3. ARBITRATION LAW

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Nature of arbitration

"Success fee" arrangements and their use in arbitration

3.1 Lawyers, experts and other professionals assisting parties in claims, whether in litigation or arbitration, are normally paid for the services which they render independent of the outcome of the case. Contingency or "success fee" arrangements are considered champertous arrangements which courts have consistently held as unenforceable due to public policy. Ironically, the argument made in favour of permitting contingent fee arrangement is also the public policy of ensuring access to justice for those who would otherwise not be able to afford it. Contingency fees arrangements have generally been allowed in the US. In 1999, in England, unhappiness with the rising costs of litigation led to the introduction of a controlled form of contingency fee arrangement, termed "conditional fees" (see s 58 of the Courts and Legal Services Act 1990 (c 41) (UK), as amended in 1999). It permits arrangements for "no-cure-no-pay" arrangements in personal injury actions, with the lawyer collecting up to double his normal fees if the claim succeeds. These arrangements apply whether the case is before the courts or in arbitration (see *Bevan Ashford v Geoff Yeandle (Contractors) Ltd* [1999] Ch 239 *per* Sir Richard Scott VC).

3.2 Champerty is an arrangement where one party agrees to aid another to bring a claim on the basis that "the person who gives the aid shall receive a share of what may be recovered in the action" (Andrew Phang Boon Leong, *Cheshire, Fifoot and Furmston's Law of Contract – Singapore and Malaysian Edition* (Butterworths Asia, 2nd Ed, 1998) at p 639). The public policy which renders champertous agreements illegal rests on the need to protect the integrity of public justice against perversion from the proper course of justice. Champertous arrangements are almost always spoken in relation to litigation, but have recently also been raised in relation to arrangements relating to claims made in arbitration.

3.3 In *Otech Pakistan Pvt Ltd v Clough Engineering Ltd* [2006] 3 SLR 1 (HC), [2007] 1 SLR 989 (CA), the first defendant ("Clough"), which had entered into two contracts for the construction of gas-condensate plants with

the Oil and Gas Development Company Limited ("OGDCL"), a government-owned corporation in Pakistan, had disputed claims by and against OGDCL. Clough engaged the services of the plaintiff ("Otech") to assist it in relation to OGDCL's claims against it and in prosecuting its own claims against OGDCL. The fee arrangement for Otech as agreed to between Clough and Otech in 1997 was based on a formula linked to the rate of recovery, *viz,* 40% of any sum in excess of US$8m recovered from OGDCL in respect of one contract and 50% of any amount in excess of US$3m recovered in respect of the second contract. A meeting was held in 1999 with some discussions on revision of the fee arrangement. It was, however, inconclusive. In February 2002, Clough was dissatisfied with Otech's performance and terminated the latter's services. In July 2004, Clough finally settled its disputes with OGDCL for US$7.515m. Otech demanded to be paid 20% of the settlement sum paid by OGDCL to Clough, alleging that that was the fee arrangement as revised in 1999, and commenced action for recovery of its fees. The High Court found in favour of Clough, noting that there was no agreement reached on the revision of the fee arrangement in 1999. As the amount recovered by Clough was less than US$8m, no fee would be payable to Otech. The court declined to decide on whether the original fee arrangement was a champertous arrangement. Before the Court of Appeal, Clough repeated its grounds for resisting payment, including the fact that the arrangement was a champertous contract. Otech argued that even if the contract was champertous, the law of champerty would not apply to arbitration. The Court of Appeal affirmed the High Court's findings and decision, but decided that it was necessary to rule also on the applicability of champerty to arbitration.

3.4 Judith Prakash J, delivering the judgment of the Court of Appeal, examined the conflict of judicial opinion in other jurisdictions on the applicability of champerty to arbitration. The learned judge disagreed with the Hong Kong High Court's decision in *Cannonway Consultants Limited v Kenworth Engineering Ltd* [1995] 2 HKLR 475, which took the view that the doctrine of champerty had developed for the public justice system in the courts and should not be extended to the private consensual system of arbitration. Kaplan J, who had relied on the English Court of Appeal's and the House of Lords' decision in *Giles v Thompson* (1993) 143 NLJ 284 (CA), [1994] 1 AC 142 (HL), also stated at 484 that "[t]he trend in recent years has all been the other way".

3.5 The Court of Appeal analysed the decisions in *Giles v Thompson*, but could not agree with Kaplan J's observation that there was a strong

inclination among the judges in England not to apply the doctrine of champerty to arbitration proceedings. The court concluded (at [36]) that:

> [T]he purity of justice and the interests of vulnerable litigants are as important in such proceedings as they are in litigation. Thus, the natural inference is that champerty is as applicable in the one as it is in the other.

Similar sentiments had been expressed by Sir Richard Scott VC in *Bevan Ashford v Geoff Yeandle (Contractors) Ltd* (*supra* para 3.1). Agreeing, the Court of Appeal expressed its views very succinctly as follows (at [38]):

> The law of champerty stems from public policy considerations that apply to all types of legal disputes and claims, whether the parties have chosen to use the court process to enforce their claims or have resorted to a private dispute resolution system like arbitration. In our judgment, it would be artificial to differentiate between litigation and arbitration proceedings and say that champerty applies to the one because it is conducted in a public forum and not to the other because it is conducted in private. The concerns that the course of justice should not be perverted and that claims should not be brought on a speculation or for extravagant amounts apply just as much to arbitration as they do to litigation.

