sometimes been made by debtors to avoid the consequences of an award by seeking a declaration that an award was not binding or by indirectly seeking to re-litigate the same issues to stall the award earlier made. In *International Coal Pte Ltd v Kristle Trading Ltd* [2009] 1 SLR 945, Lai Siu Chiu J had to deal with such a scenario. The suits in this case arose out of the failure by the plaintiff, ICP, a Singapore company in the business of coal-mining and coal mine

development, to honour an arbitral award made by a SIAC tribunal in January 2001 which had adjudged ICP to be liable to Kristle Trading Ltd, a Hong Kong company, for the sum of US$3.5m and costs. Kristle obtained leave on 1 December 2006 to enforce the award as a judgment. ICP's attempts to set aside the leave granted were finally dismissed by a judge-in-chambers on 28 January 2008 and consequently, judgment on the award was entered against ICP on 30 January 2008.

3.66 On ICP's failure to make such payment, Kristle made demand against the guarantor, Mr Low Tuck Kwong ("T K Low"), who was the managing director of ICP. ICP made no payment and instead commenced two suits in Singapore.

3.67 In Suit 11/2005, the plaintiff, ICP, alleged that the respondents, Kristle and Mr Kazushi Toyoshige, the principal shareholder and president of Kristle, had breached their covenant of confidentiality by divulging information relating to (a) the existence of the arbitration and/or the subject matter of the arbitration and the circumstances under which the arbitration arose; (b) documents prepared for and in the course of the arbitration; (c) the outcome of the arbitration; and (d) the award, to third parties.

3.68 In Suit 12/2005, the plaintiffs, T K Low and ICP, claimed that Kristle and Toyoshige misrepresented the quantity of reserves of coal and the infrastructure near the designated areas of coal operation and of the obtaining of requisite approvals for the novation of Kristle's rights to ICP. Consequently, ICP should be discharged from its liability under the novation agreement and that T K Low should be discharged from all liability under the guarantee. As an alternative, it was said that a post-award settlement was reached between ICP and Kristle for the payment of a settlement sum and, accordingly, T K Low would be discharged from his obligations under the guarantee.

3.69 In relation to the breach of confidentiality covenant, the plaintiffs based its claims on several letters from Kristle written to Low and ICP between April 2001 and April 2003 in which Kristle had consistently complained about ICP's failure to honour the award and the negative reputation ICP and Low had garnered to suggest that ICP had divulged such information to third parties. ICP also took objection to Interpol Tokyo's report to its Jakarta counterpart of 10 December 2003 responding to a request originating from the Indonesian police to trace Mr Toyoshige in Japan. Two other letters to which ICP took offence were said to have been from the other shareholder of Kristle (one Mr Cameron) who had suggested that he made a press statement to the Asian Wall Street Journal (which was not in fact carried out) and Mr Toshiki Kaifu, a former prime minister of Japan, to the President of Indonesia.

3.70 The learned judge accepted that, as a matter of law, an obligation of confidentiality is implied in arbitration proceedings due to the private nature of such proceedings. She preferred the position taken by the English courts (see *Dolling-Baker v Merrett* [1990] 1 WLR 1205; *Hassneh Insurance Co of Israel v Steuart J Mew* [1993] 2 Lloyd's Rep 243; *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314 and *AEGIS v European Re* [2003] 1 WLR 1041) to that of the Australian High Court in *Esso Australia Resources Ltd v Plowman* (1995) 128 ALR 391.

