3. ARBITRATION

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Commencement of arbitration

Contractual time limitation

3.1 Arbitration, like an action in court, must be commenced within the time prescribed by statute or as contractually agreed to by the parties. Contractual time-bar may either bar the claim in its entirety or merely bar the right for a party to make a claim in 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 jurisdiction can be established over the parties. The extent and ambit of the contractual time-bar must necessarily depend on the language of and the context in which the limitation provision is found.

3.2 In an arbitration to which the Arbitration Act (Cap 10, 2002 Rev Ed) ("AA") applies, the court may, on the ground that undue hardship may otherwise be caused, extend the contractual time limited for commencement of the arbitration: s 10 of the AA). Undue hardship means greater hardship than the circumstances warrant or hardship greater than that which, in justice, the applicant should be called upon to bear. The court may do so even though the time so fixed by agreement had expired. The case of *Tay Eng Chuan v Ace Insurance Ltd* [2007] SGHC 212 involves the consequences of failing to meet the contractual time set for commencing arbitration

3.3 The plaintiff in *Tay Eng Chuan v Ace Insurance Ltd* [2007] SGHC 212 had suffered injury to his left eye as a result of an accident that had 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. Two of the insurers, AXA and UOI, disputed his claims and the disputes were referred to arbitration.

3.4 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.

3.5 The plaintiff attended another medical examination by an eye specialist on order of the court obtained for the AXA arbitration. The medical report was received on 13 February 2004 which indicated that the plaintiff's left eye could perceive light and hand movements. On 21 May 2004, the defendant replied that it was maintaining its position that the plaintiff had not suffered a total loss of sight in one eye within the meaning of the insurance policy. On 23 May 2004, the plaintiff proposed that the defendant reconsider the claim after the conclusion of the AXA arbitration and that, if necessary, the dispute be referred to arbitration thereafter. The defendant refused the proposal. The policy contained the following provision 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.

3.6 Part 9, cl 3 ("claims provisions") states:

> 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.

3.7 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 AXA and UOI 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 to three months after the conclusion of the UOI arbitration. 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.

3.8 Tay Yong Kwang J 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 Part 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.

3.9 The terms of many insurance policies do contain provisions for arbitration and the corresponding references to obtaining an arbitral award as a condition precedent to liability under the insurance contract. This decision illustrates that it is possible that an arbitration clause which bars only the right to arbitrate when read with other provisions in the contract may effectively extinguish a party's cause of action altogether if not adhered to.

Enforcement of the arbitration agreement

Reconciling exclusive jurisdiction and arbitration clauses

3.10 Under s 6 of the AA, the power to order a stay of court action and refer the parties to arbitration under the AA is a discretionary one. Before a court does so, the court must first be satisfied that an arbitration agreement exists that covers the subject matter in dispute before the court. Exclusive jurisdiction clauses and arbitration clauses co-existing in contracts are generally ill-advised as they are often inconsistent and engender doubts as to the actual intentions of the parties.

3.11 Similar difficulties would also confront parties who had entered into more than one related agreements with different dispute resolution mechanisms. In *Econ Piling Pte Ltd v NCC International AB* [2007] SGHC 17, the parties were joint-venture partners under a Joint Venture Agreement ("the JVA") dated 13 May 2002 and successfully bid for a construction project on tender by the Land Transport Authority. A year later, Econ faced financial difficulties and the parties entered into a further agreement dated 22 May 2003 ("the Variation Agreement") in order to restructure their commercial relationship in an attempt to secure the continued viability of the project. Econ's financial difficulties

led to the appointment of an interim judicial manager who on 6 February 2004, informed NCC's solicitors that Econ would not be continuing its participation in the project.

3.12 According to Econ, following discussions between the parties, a decision to dissolve the partnership was reached. However it appeared that NCC did not and was not going to sign the Deed of Resolution. Econ filed an Originating Summons No 694 of 2006 ("OS 694/2006") on 31 March 2006, seeking a declaration that the partnership had been dissolved or, in the alternative, an order to dissolve the partnership. NCC applied to stay the action. The assistant registrar granted the application. This decision was, however, reversed on appeal to Sundaresh Menon JC.

3.13 The court had to consider the two dispute resolution clauses, one contained in the JVA and the other in the Variation Agreement, namely:

> **JVA cl 22.5 –**
>
> Any matter which cannot be resolved in the manner provided by the preceding Sub-clauses of this Clause 22, shall be finally settled by *arbitration* in accordance with the Rules of the Singapore International Arbitration Centre presently in force by one or more arbitrators appointed in accordance with the Rules.
>
> **Variation Agreement**
>
> Cl 11. In the event of any dispute or difference arising between the parties, they hereby agree:–
>
> > 11.1 that the same shall be forthwith referred to the exclusive jurisdiction of the Singapore Court and shall be pursued with all expedition by the Referring Party…

3.14 NCC had argued that these two clauses could be reconciled in that disputes which had arisen from the JVA would be referred to arbitration and those that were covered by the Variation Agreement would be referred to litigation in the court. NCC also referred to cl 1.3(b) of the Variation Agreement in which it was noted that a party may refer a dispute arising from the decisions on the composition of the management board or the executive committee to arbitration under cl 22 of the JVA.