3.6 This decision also dispels the commonly held misconception that the rule against "success fee" or champertous arrangements applies only to practising lawyers. While lawyers, both advocates and solicitors, are prohibited by their professional ethical rules from entering into success fee arrangements, the principle underlying champerty is not one of ethics or discipline, but of public policy. Fee arrangements which, by their nature, pervert the proper outcome of litigation or arbitration are champertous arrangements and would be struck down as offending public policy. It matters not whether the same is entered into by lawyers, claims consultants or advisors, costs clerks or persons of other calling. It should similarly apply to people who are called as expert witnesses in litigation or arbitration for, if there is a threat that these witnesses' objectivity may be clouded by a contingency fee arrangement, it follows that it would pose a danger to the proper administration of justice.

3.7 Whether this policy has prevented access to justice in court or to arbitration is, of course, a matter of assessment and review. It does not appear, at the moment at least, that there is any such concern.

Enforcement of the arbitration agreement

Winding-up proceedings and arbitration

3.8 The existence of an arbitration agreement would normally give a party a right to refer disputes arising under the underlying contract to arbitration. In some jurisdictions, the courts would refuse to entertain claims on the ground that they lack jurisdiction; in others, the courts would dismiss an action commenced in breach of the arbitration agreement. In Singapore, as with many jurisdictions with common law roots, the courts maintain their own curial jurisdiction, but will usually stay the pending action in favour of arbitration.

3.9 There are specific provisions both in the Arbitration Act (Cap 10, 2002 Rev Ed) ("AA") and the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") that empower the court before which an action is pending to grant a stay. Whereas the power to do so in an arbitration under the AA is discretionary, the court is mandated under the IAA to stay the proceedings if the arbitration is an international arbitration or has its seat outside Singapore.

3.10 Singapore courts have invariably exercised these powers in support of the arbitral process. One area that remains ambiguous, however, is that concerning companies in the winding-up process. While the presentation of a winding-up application may be regarded as the commencement of an action in court (see *Re W Carter Smith, ex parte Commissioners of Taxation* (1908) 8 SR (NSW) 246), it may nevertheless not amount to the commencement of proceedings under the contract in dispute. The courts seem to treat the grant of a winding-up order as an exercise of their specific statutory duty, as opposed to their adjudicatory jurisdiction in resolving matters in dispute arising out of a commercial contract. On this basis, 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 and discontinued eventually (see *Four Pillars Enterprises Co Ltd v Beiersdorf Aktiengesellschaft* [1999] 1 SLR 737 (CA)). At other times, the filing of an application for winding up can be used to extract security for costs against the claimant in arbitration. The competing interests of parties and the issue of collateral intention in filing a winding-up application were examined in

Metalform Asia Pte Ltd v Holland Leedon Pte Ltd [2006] 3 SLR 133, where an application for an injunction against a winding-up applicant was considered.

3.11 There, the plaintiff ("Metalform") had agreed to purchase the business of manufacturing and selling covers for computer disk drives from the defendant ("Holland Leedon") for a total price of US$267m pursuant to a sale and purchase agreement ("the SPA"). 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.

3.12 Woo Bih Li J refused to grant the injunction sought. He held that while a court might restrain the filing of a winding-up application or decline to make an order on such an application if the debtor had a *bona fide* cross-claim based on substantial grounds, under the terms of the SPA, a sum of $25m was already held in an escrow account to meet any claim under the warranties. The learned judge also agreed with counsel for Holland Leedon that where a debt is clearly due, the general rule, although not an absolute one, is that the creditor has the right to petition for the debtor's winding-up, "whatever may be his motives" (*per* Chao Hick Tin JC (as he then was) in *Re Sanpete Builders (S) Pte Ltd* (*supra* para 3.10) at 176, [45]). In underscoring that the rule is a general and not an absolute one, Woo J hinted at the possibility that if there are any illegitimate collateral reasons for presenting a winding-up application, the court can prevent the applicant from doing so even if the debt is an undisputed one. In the circumstances of the case, the court found no collateral motive on the part of Holland Leedon to restrain it from exercising its rights *qua* creditor.

3.13 This decision offers a glimmer of hope that when hearing a winding-up application, especially one by a party involved in a dispute with or relating to the company which is the subject matter of the application, the court will apply its mind judiciously to ascertain if there are collateral motives. Such improper motive should, in the author's view, include an attempt to frustrate ongoing or anticipated arbitral proceedings.

Judicial assistance in aid of arbitration – security for foreign arbitrations

3.14 Section 12(7) of the IAA gives the High Court the power to grant injunctions in respect of arbitrations under the same Act. This, read with Art 9 of the UNCITRAL Model Law on International Commercial Arbitration ("MAL") (set out in the First Schedule to the IAA), which is specially expressed to apply even to arbitrations not held in Singapore, appears to extend this power to permit the High Court to grant interim measures in support of arbitration even if the seat is outside Singapore. This view appears to have been accepted by the Singapore court in *Econ Corporation International Limited v Ballast-Nedam International BV* [2003] 2 SLR 15, where an injunction was granted by Lai Kew Chai J to restrain a party from calling on a performance bond even though the arbitration was in India. The issue of whether a Singapore court can order interim measures in aid of arbitration which has its seat outside Singapore was, however, contested in two cases before the High Court.

3.15 In *Swift-Fortune Ltd v Magnifica Marine SA* [2006] 2 SLR 323 ("*Swift-Fortune* (HC)"), Judith Prakash J took the view that the court has no power to make such an order unless the arbitration has its seat in Singapore. In *Swift-Fortune* (HC), the purchasers of a ship, shortly before the scheduled date for the delivery of the ship, applied for and obtained an *ex parte* injunction against the sellers preventing the sellers from removing or disposing in any way their assets in Singapore up to the value of US$2.5m. It essentially prevented the sellers from removing the deposit held here by a Singapore bank. The purchasers had claims for delay in the completion of the sale and intended to pursue the claims in arbitration, as provided for in the contract, by English law in London. Prakash J set aside the *ex parte* injunction, holding that s 12(7) of the IAA, which empowers the High Court to assist international arbitrations, did not include international arbitrations having their seat outside Singapore. She took the view that Singapore legislation generally only has territorial effect unless specifically provided otherwise, adding that Art 9 of the MAL read with Art 1(2) of the MAL also did not provide adequate justification. Article 9 was merely a permissive article that allowed parties to international arbitrations to apply to domestic courts for protection where the domestic law already had provisions making such protection available to the parties. In Prakash J's view, there was no power in the IAA which empowered the court to make such an order or render assistance in aid of foreign arbitration. She reasoned that the legislature, in enacting s 12(7), had intended to promote arbitration in Singapore and had not contemplated extending the application of s 12(7) in support of arbitrations outside Singapore.