3.71 Her Honour's view is consistent with the earlier decision of Kan Ting Chiu J in *Myanma Yaung Chi Oo Co Ltd v Win Win Nu* [2003] 2 SLR 547. In her view, the obligation of confidentiality is uncontroversial. The only considerations that require discussion are the exceptions to the obligation as provided under common law and the confidentiality rule (r 34.6 of the SIAC Rules 1997). She ruled that once recognition was granted to an award and judgment entered, it enters the public domain and no privacy can attach to enforcement proceedings attendant on the judgment. Similarly, if a party to the arbitration had divulged information about the arbitration to some other party, it cannot then raise any objection should the other party to the arbitration responded to those disclosures. She found that in the letters complained of, it was ICP and T K Low who had earlier divulged the information to strangers in an effort to avoid payment or to pressure ICP from insisting on seeking such payment. The Interpol Japan's report arose following a police report made by T K Low to the Indonesian police which exposed the second defendant to the risk of being unjustly arrested. The Cameron letter was a justified expression of frustration by a creditor who had not been paid what was lawfully found due to him and in any case Cameron did not send any release to the AWSJ. The Kaifu letter was possibly the result of threats of arrest heaped upon the respondents. In any event, by the time these letters were written, the award and the arbitration were in the public domain and no confidentiality attached to them. The learned judge, therefore, dismissed Suit 11/2005 as unmeritorious.

3.72 In relation to the claim for a declaration in Suit 12/2005, the court ruled that the matters raised by ICP as to misrepresentation, breach of implied term and failure of consideration were matters dealt with and dismissed by the arbitral tribunal. The only argument that required consideration was whether these decisions bound the guarantors. The court took the view that T K Low was not a mere guarantor to a party to the arbitration proceedings; he was the *alter ego* of ICP and played a central role in its arbitration and in this litigation; he was its privy. Accordingly, the doctrine of *issue estoppel* operated to prevent a re-litigation of the matters earlier disposed off in the arbitration. The plaintiffs, therefore, failed in the second suit.

3.73 The court's findings in *International Coal Pte Ltd v Kristle Trading Ltd* [2009] 1 SLR 945 are consistent with the robust stand Singapore courts are maintaining in support of international arbitration. The use of the confidentiality obligation to thwart or distract efforts at enforcement of an award has also been attempted without success in other jurisdictions: see *Bulgarian Foreign Trade Bank Ltd v A I Trade Finance Inc* (Swedish Supreme Court, 2000) *Yearbook Com Arb XXVI* (2001) paras 291–298).

Public policy and amount of recoverable costs in arbitration

3.74 The award of costs is a matter that is generally regarded as being within the power and discretion of the arbitral tribunal subject to the applicable contractual rules and to the national law where the award is made. The treatment differs with different arbitral institutions as well as with different national laws, for example, some national systems disallow or discourage the recovery of costs, while others permit recovery but subject them to a tariff or a percentage and yet others allow for recovery that approaches full indemnity. Most jurisdictions free the tribunal from the national law on the allocation of costs. This means that the tribunal need not be too concerned with how the courts in the seat of arbitration award or allocate costs, so long as the tribunal has some justifiable and rational basis for the award of costs.

3.75 Two sets of costs generally arise in arbitration. The first includes costs of the arbitration incurred jointly by the parties (sometimes termed as "costs of the award"). This includes the fees of the tribunal, the costs of room hire, administrative assistance, transcription, costs of the tribunal's appointed experts or advisers and where the arbitration is administered, fees of the arbitral institution. The second set of costs includes costs and expenses (other than the costs of the award) incurred by the successful party in the preparation and conduct of the case (sometimes referred to as the "costs of the reference"). This would include the fees and expenses of counsel or other representative, expert witnesses or advisers consulted. In both cases, the tribunal has the discretion to decide by whom the costs may be borne, the amount of such costs and in what manner the costs are to be paid. When making an award, the tribunal has a duty to allocate costs and may, if permitted by the law or rules of arbitration, fix or assess the quantum of the parties' recoverable costs. If the tribunal does not assess the costs, the same may be assessed by the Registrar of the High Court (in domestic cases in accordance with s 39(1) of the Arbitration Act (Cap 10, 2002 Rev Ed)) or by the registrar of the SIAC (in international cases in accordance with s 21 of the International Arbitration Act (Cap 143A, 2005 Rev Ed)).