3.15 In the court's view, however, in the subsequent Variation Agreement, the parties had decided to have all disputes arising from the JVA as varied by the Variation Agreement to be resolved by the Singapore courts and not to arbitration. The learned judicial commissioner held that the inconsistency between the dispute resolution clauses in the JVA and the Variation Agreement would deem that cl 11.1 in the latter had superseded cl 22.5 of the JVA. The court

also disagreed with the suggestion that the reference in cl 1.3(b) to arbitration under cl 22 of the JVA evidenced that the parties had intended to retain the arbitral process in cl 22 for all disputes under the JVA. His Honour took the view that, at its best, cl 1.3(b) would only preserve for arbitration, cases in those limited circumstances and no more. The stay of the originating summons was, therefore, refused.

3.16 In reaching his decision, the learned judicial commissioner appeared to have also been influenced by his doubt that an arbitrator may not have the power to dissolve a partnership when he said *obiter*, that "while there was no contest that an arbitrator has the power to grant a declaration, it was disputed that an arbitrator would have the power to order the dissolution of a partnership" (at [28]).

3.17 His Honour did not elaborate on the basis for doubting the arbitrability of dissolution of partnership but the *dicta* adds to the list of grey areas on subject-matter arbitrability in Singapore.

Judgment in default of defence and stay pending arbitration

3.18 An application for stay of court proceedings in favour of arbitration in a domestic arbitration under the AA may be made "at any time after appearance and before delivering any pleading or taking any other step in the proceedings": s 61 of the AA. 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. Complications and confusion do often arise when a plaintiff insists on the defendant, who is seeking a stay pending arbitration, to file the defence under threat of entering a judgment in default or a summary judgment.

3.19 An attempt to reconcile the statutory right of a party to seek a stay under the AA and the need to comply with the requirements of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC") to file a defence within a prescribed time by deeming the defence as not being a "pleading" or the filing of the defence as not being "a step in the proceedings" ("compromise orders") had been frowned upon in the Court of Appeal's decision in *Samsung Corp v Chinese Chamber Realty Pte Ltd* [2004] 1 SLR 382 ("*Samsung Corp*"). The Court of Appeal in that decision effectively postponed the time of the filing of defence by mandating that a stay application must be determined first before any further steps (including the filing of defence) are taken in the proceedings to enter summary judgment under O 14 ROC. That formulation, however, did not appear to be sufficient to prevent the entry of a judgment in default of defence under O 19 ROC (see *Australian Timber Products Pte Ltd v Koh Brothers Building & Civil*

Engineering Contractor (Pte) Ltd [2005] 1 SLR 168 ("*Australian Timber*") where the court refused to set aside a default entered on this basis; see also the author's comments on this decision in (2004) 5 SAL Ann Rev 48 at paras 3.14–3.18). In *WestLB AG v Philippine National Bank* [2007] 1 SLR 967, Kan Ting Chiu J, commenting on the *dicta* in *Australian Timber* that "an act, which would otherwise be regarded as a step in the proceedings, will not be treated as such if the [party] has specifically stated that he intends to seek a stay or expressly reserves his right to do so", properly cautioned that such an expressed reservation or indication of intention to apply for a stay may not be sufficient by itself to preserve that right (at [41]).

3.20 A situation similar to *Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2005] 1 SLR 168 arose in *Go Go Delicacy Pte Ltd v Carona Holdings Pte Ltd* [2008] 1 SLR 161. 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 AA. 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.

3.21 The assistant registrar (see [2007] SGHC 97) granted the application for default judgment, and made no order in relation to the stay application. Before him, the decisions in *Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2005] 1 SLR 168 ("*Australian Timber*") and *Samsung Corp v Chinese Chamber Realty Pte Ltd* [2004] 1 SLR 382 ("*Samsung Corp*") were heavily canvassed. The learned assistant registrar ruled that there was a bifurcation of the concept of *filing a defence* as spoken of in the *Samsung Corp* decision and the *extension of time to file a defence* as alluded to in *Australian Timber*. In his analysis, *Samsung Corp* merely stands for the proposition that a defendant may not be compelled to file a defence while an application for a stay in favour of arbitration is pending, and that *Australian Timber*, on the other hand, requires the defendant to take proactive steps to ensure that the court grants an extension of time to ensure that the defendant will not fall foul of the timelines stipulated in the Rules of Court.