3.16 A different approach was, however, taken in the decision of Belinda Ang Saw Ean J in *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR 854 ("*Front Carriers*"). In that case, the plaintiff simultaneously commenced arbitration proceedings in London against the defendant ("A&O") for breach of a time charter and took out an originating summons and obtained an *ex parte* Mareva injunction in the Singapore High Court. On hearing the matter *inter partes*, the court set aside the injunction on the basis that the plaintiff had failed to establish that there was a real risk of dissipation of the defendant's assets. The learned judge, however, differed from Prakash J's ruling in *Swift-Fortune* (HC), and held that the court may, under s 12(7) of the IAA, grant Mareva relief in aid of foreign arbitration proceedings. Her Honour reasoned that s 12(7) of the IAA gives effect to Art 9 MAL which has the "force of law in Singapore" (*Front Carriers* at [17]) In her view, the purpose of Art 9 of the MAL was to preserve the right of parties to have recourse to courts for interim measures which were supportive of the arbitration irrespective of the seat of arbitration, so long as the court had *in personam* jurisdiction over the party against whom the measure was sought and so long as the measure sought was within the range of measures which the court was empowered to make. Ang J, thus, shared the views given by Lai J in *Econ Corporation International Limited v Ballast-Nedam International BV* (*supra* para 3.14).

3.17 Ang J also considered that s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("CLA"), which gives a general power to the court to make orders for interim injunction, read with Art 9 of the MAL, would further support the court's jurisdiction to make interim injunctive relief in support of arbitration so long as the court regarded it as "just or convenient" (*per* s 4(10) of the CLA) to do so. The court distinguished the Court of Appeal's decision in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR 112 ("*Karaha Bodas*"), where it was held that a Singapore court has no power to grant Mareva relief in respect of the Singapore assets of a foreign defendant if the only purpose of such relief was to support foreign court proceedings.

3.18 The parties in *Swift-Fortune* (HC) and *Front Carriers* both filed appeals against the respective decisions. In December 2006, the Court of Appeal, in *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 ("*Swift-Fortune* (CA)") affirmed the decision of Prakash J in *Swift-Fortune* (HC), holding that a Singapore court has no statutory power to grant interim orders or relief to assist international arbitration under the IAA.

3.19 The Court of Appeal embarked on a very meticulous examination of the various provisions of the IAA and, in particular, traced the legislative

history of s 12(7) of the IAA as well as the drafting history of Art 9 of the MAL. The court noted that s 12(7) was enacted as part of s 12 and not as an independent provision. Section 12(1) read with s 12(7) of the IAA gives the High Court a whole range of powers enabling it (concurrently with the tribunal) to make orders, specifically, orders security for costs; discovery of documents and interrogatories; giving of evidence by affidavit; preservation, interim custody or sale of any property forming the subject matter of the dispute; taking of samples; preservation and interim custody of evidence for the purposes of the proceedings; securing the amount in dispute; and interim injunctions or other interim measures. Some of these powers, such as the power to order discovery, interrogatories and security for costs, "[might] be antithetical to the curial law chosen by the parties" (*Swift-Fortune* (CA) at [51]) and might be considered an intrusion on or interference with the powers of a foreign arbitral tribunal. The court found that a literal reading of s 12(7) of the IAA would mean that the full range of these powers would be statutorily implied into all foreign arbitrations whether seated in Singapore or elsewhere, a situation which the court felt would be contrary to the spirit of international arbitration. The court felt compelled to conclude that the legislature could not have intended s 12(7) to apply to foreign arbitrations. The court ruled that the words in s 12(7) of the IAA that the court has the powers "as it has for the purpose of and in relation to an action or matter in the court" did not independently confer upon the court any new powers, *viz*, if a court has no power to grant interim measures in an action or matter before the court, it has no power to do so either in relation to an arbitration to which the IAA applies.

3.20 Section s 4(10) of the CLA was also examined by the Court of Appeal in *Swift-Fortune* (CA). The court noted that in both *Karaha Bodas* and *Swift-Fortune* (HC), the plaintiff did not have an accrued cause of action against the defendant that was recognisable by a Singapore court, whereas in *Front Carriers*, the plaintiff had an accrued cause of action against the defendant that was subject to the jurisdiction of the Singapore court.

3.21 It was part of the findings of the Court of Appeal (at[96]) that:

> Where the plaintiff has such a cause of action against the defendant who is subject to the personal jurisdiction of the Singapore court (as, *eg*, where he has assets in Singapore), *Front Carriers* ... has decided that the court has power under s 4(10) of the CLA to grant a Mareva injunction in aid of the foreign arbitration to which the substantive claim has been referred in accordance with the agreement of the parties, and by implication, where the substantive claim is tried in a foreign court.