3.76 An award of costs made by a tribunal, being an award, is subject to the similar grounds for setting aside under Art 34 of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration. In *VV v VW* [2008] 2 SLR 929, the plaintiffs, which had failed in its principal claims in the arbitration, applied to set aside the award on the basis that the tribunal had awarded costs far in excess of the aggregate of its principal claims. The dispute in that case arose from a 1996 contract for the plaintiffs to provide services for an infrastructure project in the defendant's country. The plaintiffs claimed to be entitled to terminate the contract and demanded payment of some $927,000. The defendant counterclaimed for damages amounting to about S$20m. The arbitrator dismissed the plaintiffs' claim and concluded that it was unnecessary to consider the defendant's counterclaims since there was nothing to set-off and that he did not have jurisdiction to consider them as independent claims.

3.77 In his award on costs, the arbitrator awarded to the defendant $2,805,498.52 in legal costs and expenses. This figure included $2.25m in legal fees which he fixed "doing the best [he could] in all the circumstances". The plaintiffs sought to set aside the award on costs on the grounds that (a) the degree to which the legal costs exceeded the amount in dispute violated Singapore public policy; (b) the arbitrator lacked jurisdiction to award costs on the counterclaims; and (c) the arbitrator breached the requirements of natural justice by relying on his own knowledge of what constituted standard legal fees in international arbitration.

3.78 Judith Prakash J declined to set aside the award. She followed the Court of Appeal's call in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597 that the public policy ground should only be applied where "upholding … an arbitral award would 'shock the conscience' … or [would be] clearly injurious to the public good or … violate the forum's most basic notion of morality and justice": *VV v VW* [2008] 2 SLR 929 at [17]. The court found that there is no legal basis to suggest that there was a principle of proportionality between the claim amount in dispute and the legal costs awarded in international arbitration. Even in the UK, where there is legislation requiring courts to consider proportionality when awarding costs, the court is to have regard for "all the circumstances" and is not to determine the figure mechanically. Singapore courts do not have authority to ensure that costs in arbitrations conform to any given principle (whether proportionality or otherwise). Her Honour stated (*VV v VW* [2008] 2 SLR 929 at [31]) that "[t]here is no public interest involved in the legal costs of parties to one-off and private litigation".

3.79 The court also clarified that the natural justice requirement does not require the arbitrator to seek the parties' positions on every

issue before making a conclusion. The assessment of costs is entirely an opinion of reasonableness and not strictly fact-finding. Courts in England and Singapore rely on their own judgment when setting hourly rates and taxation costs. International arbitrators should have the same ability to rely on "their general knowledge and experience as well as on the precedents cited to them by counsel": *VV v VW* [2008] 2 SLR 929 at [56]. While expressing sympathy for the plaintiff's view that "the Arbitrator made a mistake in his assessment of costs" (at [58]), the court, nevertheless, had no power to correct it.

3.80 Judith Prakash J's decision in *VV v VW* [2008] 2 SLR 929 does raise some concerns regarding the issue of costs in international arbitration. It cannot be denied that there is much force in the argument that the tribunal which has a more intimate knowledge of the arbitral proceedings would be better placed than another taxing authority, even if it is the administering institution. Yet it should not be denied that an arbitrator assessing costs could only rely on the cases he was previously involved as a guide. An administering institution, while not having as intimate a knowledge as that of the arbitrator is in fact not totally divorced from the process and has the advantage of being able to draw upon the institutional knowledge regarding the practices and principles drawn from a much larger *corpus* of cases it has administered. While the costs of each case should, of course, be determined according to the special facts of that case, the development of recognisable practices and norms developed through these processes would be helpful in promoting consistency in the taxation of costs in international arbitration.

3.81 Perhaps an even greater concern lies not with taxation but with signs that legal costs may be rising with higher hourly rates and larger teams representing parties in arbitration and litigation. A report prepared by The World Bank Group, "Doing Business Project Report 2009" <http://www.doingbusiness.org/ExploreEconomies/?economyid=167> (accessed 23 April 2009) ranked Singapore as No 1 in terms of overall ease of doing business but noted that costs for enforcing contracts in Singapore had risen to about 25.8% of the amount in dispute resulting in a fall in competitive ranking from third to 14th placing. While the debate thus far has centred on whether or not this is an accurate report, this author believes that a more positive discussion should address the steps that should be taken to keep legal costs in check to retain Singapore's competitive edge.