3.22 In her grounds dismissing the appeal, Lai Siu Chiu J in *Go Go Delicacy Pte Ltd v Carona Holdings Pte Ltd* [2008] 1 SLR 161 took the view that a stay of the proceedings was not practical as only the first defendant who was a signatory would be bound by the arbitration clause in the Franchise Agreement. All the others being non-signatories could not avail themselves of the arbitration process as a court cannot "compel non-parties to an agreement that contains an arbitration clause to arbitrate their dispute merely because one defendant is a party to that agreement" (at [26]).

3.23 The learned judge also expressed her agreement (at [36]) with the assistant registrar's view that the defendants ought not 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.

3.24 The High Court's decision in *Go Go Delicacy Pte Ltd v Carona Holdings Pte Ltd* [2008] 1 SLR 161 ("*Go Go Delicacy*") brings to fore 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 which if done would defeat that right. If the intention of the Court of Appeal's decision in *Samsung Corp v Chinese Chamber Realty Pte Ltd* [2004] 1 SLR 382 was to avert a compromise of the right to seek a stay pending arbitration, would it not be superfluous to insist that the applicant seeks an extension of time to file the defence just for the purpose of complying with the technical requirements of the Rules of Court? If the timelines in the Rules of Court are intended to make the court process less cumbersome and shorten the proceedings with "the overriding goal of facilitating the fair and expedient disposal of cases before the courts" (*per* the assistant registrar in *Go Go Delicacy Pte Ltd v Carona Holdings Pte Ltd* [2007] SGHC 97 at [1]), then it would appear that the suggestion that apart from just applying for stay pending arbitration, the applicant should still file for extension of time to file defence (which it had no apparent intention to do so) or face the plaintiff's application for judgment in default of defence, would in fact protract and complicate the process.

3.25 The learned judge's holding in *Go Go Delicacy Pte Ltd v Carona Holdings Pte Ltd* [2008] 1 SLR 161 that only one defendant is a party and, therefore, the action should not be stayed, also calls into question how a court should in domestic cases under the AA exercise its discretion to grant or refuse a stay. Should a party or parties to an arbitration agreement be deprived of its/their right to arbitrate only because the plaintiff had added other parties to the action who are not

parties to the arbitration agreement? Further, are non-signatories always necessarily non-parties to the agreement? These and other issues await clarification from the courts.

Plaintiff seeking stay of its own action

3.26 The right to seek a stay of court action would normally be invoked by the defendant who seeks the benefit of an arbitration agreement but this right may sometimes be invoked by the plaintiff in certain circumstances. This view was earlier expressed in the High Court decision of *The Sunwind* [1998] 3 SLR 954, albeit in relation to an application under the International Arbitration Act (Cap 143A, 2005 Rev Ed) where an *in rem* action was commenced to obtain security for arbitration. More complications would arise if a party who had earlier commenced arbitration when faced with a challenge that the arbitral tribunal could lack jurisdiction then commences an action in court. Questions such as which of the two proceedings should properly be allowed to continue, *ie*, whether a court should allow a plaintiff to stay the action it had of its own volition commenced, would have to be answered.

3.27 Such a situation confronted Choo Han Teck J in *Mitsui OSK Lines Ltd v Samudera Shipping Line Ltd* [2007] SGHC 41. In that case, the plaintiff and another company, Mitsui OSK Lines (SEA) Pte Ltd, commenced arbitration proceedings against the defendant, claiming damages for breach of contract and for negligence in tort. The defendant denied liability to the plaintiff on the ground of lack of contractual relationship between them. To preserve their right to claim in tort, the plaintiff then commenced an action in court against the defendant and proceeded to file their statement of claim. The defendant applied to strike out the plaintiff's action in court and for an injunction against the plaintiff from prosecuting the arbitration as there would be duplicity of proceedings concerning the same dispute. The defendant contended that s 6 of the AA permitted the plaintiff, after filing the protective writ, to stay the court action pending arbitration. Having filed its case statement, the plaintiff would be considered to have elected to litigate and thus could not simultaneously pursue its claim in arbitration.

3.28 In his decision dismissing the defendant's application to strike out the plaintiff's claim and refusing an injunction against the continuation of the arbitration, Choo J took the view that s 6 of the AA applies only if the party instituting a court action was "a party to an arbitration agreement". As the defendant had challenged the plaintiff's right in the arbitration proceedings on the averment that the plaintiff was not a party to the arbitration agreement, s 6 of the AA cannot be the basis for the defendant's application to stay the arbitration proceedings.