3.22 Notwithstanding this, the Court of Appeal observed (at [93]) that there were differences between the legal framework in Singapore and that in England relating to the power of the court to grant interim measures to assist foreign court and foreign arbitral proceedings, and noted (at [94]) that it was:

> [T]herefore open to argument in a future case whether in the context of the political and commercial conditions existing in Singapore in 1878, the legislature of the Straits Settlements had intended s 4(10) [of the CLA] to give power to the court to grant interlocutory injunctions in aid of foreign court proceedings, or even less likely in aid of foreign arbitral proceedings. Unlike in England where legislative and policy developments since the 1980s appeared to have influenced the courts in their interpretation of s 37(3) of the [Supreme Court of Judicature Act 1981 (c 54) (UK)] (which has no equivalent in Singapore), there has been no such development in Singapore in relation to s 4(10) of the CLA as a source of statutory authority in relation to Mareva injunctions in aid of foreign proceedings until the enactment of the IAA. Given that Parliament ignored s 4(10) of the CLA entirely when it enacted the IAA to provide a new statutory framework for international arbitrations in Singapore, a court would need to know why it was necessary to enact s 12(7) of the IAA if the court had power under s 4(10) to grant Mareva relief in aid of foreign arbitrations. Perhaps it was simply a case of Parliament's attention not having been drawn to the need to provide a broader framework to deal with interim measures to assist foreign proceedings, whether court or arbitral proceedings.

3.23 By its decision in *Swift-Fortune* (CA), the Court of Appeal has settled the debate over the statutory interpretation of s 12(7) of the IAA read with Art 9 of the MAL. It has added a new and fresh dimension to the development of international arbitral jurisprudence. However, the Court of Appeal has also hinted that the policy issue of whether Singapore courts ought to support only Singapore-based arbitrations is one for the legislature to decide, and not one for the courts to second-guess.

3.24 In this author's respectful view, to render no assistance to parties on the basis that the seat of arbitration is not in Singapore is not consistent with Art 9 of the MAL as well as with the positions taken in other jurisdictions (see, *eg*, the House of Lords' decision in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, where the arbitration was to be held in Brussels, yet the court said it had power to grant an injunction in aid of that arbitration; see also *The Lady Muriel* [1995] 2 HKC 320). Singapore has hitherto been seen as a "pro-arbitration" regime. The position as it now lies with the *Swift-Fortune* (CA) decision cuts a different picture, *viz*, that

Singapore is actually only "pro-Singapore arbitration". If the intention is to pitch Singapore as a serious international arbitration hub, a parochial approach of self-help may actually be self-defeating.

Recourse against awards

Domestic arbitration – appeal on question of law

3.25 A party who is dissatisfied with an award made in an arbitration under the AA has the choice of appealing, with the consent of all the parties or the arbitrator or with the leave of the court, against the award if there is a question of law that can substantially affect the rights of the parties. Leave to appeal is granted only in the specific situations provided for in s 49(5) of the AA. Another possible recourse against the award is to apply to set it aside on the limited procedural grounds set out in s 48(1) of the AA.

3.26 An application for leave to appeal must be made timeously. V K Rajah J (as he then was) in *Progen Engineering Pte Ltd v Winter Engineering (S) Pte Ltd* [2006] SGHC 224 at [17] expressed the view that in considering an application for leave out of time, the court would scrupulously assess the application:

> ... so as never to detract from the parliamentary policy of promoting finality in arbitration awards. The longer and more inappropriate the delay the more reluctant the courts should be in acceding to such applications.

3.27 Not every legal issue decided in an award will give rise to a question of law that can be subject to appeal. An appeal on a question of law must also be premised on the findings of fact made in the award. The case of *Ng Huat Foundations Pte Ltd v Samwoh Resources Pte Ltd* [2006] SGHC 43 ("*Ng Huat Foundations*") illustrates this distinction. The parties to that action, Ng Huat Foundations Pte Ltd ("NHF") and Samwoh Resources Pte Ltd ("Samwoh"), had entered into a pre-bid joint venture agreement to bid for the Minstry of Defence's project for a quarry-shaping and rock removal project. The bid was submitted in the name of Samwoh and was accepted for the project. A company, Gali Batu Quarry (S) Pte Ltd ("Gali Batu"), was incorporated to be the joint venture vehicle for the project. Disputes, however, arose between the parties as to the detailed terms of the joint venture. The matters were referred to arbitration, with Samwoh seeking a declaration that the joint venture had been terminated due to repudiatory breaches by NHF. Samwoh succeeded in the arbitration and was awarded the declaration sought together with the full benefit of the interest in the project after the date of termination. NHF obtained leave to appeal on a question of law under s 49 of the AA. The

question posed for decision on appeal was: whether a party to a joint venture contract which has accepted the repudiatory breach of the other party is entitled thereafter to the entire benefit of the assets of the joint venture, including the right to retain for itself all profits from such assets earned after acceptance of the repudiatory breach. NHF submitted that the question must be answered in the negative and, relying on an English decision in *The European Strategic Bureau Ltd v Technomark Consulting Services Ltd* (Ch D, 20 June 1995), advanced several arguments to suggest that the arbitrator's decision resulted in a windfall for Samwoh and that the over-compensation violated the principle of awarding only compensatory damages.

3.28 Before answering the question, Judith Prakash J, noting that the question presupposed a finding that the project was an asset of the joint venture, set out to determine if there was such a finding of fact by the arbitrator. Her Honour found no such finding. She found, instead, that the arbitrator had always treated the project as being between Samwoh and the Ministry of Defence, and that Samwoh was responsible for the execution of the project, with Gali Batu as the joint venture vehicle. The appeal was thus dismissed without the need to answer the question of law posed.

3.29 The approach taken by the court is that in every appeal against an award on a question of law, the court can only rule on that question of law if it is premised on the findings of fact in the award. This approach must be correct, for the court should not be concerned with issues of law which have no link to factual findings in the award, however interesting such issues may be. It is interesting, however, to note that the court in *Ng Huat Foundations* considered the issue of whether the question of law was based on findings of fact in the award only at the stage of considering the merits of the appeal, whereas s 49(5) of the AA requires that the court grant leave to appeal only if it is satisfied that the question of law has, as its basis, the findings of fact in the award. Perhaps, the court's approach in *Ng Huat Foundations* was a case of "better late than never".