The court acknowledged that the plaintiff cannot be allowed to maintain two separate proceedings for a cause of action arising from the same set of facts. To prevent the arbitration from proceeding would affect a non-party to the court action, namely, Mitsui OSK Lines (SEA) Pte Ltd. The court as such ordered the action stayed and for the arbitration to continue. His Honour did so in reliance not on s 6 of the AA but on the power under cl 9 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, R5, 2006 Rev Ed) ("SCJA") where the High Court is empowered to dismiss or stay proceedings for various reasons, including a multiplicity of actions.

3.29 An uneasy feature of this decision is the fact that the plaintiff had filed the statement of claim in the action, which constitutes a waiver of the right to arbitrate under s 6 of the AA (the statement of claim being clearly a "pleading" and a "step in the proceeding"). Choo J cured this waiver by exercising his additional powers under the SCJA.

Winding-up proceedings and arbitration

3.30 The grant of a winding-up order by a court is an exercise of its specific statutory duty, as opposed to its adjudicatory jurisdiction in resolving matters in dispute arising out of a commercial contract. Winding-up proceedings have sometimes been allowed to proceed even though there is an arbitration clause in the contract between the applicant and the company (see *Re Sanpete Builders (S) Pte Ltd* [1989] SLR 164). At times, this can lead to the anomalous situation where a party who is faced with a substantive claim in arbitration can frustrate the arbitral process by applying for the winding-up of the claimant, with the immediate result that the arbitration (being a legal proceeding) has to be stayed in the first instance. The Court of Appeal's decision in *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR 268 sets out some guiding principles in the winding-up process that could address such anomalies.

3.31 The disputes between the plaintiff ("Metalform") and the defendant ("Holland Leedon") arose out of a sale and purchase agreement ("the SPA") in which Metalform agreed to purchase the business of manufacturing and selling covers for computer disk drives from Holland Leedon for a total price of US$267m. Holland Leedon had also supplied Metalform with steel for which an undisputed sum of US$16,990,308 was due from Metalform. Metalform alleged that Holland Leedon had made fraudulent representations and had breached warranties under the SPA for which Metalform claimed about US$35m against Holland Leedon. Metalform filed an originating summons seeking an injunction to restrain Holland Leedon from presenting a winding-up application based on the undisputed debt until the determination in arbitration of its (Metalform's) claims for breaches of

warranties under the SPA. The High Court (see [2006] 3 SLR 133) rejected Metalform's application to prevent the presentation of the winding-up, holding that there was no collateral motive on the part of Holland Leedon to restrain it from exercising its rights *qua* creditor (see the author's comments in (2006) 7 SAL Ann Rev 55 at paras 3.11–3.13).

3.32 The Court of Appeal reversed this decision and granted an injunction restraining Holland Leedon from proceeding with the winding-up process until Metalform's cross-claim has been decided by the arbitrator. The Court of Appeal found as a fact that Metalform had a genuine cross-claim based on substantial grounds and until these were decided in the arbitration, it would not be possible to know if the cross-claim was not equal to or in excess of the undisputed debt. Although the court found no evidence of any collateral motive on the part of Holland Leedon, it ruled that the filing of a winding-up petition against Metalform would likely cause irreparable harm to Metalform's business and reputation. The court also held that Holland Leedon had not shown any special circumstances why the court should not restrain Holland Leedon from presenting a winding-up petition against Metalform.

3.33 This decision clarifies that so long as there is a genuine cross-claim, a petition for winding-up should not proceed until the cross-claim by the company has been determined, reversing a view taken by the High Court in *Tang Choon Keng Realty (Pte) Ltd v Tang Wee Chong* [1992] 2 SLR 1114 which had given prime consideration to the statutory right of a creditor of an undisputed debt and criticising restraining orders against winding-up petitions as having "the potential of defeating the rights of creditors who may not have the same financial resources as the company, thereby denying them equal access to the court after a pre-emptive strike." In the Court of Appeal's view, these considerations do not outweigh "the policy consideration that the commercial viability of a company should not be put in jeopardy by the premature presentation of a winding-up petition against it where it has a serious cross-claim based on substantial grounds" (at [82]).

3.34 Yet another matter involving winding-up and pending arbitration process was considered in *S Y Technology Inc v Pacific Recreation Pte Ltd* [2007] 2 SLR 756, where Judith Prakash J had to consider petitions filed by the plaintiff, S Y Technology Inc, for the winding-up of two defendant companies, Pacific Recreation Pte Ltd ("PRPL") and Pacific Association Pte Ltd ("PAPL"). These companies, PRPL and PAPL, had executed a deed of indemnity and guarantee ("the Deed") in its favour to secure any amount due and owing from Shanghai Pacific Club Co Ltd ("Shanghai Pacific"), a company incorporated in the People's Republic of China, and one Mr Lee Chong Ming, a director of both the defendant companies. Shanghai Pacific had drawn on a facility arranged by the applicant but had failed to make

repayment. The plaintiff claimed that a sum of US$4,623,999.97 was outstanding from Shanghai Pacific. The agreement of 21 January 2003 between Shanghai Pacific and Mr Lee Cong Min ("the 2003 Agreement") setting out the financing arrangements, contained an arbitration clause providing for any dispute arising therefrom to be referred to the China International Economic and Trade Arbitration Commission ("CIETAC") for resolution through arbitration. The plaintiff made a statutory demand on the defendants on 24 April 2006. On 15 May 2006, Shanghai Pacific's Mr Lee submitted a request for arbitration to CIETAC asserting that because the 2003 Agreement had not been registered as required by Art 40 of the "Interim Measures on the Management of Foreign Debts", a Chinese law that had been enacted in April 2005, the 2003 Agreement was not legally binding on Shanghai Pacific and that all obligations imposed on the guarantors of Shanghai Pacific had been lawfully discharged.

3.35 The defendants did not challenge the outstanding amount due from Shanghai Pacific to the plaintiff. Instead, they asserted that the 2003 Agreement was not legally binding under Chinese law, and that all guarantees and indemnities given by the defendants would also be invalid. Alternatively, the Deed, being collateral to the 2003 agreement, was tainted with this illegality and, therefore, was also illegal and void. The defendants argued that as the issue of the legality of the 2003 Agreement had been referred to arbitration in CIETAC, the winding-up proceedings should not be proceeded with pending the final outcome of the arbitration.

3.36 Prakash J rejected the defendants' argument and ordered the winding-up of the defendants. Her Honour ruled that an indemnity is in the nature of a primary obligation and a creditor may still recover the relevant losses even if the principal transaction was defective. The defendants, therefore, had no *bona fide* dispute to the demand for payment. The CIETAC arbitration proceedings were irrelevant as they involved the parties to the 2003 Agreement and the defendants were not parties thereto. The defendants' obligations to the plaintiff arose under a separate Deed. They were not involved in the arbitration and could not be affected by its outcome.

3.37 It is clear from the court's ruling that the mere commencement of an arbitration alone cannot thwart the proper exercise of the statutory right to wind-up a company where there is no *bona fide* dispute on the debt owed.

Judicial assistance in aid of arbitration

Interim measures in aid of arbitration proceedings

3.38 Singapore courts have the power to make interim measures in aid of arbitration and such steps are not considered to be incompatible with the applicant's intention to proceed with the arbitration. In an arbitration which falls under the International Arbitration Act (Cap 143A, 2005 Rev Ed) ("IAA"), this power includes the making of restraining orders (injunctions) as well as ordering a party to do a positive act (mandatory injunction): s 12(7) of the IAA. These powers should only be exercised if the applicant has commenced or has taken some steps in resolving the disputed matters in arbitration. This is illustrated in the decision of Kan Ting Chiu J in *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2007] SGHC 64.

3.39 The sudden banning of the export of concreting sand by the Indonesian authorities in February 2007 had affected all the construction companies involved in the many ongoing construction projects in Singapore. The plaintiff, NCC International AB, had in July 2006 entered into a contract with the defendant, Alliance Concrete Singapore Pte Ltd, under which the defendant was obliged to supply ready-mix concrete to the plaintiff's construction projects. Certain measures were taken by the relevant authorities to ameliorate the problems created by the ban. However, disputes arose between the plaintiff and defendant over the collection and payment for the sand from the suppliers to enable the defendant to prepare the ready-mix concrete. The plaintiff commenced action and applied for an interlocutory mandatory injunction for the defendant to continue to deliver concrete to it under the terms of the contract pending commencement of arbitration proceedings. The contract provided for a tiered dispute resolution process requiring a reference to the supervising engineer, then mediation before commencement of arbitration at the Singapore International Arbitration Centre ("SIAC"). At the time of the application, no steps had been taken to follow the dispute resolution process set out in the agreement.

3.40 Kan J rejected the application for the interlocutory mandatory injunction, holding that the plaintiff had not shown itself to deserve the court's assistance. His Honour frowned on the plaintiff's failure to avail itself of the various measures offered by the Building Construction Authority and the Singapore Contractor's Association and had instead insisted that the defendant complied with the terms of the contract. The court also noted that the plaintiff had not taken steps to seek resolution of the problem but had instead simply applied for the mandatory injunction (initially *ex parte*, until directed by the court to enable the

defendant to be heard), an action perceived to have weakened the plaintiff's averment that it was deserving of urgent assistance.