3.30 Parties seeking leave to appeal often attempt to put forward their putative case in the hope that the court will see the merits and strength of their case and lean towards granting leave to appeal. The role of a court considering leave to appeal was succinctly summarised by Belinda Ang Saw Ean J in *Progen Engineering Pte Ltd v Chua Aik Kia* [2006] 4 SLR 419. There, the court had to consider an application to set aside an award on the basis of "misconduct" under s 17(2) of the repealed Arbitration Act (Cap 10, 1985 Rev Ed) ("the repealed Arbitration Act") (repealed in 2001) as well as an alternative application for leave to appeal under s 28 of the repealed Arbitration Act. The learned judge, citing the Court of Appeal's decision in

Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd (No 2) [2004] 2 SLR 494, distinguished between an "error of law" and a "question of law" as referred to in the Act. Her Honour went on to explain that the court, on hearing such an application, need do no more than to look at the award and, if the court so decides, other documents referred to in the award, and form a provisional view as to whether the arbitrator's decision on a question of law which was required to be answered was "obviously wrong" (if it was a "one-off" question) or whether there was a "strong *prima facie* case" (in the case of a question which would aid the understanding of the law in other cases) that the arbitrator's decision was wrong. The court found that the "questions of law" as framed by the applicant ("Progen") were not questions of law that required determination. The first question, which related to whether, under the agreement concerned, Progen ought to be given the right to make deductions for the costs of materials, was described by the learned judge as an attempt to ask the court to make a different finding of fact. She pointed out at [16] that:

> [T]he arbitrator's findings of fact are conclusive; it is irrelevant whether the court considers those findings of fact to be right or wrong. The upshot of this is that on an application for leave to appeal, the court must decide any question of law arising from an award on the basis of an unqualified acceptance of the findings of fact of the arbitrator as the court has no jurisdiction to set aside an award on the ground of errors of fact on the face of the award.

3.31 There was Progen's second question of whether the award of costs to the other party was correct when the arbitrator had found Progen not to be in breach. Quite apart from the fact that the arbitrator had explained the basis for that ruling, the court also rejected this issue as not being a question of law but, at the very worst, if at all, a misapplication of the law. Finally, the court rejected Progen's complaint that the arbitrator had made a finding against the weight of evidence. In the opinion of the court, this was not a question of law but a question of the arbitrator's finding of facts. Admissibility of evidence, weight of the evidence and the inferences to be drawn from it are essentially matters for the arbitrator against which there should be no basis for appeal.

3.32 Parties should be aware that attempts to couch factual findings by framing them into questions of law will not find favour before Singapore courts.

Domestic arbitration: setting aside for "misconduct" under the repealed Arbitration Act

3.33 Parties in arbitration cases conducted under the repealed Arbitration Act can also apply to set aside an award on the ground that the arbitrator had misconducted himself or the proceedings. (It may be noted that "misconduct" is no longer a ground for setting aside an award under the AA.) In *Progen Engineering Pte Ltd v Chua Aik Kia* (*supra* para 3.30), the learned judge very properly dismissed the allegation of "misconduct" which, in essence, consisted of allegations that the arbitrator had not given sufficient weight to Progen's evidence and submissions and had therefore shown bias against Progen. The learned judge put it most clearly (at [38]) that:

> [A]ny inconsistency in the treatment of the evidence would not constitute or evidence misconduct on the part of the arbitrator.

3.34 Recourse by way of setting aside an award on procedural grounds is also available to awards made under the AA. These grounds include "a breach of the rules of natural justice". Judith Prakash J had occasion to consider two of the limited grounds for setting aside in the case of *Fairmount Development Pte Ltd v Soh Beng Tee & Co Pte Ltd* [2007] 1 SLR 32, namely, that the tribunal had acted the beyond the scope of the reference(s 48(1)(*a*)(iv) of the AA) and/or that the tribunal had breached the rules of natural justice in connection with the making of the award (s 48(1)(*a*)(vii) of the AA). (These grounds have sometimes been mistakenly labelled as "misconduct": see the headnote of the report.) The disputes there 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) 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. The plaintiff in this action ("Fairmount") singled out three crucial paragraphs of the award (see at [12] of the judgment) for attack, *viz*:

> 207. In their Written Submissions the Respondent [Fairmount} submitted that the Claimant [SBT] has not given any evidence on the amount of extension of time that they claim they would be entitled to for all these alleged delaying events and no expert has been called to assess the amount of extension of time that the Claimant would be entitled to for all the alleged events in question. Further, the Tribunal does not have the pre-requisite expertise and skills to properly assess the Claimant's claim for

> extension of time for all these alleged events on its own. The Tribunal cannot be expected to guess at or speculate over the amount of delays that may have been caused by these alleged events. Likewise, the Tribunal cannot be expected to guess at or speculate over what amount of additional time the Claimant would possibly need to complete the Project as a result of these alleged events. As there is no evidence or basis before the Tribunal to enable it to properly and correctly assess accurately or at all the Claimant's claim for an extension of time for the alleged events referred to above, the Tribunal accordingly has no power or jurisdiction to consider the Claimant's claim for an extension of time for these items. The Tribunal therefore must reject all the claims for extension of time for all these alleged events.
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> 208. Whilst it is true that without any delay analysis given by a competent witness, I am not able to come to a conclusion on the exact periods of time that should be awarded to the Claimant, I find that I have no difficulty in arriving at the conclusion that in principle, substantially more than 5 days of extension of time were due to the Claimant and I also find that acts of prevention by the Respondent as listed out above had affected the Claimant's ability to complete their work by the contractual completion date. Accordingly, I find and hold that the 5-day extension of time granted by the Architect no longer binds the Claimant and the Claimant was entitled to a reasonable time to complete the Works after 6 February 1999.
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> 209. After having considered the evidence before me and the submissions by counsel for the parties I find and hold that the Architect failed to give a fair and reasonable extension of time to the Claimant to complete the Project. The Architect had issued Architect's Instructions which caused further delay to the performance of the Works and had thus prevented the Claimant from completing the Works by the original contract date. Time for the performance of the Project was at large.