3.41 This decision will no doubt serve to remind applicants that the powers given to the court in s 12 of the IAA is a power that is to be exercised judiciously by the court only in aid of arbitration or resolution of the dispute. It is not intended to permit a party to "steal a march" over the other, placing unnecessary burden into already difficult situations. In any event, the powers given in s 12 of the IAA are but discretionary powers (not mandatory ones) which a court could exercise. The plaintiff's application if granted, would have been an order for specific performance of the contract pending the determination of the merits of the dispute. The plaintiff's failure to take steps to resolve the dispute by referring it to mediation or to commence arbitration as agreed to in the contract, had properly been taken against the plaintiff in its application for judicial assistance.

3.42 The issue whether Singapore courts should in exercise of its powers under the IAA render assistance to arbitration seated in Singapore only have been considered in several decisions (see the Court of Appeal's decision in *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 which ruled that s 12(7) of the IAA would not apply to give the court the power to make interim orders in aid of an arbitration which has its seat outside Singapore; whereas a different school of thought is represented in the decisions of *Econ Corp International Ltd v Ballast-Nedam International BV* [2003] 2 SLR 15 (Lai Kew Chai J), and *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR 854 (Belinda Ang Saw Ean J).

3.43 In December 2006, the Revised Articles of the UNCITRAL Model Law on International Commercial Arbitration ("2006 Revision MAL") were adopted by the 61st Session of the General Assembly by Resolution No A/RES/61/33. Included in the 2006 Revision MAL is the provision relating to interim measures by the court. The revised Art 17J reads:

> **Article 17J. Court-ordered interim measures**
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> A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

3.44 This revised provision reflects the views of the international arbitration community of users and practitioners and spells out in clear terms that the intent of the MAL is for courts to support arbitration wherever seated and not to do so only in support of arbitrations held

within the court's territorial jurisdiction. Perhaps a policy decision should soon be taken by the legislature whether to adopt a more liberal rather than a parochial view in Singapore's judicial support of international arbitration.

Recourse against awards

Domestic arbitration – Appeal on question of law

3.45 Recourse against an award made in an arbitration under the AA may be made by way of an appeal to the High Court on a question of law arising out of an award made in the proceedings (s 49(1)) or by an application for setting aside on the limited grounds of procedural defects set out in s 48 of the AA.

3.46 An appeal against an award may be brought only if the parties consent or with leave of the court. Where the parties have consented or leave has been granted by the court, the court may examine the question(s) of law decided in the award and make a determination as to its propriety. The court may confirm the award, vary it, or remit it to the tribunal for reconsideration or set aside the award in whole or in part.

3.47 In *Ng Chin Siau v How Kim Chuan* [2007] 2 SLR 789, the defendant, Mr How Kim Chuan, was in partnership with several partners (in different combinations) in five dental practices and a dental laboratory, located in various parts of Singapore. Differences arose between him and his other partners resulting in him retiring from the practices. The amount claimed on his retirement was disputed by the partners and the matter was referred to arbitration by agreement of the parties on 12 October 2004. The partnership agreement provided for the valuation of the practices to be:

> … determined by a valuation made by a valuer to be agreed or (if the Partners cannot agree upon a valuer) by the average valuation made by two independent valuers to be appointed by each Partner.

3.48 At the arbitration, the parties had each submitted valuation reports of the practices by accountants: the partners submitted a report by M/s Tan & Teh ("Teh") which had valued Mr How's share of the goodwill in the Hougang clinic at $54,017.47 and Mr Koh of T K Low & Co, who valued it at $474,201. During the course of cross-examination, it became known that Mr How had earlier engaged another firm Ewe, Loke & Partners ("Ewe") which had given a valuation of $376,650.00. In his award, the sole arbitrator valued the Hougang clinic at $215,333.74, taking the average of the values given to the share of the goodwill in the Teh and Ewe reports and awarded the same to Mr How.

3.49 Both Mr How and the other partners sought leave to appeal. The partners were granted leave by Prakash J to appeal against the valuation of the Hougang clinic. Her Honour allowed the appeal on hearing the merits, ruling that the arbitrator had erred in law by going beyond the pleaded case of the parties and applying the averaging method to come to his decision on the valuation of the Hougang clinic when it was clear that the parties had abandoned the exchange and averaging procedure when the parties each submitted their reports to the arbitrator for a decision as to which of the reports/expert's evidence should be adopted in deciding the valuation of the Hougang clinic. The court added that the arbitrator having rejected Mr Koh's valuation and accepted the Teh report had failed "to take the obvious next step which was to adopt Mr Teh's valuation as the only credible valuation before him and make his award on that basis" (at [28]). The court, accordingly, varied the award by substituting the average valuation of $215,333.74 with the Teh valuation of $54,017.47.