3.35 Fairmount submitted that the arbitrator had failed to make a determination on the extension of time and, therefore, the arbitrator could not be in a position to make a legitimate finding as to whether SBT had proceeded with diligence and due expedition. The court accepted Fairmount's submission that the issue of time extension was pivotal in the resolution of a substantial part of the dispute as it formed the yardstick against which the progress of work could be measured. 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.

3.36 The 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. 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.

3.37 It appears from a reading of the decision that the court probably misunderstood the arbitrator's decision in relation to the issue of extension of time. After quoting paras 207 to 209 of the arbitral award (see para 3.34 above), the learned judge commented at [13] that:

> The above paragraphs show how the arbitrator tried to deal with the issue of the extension of time. As he himself said, he found that he was unable to assess accurately the number of days of extra time to which SBT was entitled because SBT had not put sufficient evidence before him to come to such a conclusion. *He then went on to reject all the claims for extension of time for all the alleged delaying events. The arbitrator was not happy with this conclusion because he considered that acts of prevention by Fairmount had affected SBT's ability to complete its work so he then decided that SBT was entitled to a reasonable time to complete the work and that time for performance of the work was at large*. [emphasis added]

3.38 With respect, the court misconstrued para 207 of the award as the arbitrator's holding and concluded that the arbitrator had rejected all the claims for extension of time when para 207 of the award was in fact the arbitrator's summary of Fairmount's submission urging the arbitrator to reject SBT's claim for extension of time. The arbitrator's own findings can be found in paras 208–209 of the award, which were that Fairmount had committed acts of prevention which had affected SBT's ability to complete its work by the contractual completion date. Accordingly, the arbitrator found that SBT was entitled to a reasonable time to complete the works after the contractual completion date. The arbitrator's factual finding was that the delay was caused by the preventive acts of Fairmount and the architect and that SBT must be granted reasonable time to complete its works. That finding, in turn, led to his decision that the termination of the contract was wrongful. There was no doubt that the parties had submitted extensively on the issue of extension of time and the arbitrator had found that extension of time ought to have been granted, to the extent reasonable, to enable SBT to complete the contract works albeit he did not fix the period of time extension.

3.39 Admittedly, the use of the additional words in para 209 of the award that "[t]ime for the performance of the Project was at large" would appear meaningless or, at the very least, superfluous and unnecessary. It should not, however, form the basis for an attack which would result in the setting aside of the whole award. Excising these words from the award under the court's power to vary would probably achieve a more equitable outcome.

Challenging arbitral jurisdiction

Tribunal's ruling on jurisdiction – is that an award?

3.40 The decision of an arbitrator or arbitral tribunal on a matter in dispute is called an "arbitral award" or, simply, an "award". In the course of arbitration, the arbitral tribunal may make procedural directions and orders. Such interlocutory procedural directions and orders made in the course of arbitration have sometimes been erroneously termed as "interim" or "interlocutory" awards. In so far as such directions, orders and decisions do not determine matters in dispute, they should not be properly considered "awards" whatever the name the arbitral tribunal may choose to call them. Whereas recourse may be had against an award by way of the appeal process (if it is an arbitration under the AA) or a challenge under the setting aside procedure, a decision, direction or order which is not an award would not enjoy such right of judicial access. In this respect, two decisions relating to procedural matters have come before the Singapore courts.

3.41 A decision by an arbitral tribunal holding that it had no jurisdiction was sought to be set aside as an award in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] 1 SLR 197 (HC), [2007] 1 SLR 597 (CA). There, the parties were involved in two arbitrations. In the first arbitration, the respondent ("Dexia Bank"), as noteholders of a series of US$ notes issued by Rekasaran BI Ltd and guaranteed by the appellant ("Jasindo"), had obtained an award against Jasindo for US$8.6m in October 2001 ("the first award"). The first award was made on the basis that Jasindo's proposal to restructure its obligations, which would have resulted in a release of its guarantees, was not approved by the majority of the creditor noteholders. Subsequent to the issuance of the first award, a meeting of the noteholders was held in June 2001, at which the re-structuring scheme was approved. Jasindo then commenced a second arbitration seeking a declaration that the restructuring scheme had become binding on Dexia Bank. The tribunal was asked to consider the preliminary issue of its jurisdiction. In its award ("the Jurisdiction Award"), the second tribunal ruled that it lacked jurisdiction and dismissed Jasindo's claims in the arbitration. Jasindo applied to set aside the

Jurisdiction Award. The High Court dismissed the application and Jasindo appealed. In the High Court, the Jurisdiction Award was treated as an award subject to Art 34 of the MAL and s 24 of the IAA (see [2006] 1 SLR 197 at [20]; see also Lawrence Boo, "Arbitration" (2005) 6 SAL Ann Rev 49 at paras 3.37–3.39). In particular, the learned judge had said (at [30]) that:

> If the second tribunal deals with the challenge to its jurisdiction by ruling that it has jurisdiction, then that ruling can be challenged in court under the provisions of Art 16(3) of the Model Law. On the other hand, if the second tribunal rules that it has no jurisdiction because the issue in question had been finally decided by a prior arbitration between the same parties, then the aggrieved party can try to have that ruling set aside on one of the grounds set out in Art 34 of the Model Law (apart from the public policy ground) or in s 24 of the [IAA].

3.42 Before the Court of Appeal, counsel for both parties eschewed from canvassing this issue and were content to proceed on the basis that the Jurisdiction Award made by the arbitration tribunal was an award subject to the setting aside provisions. In the course of hearing the appeal, however, the Court of Appeal formed the view (at [61]) that there was a serious issue to be addressed which was dispositive of the appeal and appointed *amicus curiae* (the author was the *amicus* appointed) to make submissions on the following issue:

> Whether or not the decision of an arbitral tribunal convened under the auspices of the [IAA] that it has no jurisdiction to determine an issue referred to it under an arbitration agreement constitutes an award for the purposes of Section 2(1) of the Act such that it may be set aside by the Court in exercise of its jurisdiction under any of the provisions of the Act, if the circumstances of the case justify.

3.43 The *amicus*' submission that a negative ruling on jurisdiction was not an award under the IAA was accepted by the court. The court also accepted that Art 16(3) of the MAL, read with Art 5, would preclude any recourse to the courts of a negative ruling on jurisdiction.

3.44 Counsel for both parties had also attempted to characterise and restate the Jurisdiction Award as an "award on the merits" (see [2007] 1 SLR 597 at [64]) on the basis that an issue estoppel was raised, which would be a substantive defence against the continuation of the arbitration. Counsel referred to the analogy of a defence based on limitation. They urged that as the Jurisdiction Award dealt with *issue estoppel*, it should be considered in substance as an "award on the merits". The Court of Appeal, however, disagreed, holding that the legal nature of the two defences were different in

that with a limitation defence, there was an assumption that there was a valid claim, whereas, where *issue estoppel* was raised, it assumed that the issue had been decided against a party in a previous proceeding.

3.45 Although the Court of Appeal ruled against Jasindo, it expressed some sympathy with the plight which the latter had got itself into. Chan Sek Keong CJ suggested (at [76]) that Jasindo could well have some ground for resisting the enforcement of the first award when Dexia Bank sought leave for enforcement, which process conferred some discretion on the court (see *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue, 2003) at para 20.134, which was cited with approval). His Honour queried (at [77]) if "a court, as a matter of law, could enforce the [f]irst [a]ward, or, as a matter of discretion, should enforce the [f]irst [a]ward". It remains an interesting and novel question which will have to await further developments in this case.

Setting aside a tribunal's ruling on the governing law of the arbitration and the agreement

3.46 An interesting challenge was made in *Government of the Republic of the Philippines v Philippine International Air Terminals Co, Inc* [2007] 1 SLR 278, where the Government of the Philippines ("the GOP") applied to set aside a "Partial Award" made in October 2004 by an International Chamber of Commerce ("ICC") arbitral tribunal in Singapore, in which the tribunal had ruled that the law governing the arbitration proceedings and the arbitration agreement was the law of Singapore. These questions arose following a preliminary conference between the tribunal and parties' counsel, where the GOP's counsel submitted that a determination of these questions was a prerequisite to enable the parties to make their submissions on jurisdiction and the validity of the arbitration agreement (see [12] of the judgment). The challenged was launched principally on the allegation of breach of natural justice, in that the tribunal had dealt with the question of the separability of the arbitration clause from the contract in which it was contained (referred to by the judge as "severability" in the judgment) without allowing the parties to address the tribunal fully. The GOP submitted that its challenge to jurisdiction was premised on the concession agreements ("the Concession Contracts") pursuant to which the arbitration was commenced being "null and void *ab initio*" (see [21] of the judgment) such that the arbitration clause too was void. The GOP pointed out that the tribunal's discussion on separability in the Partial Award had, in its view, prejudged the issue of arbitral jurisdiction before it was argued.

3.47 Judith Prakash J, however, rejected the application. In the court's view, the GOP was merely attempting to seek a review of the merits of the tribunal's decision. The GOP's submissions were replete with discussions of separability. The concept of separability as a distinct feature in international arbitration would necessarily be involved in any discussion on the choice of law.

3.48 Both counsel, as did the learned judge, treated the tribunal's decision as an award subject to challenge under s 24 of the IAA and Art 34 of the MAL. Orders of a procedural nature are distinct from the "substance of the dispute" contemplated in the definition of "award" under s 2 of the IAA. As the Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* (*supra* para 3.41) pointed out, the label attached to a decision by the tribunal is not determinative of the nature of the decision. A procedural order does not become an "award" merely because the tribunal decides to call it so. In *Government of the Republic of the Philippines v Philippine International Air Terminals Co, Inc*, the use of the label "Partial Award" to the two matters decided as a precursor to the tribunal's own decision on jurisdiction did give cause for the court to attempt to suggest that the decision was not quite as binding as the label suggested. Prakash J said (at [41]):

> The fact that the Tribunal issued its decision by way of a partial award instead of by way of an order does not in my view alter the situation. [The] GOP pointed out that it is well known that an award once made is binding and final and the arbitrator cannot revisit the decision made save to correct clerical mistakes: see *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue) at para 20.096 and also s 19B of the [IAA]. However, that principle would not have an impact on the present position bearing in mind that the Award was made on the basis of assumed facts objectively gleaned from the document alone whilst when the jurisdictional objections are fully heard and determined, the subsequent decision would be made on the basis of the actual facts that led to the conclusion of the ARCA [one of the agreements making up the Concession Contracts].

Enforcement of foreign award

Enforcement by way of registration as a judgment under the Reciprocal Enforcement of Commonwealth Judgments Act

3.49 Awards made outside Singapore may be enforced in Singapore under s 29 of the IAA, which incorporates the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 38 (entered into force 7 June 1959) ("the New York Convention"), if the awards are made in a country which is a party to the New York

Convention, or under s 46(3) of the AA if the awards are not made in such a country.