3.50 The learned judge quite properly noted (at [26]) that an arbitrator is "not entitled to go beyond the pleadings and decide on points on which the parties had not given evidence and had not made submissions". She also added the sound advice that (at [26]):

> If an arbitrator considers that the parties have not framed their cases correctly and that certain points need to be addressed then he must indicate his concerns to the parties and allow them to make such amendments to their pleadings and to adduce such additional evidence as may be necessary to deal with those concerns. He is not entitled to make a decision on points that have not been addressed by the parties. The necessity of abiding by this rule is important in litigation but it is essential in arbitration proceedings where the right of appeal is severely restricted.

3.51 It is curious, however, that the court should consider the Teh report to be the only credible valuation when the arbitrator had also found the Ewe report to be credible. Could it be said that the parties had abandoned the averaging method merely because the parties had taken a certain view in their pleaded case? Should the arbitrator not be entitled to hold parties to the contractual method even if each insisted on their own valuations?

3.52 A party who is dissatisfied with the High Court's decision on the appeal against the merits of the award under s 49(1) of the AA, may appeal to the Court of Appeal with leave of the High Court. Mr How applied for leave to appeal to the Court of Appeal but this was refused by the learned judge on 6 March 2007 on the ground that there was neither a question of law of general importance to be brought before the Court of Appeal nor any special reason that her decision requires consideration by the Court of Appeal.

3.53 In her decision rejecting leave, Her Honour adopted the definition of a "question of law … of general importance" given by Lai Kew Chai J in *Anthony s/o Savarimiuthu v Soh Chuan Tin* [1989] SLR 607 (at 608E, [2]) as a "question … upon which further argument and a decision of a higher tribunal would be to public advantage". As the issue involved in this case was specific only to the partnership, the court's decision could not be said to be of such import. As for the alternative test for leave, *viz* "special reason", the court suggested that only the correction of egregious errors of law should qualify as "special reason" to allow leave to appeal and that the threshold for leave to appeal to the Court of Appeal cannot be lower than the "obviously wrong" basis on which leave to appeal to the High Court against an award of the arbitrator is required. Her Honour would not agree that her decision was "obviously wrong" and as no other "special reason" could be proffered by the defendant, leave was, accordingly, refused.

Appeal against High Court's decision on the arbitration award

3.54 Mr How then applied to the Court of Appeal under s 49(7) of the AA for leave to appeal against Prakash J's decision refusing leave to appeal against her decision on the appeal against the award. The Court of Appeal held (see [2007] 4 SLR 809) that an application for leave to appeal against a decision of the High Court on the merits of an appeal against an arbitration award cannot be brought to the Court of Appeal. Where the High Court has made its decision either to allow or to refuse leave to appeal to the Court of Appeal under s 49(11) of the AA, that decision stands as final. There can be no doubt that this decision is consonant with the legislative intent behind s 49 of the AA of promoting finality and limited curial intervention in arbitration proceedings.

3.55 The Court of Appeal, nevertheless, hinted that in very limited circumstances, there could well be justification for the Court of Appeal to intervene to avert procedural injustice. Adopting the view expressed in the English Court of Appeal decision in *North Range Shipping Ltd v Seatrans Shipping Corp* [2002] 1 WLR 2397 ("*North Range*"), V K Rajah JA posited that there is a *residual jurisdiction* vested in the Court of Appeal to hear an appeal against a refusal to permit an appeal in circumstances in which the judge's decision had allegedly been unfair. His Honour said (at [69]):

> [I]n our view, the Court of Appeal has a residual jurisdiction to enquire into unfairness in the process of a refusal of leave under s 49(11) of the Act read together with ss 29A(3) and 29A(4) of the SCJA. We agree that there is a distinction to be drawn between a decision on the merits and the process by which that decision is reached. Where the Court of Appeal exercises this residual jurisdiction, it does so *only* to correct the *process* of decision-making of the High

> Court; it does not purport – indeed, it does not have the jurisdiction – to interfere with the *merits* of a decision of the High Court.

3.56 As there was no hint of any procedural unfairness in the case, there was, therefore, no question of the need for exercising this residual jurisdiction. Nonetheless, it appears that the Court of Appeal is ready and will in appropriate cases step in to address any inappropriate process that had occurred in the High Court's exercise of its appellate function over arbitral awards.

Domestic award – setting-aside

3.57 Recourse against an award by way of a setting-aside application may be made on the limited procedural grounds set out in s 48 of the AA. These grounds include procedural defects in the making of the award, such as the invalidity of the arbitration agreement, the incapacity of the parties to agree to arbitration, the award deciding upon matters beyond the scope of the reference, the improper composition of the tribunal, the existence of fraud or corruption infecting the making of the award and more substantive matters such as the arbitrability of the subject matter in dispute or the breach of the rules of natural justice in the making of the award. The last of these arose for consideration in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR 86.

3.58 In the instant case, disputes arose out of a construction contract in the standard form of the Singapore Institute of Architects' Articles and Conditions of Building Contract (Measurement Contract) (5th Ed) ("SIAC Conditions") for the development of a condominium project in which the contractor's engagement was terminated. The matter was referred to arbitration and the arbitrator made an award in favour of the contractor, Soh Beng Tee & Co Pte Ltd ("SBT"), ruling that the termination was wrongful and that the architect ought to have granted reasonable extension of time for SBT to complete the works. Two grounds were cited as the bases for the application to set aside the award, both of which, Fairmount said, hinged on the finding by the arbitrator that time for performance of the works had been set at large. The High Court rejected the first ground of challenge (namely, that the arbitrator's decision on time being set at large was outside the scope of the reference), but proceeded to set aside the award on the ground that the arbitrator had breached the rules of natural justice (see *Fairmount Development Pte Ltd v Soh Beng Tee & Co Pte Ltd* [2007] 1 SLR 32). The learned judge in the High Court ruled that the breach was occasioned by the arbitrator having come to his decision without the issue of whether time for performance was at large having been raised in written submissions or in oral arguments by the parties, or drawn to the parties' attention for further submissions. SBT appealed to the Court of Appeal.

3.59 The Court of Appeal unanimously allowed the appeal, holding that there was no breach of natural justice in the making of the award. The issue of whether time was set at large was "live" throughout the proceedings. Fairmount was made aware of the allegation of acts of prevention from the pleadings and the submissions. The issues of whether time had been set at large by Fairmount's acts of prevention and whether time extension should have been granted by the architect were in reality two sides of the same coin. The court also found that the learned judge's ruling that the decision was not outside the scope of submission but yet in breach of the rules of natural justice was clearly inconsistent.

3.60 The Court of Appeal held that the arbitrator's comment that time was set at large was not material in his final assessment as to whether SBT was in breach of its obligation to complete the works with due expedition (see this author's comments on the High Court's decision in (2006) 7 SAL Ann Rev 63 at paras 3.34–3.39).

3.61 In the decision, the Court of Appeal meticulously examined and analysed numerous judicial opinions from English, Australian and New Zealand courts on the requirements imposed on an arbitrator by the rules of natural justice, and, in particular, the right to be heard and the extent to which an arbitrator may decide on issues that have not been addressed. The court observed that in considering these decisions, "international practice has now radically shifted in favour of respecting and preserving the autonomy of the arbitral process in contrast to the earlier practice of enthusiastic curial intervention" (at [59]).

3.62 From the cases surveyed, the court summarised very concise and useful principles on the application of natural justice which should be adopted for both international and domestic arbitrations in Singapore, namely:

> (a) Parties to arbitration have a right to be heard effectively on every issue that may be relevant to the resolution of a dispute. An arbitrator should not base his decision(s) on matters not submitted or argued before him. Arbitrators who exercise unreasonable initiative without the parties' involvement may attract serious and sustainable challenges.
>
> (b) It would also be unfair to the successful party if it were deprived of the fruits of its labour as a result of a dissatisfied party raising a multitude of arid technical challenges after an arbitral award has been made.
>
> (c) The policy of minimal curial intervention recognises the autonomy of the arbitral process by encouraging finality, and parties must be taken to have acknowledged and accepted the attendant risks of having only a very limited right of

recourse to the courts. A court will not intervene merely because it might have resolved the matters differently.

(d) The balance in preserving the integrity of the arbitral process and ensuring adherence to the rules of natural justice is preserved by strictly adhering to only the narrow scope and basis for challenging an arbitral award that has been expressly acknowledged under the AA and IAA. In so far as the right to be heard is concerned, the failure of an arbitrator to refer every point for decision to the parties for submissions is not invariably a valid ground for challenge. Only where the impugned decision reveals a dramatic departure from the submissions, or involves an arbitrator receiving extraneous evidence, or adopts a view wholly at odds with the established evidence adduced by the parties, or arrives at a conclusion unequivocally rejected by the parties as being trivial or irrelevant, might it be appropriate for a court to intervene. In short, there must be a real basis for alleging that the arbitrator has conducted the arbitral process either irrationally or capriciously.

(e) Where parties propose diametrically opposite solutions, the arbitrator is not bound to adopt an either/or approach. He is not expected to inexorably accept the conclusions being urged upon him by the parties. Neither is he expected to consult the parties on his thinking process before finalising his award unless it involves a dramatic departure from what has been presented to him.

(f) It is not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process; rather, an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied.

3.63 This decision has no doubt set the benchmark for the tests to be applied in every case where an award, whether in the international or domestic regime, is challenged on the allegation of a breach of natural justice.