3.50 An arbitral award may also be enforced under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) ("RECJA") if the award has, pursuant to the law of the place where it was made, become enforceable as a judgment given by a court in that place. These territories include the United Kingdom of Great Britain and Northern Ireland, Brunei Darussalam, Sri Lanka, Hong Kong (for judgments obtained before 30 June 1997), India (except the states of Jammu and Kashmir), Malaysia, New Zealand, Pakistan, Papua New Guinea and the Windward Islands. The RECJA only permits the enforcement of judgments for the payment of money where such judgments are final and not subject to any appeal in the originating court. A court hearing an application for leave to register a judgment based on an award is also required to ensure that enforcement of the award is not contrary to public policy (s 3(2)(*f*) of the RECJA) and that it is in all circumstances "just and convenient" that the judgment be enforced in Singapore (s 3(1) of the RECJA). There is a time limitation of 12 months from the date on which the judgment is entered in the originating court to apply for registration under the RECJA.

3.51 With the ease of enforcement under the New York Convention, awards are now rarely enforced through the registration route under the RECJA. One recent attempt was made in *Westacre Investments Inc v Yugoimport-SDPR* [2007] 1 SLR 501, where an ICC award made in 1994, in Geneva, Switzerland led to a long-drawn common law action for enforcement that eventually resulted in a final victory for the judgment creditor ("Westacre") before the House of Lords on 20 October 1999. Having obtained only partial satisfaction of the £41,584,488.86 debt by enforcement in England, Westacre applied to register the judgment in Singapore for recovery of the balance of the judgment debt. The judgment debtor ("Yugoimport") resisted the application on the ground, among others, that under English law, in particular, s 24(1) of the Limitation Act 1980 (c 58) (UK) ("the English Limitation Act"), the judgment debt could not be sued on again after six years and as such, by analogy, the judgment debt could not be registered abroad as a foreign judgment. This was rejected by Kan Ting Chiu J on the basis that the English Limitation Act had no application to the matter and that it was the Limitation Act (Cap 163, 1996 Rev Ed) that would apply to the action in Singapore. While the Limitation Act does not stipulate any time limit for registration of a foreign judgment, s 3(1) of the RECJA requires that the application for registration of the judgment be made within 12 months after the date of the foreign judgment "or such longer period as

may be allowed by the Court". In this regard, Westacre must show circumstances to persuade the court to extend the time for applying for registration under the "just and convenient" requirement in s 3(1). Westacre proffered two reasons for its delay in taking steps within the time limited, namely, that it had only found out Yugoimport's assets of some US$14.8m lying in Singapore in late July 2004, and that during the years from 1997 to 2002, Yugoslavia was in a state of war, bloodshed, political turmoil and instability, which made a recovery action impracticable. Yugoimport was then playing a central role in the country's military procurement and national defence. These grounds were rejected by the learned judge as not justifying Westacre's delay and the registration of the judgment was set aside.

3.52 It is clear from this decision that enforcement under the New York Convention is probably a much better option if the basis of a judgment is an arbitral award. It appears that the court would require special circumstances to justify a late registration of a foreign judgment. Unfortunately, given the peculiar facts of this case, Westacre, having obtained the award in 1994, would also be time-barred under s 6(1)(*c*) of the Limitation Act from commencing enforcement action in Singapore under the Convention. Had Westacre taken advantage of the enforcement mechanism under the New York Convention and sought enforcement in countries party to this convention instead of commencing a common law action in England, Westacre would probably have faced a much shorter route to realising the fruits of the ICC award made in Switzerland without the need for a trial in the English courts.

Enforcement and the issue of non-signatories

3.53 A court hearing an application for enforcement of a foreign award cannot review the case on the merits. It has no jurisdiction to set aside a foreign award. It has no discretion to refuse enforcement unless the party opposing the application proves one of the grounds for refusal of enforcement under s 31 of the IAA, but not otherwise. Attempts have sometimes been made to introduce new grounds to justify resisting enforcement of a foreign award.

3.54 The plaintiff in *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR 174 had obtained leave to enforce an award made by a tribunal of the International Centre for Dispute Resolution of the American Arbitration Association in Arizona against Asianic Food (S) Pte Ltd ("the first defendant") and Chiew Chee Boon ("the second defendant"). In the arbitration proceedings, the second defendant argued that he was not a party to the arbitration agreement as the dispute arose out of a contract between

the plaintiff and the first defendant, and that he had merely signed the contract as a manager of the first defendant. The second defendant initially challenged the tribunal's jurisdiction, but, following a preliminary ruling upholding jurisdiction, both defendants did not participate in the proceedings. In the award, the arbitrator found that the second defendant was the *alter ego* of the first defendant and hence was a party to the contract and the arbitration agreement. The second defendant applied to set aside the order granting leave to enforce the award on the grounds that the plaintiff had failed to establish that there was an arbitration agreement between the parties or, alternatively, that the second defendant was able to satisfy one or more grounds set out in s 31(2) of the IAA.

3.55 The application was dismissed by Prakash J. Her Honour held that the court's examination of the documents required under the IAA in an application to enforce an arbitral award was a formalistic or mechanistic one and did not require judicial investigation by the court as to whether the arbitral tribunal's finding that the second defendant was a party to the arbitration agreement was correct. Further, the second defendant could not satisfy any of the grounds set out in s 31(2) of the IAA as: (a) there was a valid arbitration agreement; (b) the award was not beyond the scope of the arbitration agreement (which ground related to the scope of the arbitration agreement rather than to whether a particular person was a party to the arbitration agreement); (c) the issue was arbitrable; and (d) the enforcement of the award would not offend notions of justice and morality and, hence, was not contrary to the public policy of Singapore.

3.56 The decision also signifies the first endorsement by a Singapore court of the concept of a non-signatory party to the arbitration agreement against whom arbitration maybe invoked. The use of the concept of *alter ego* and the lifting of the corporate veil in Singapore often requires a high degree of proof of fraud when such allegation is made in court proceedings. By refraining from interfering with the finding of the tribunal, the court in *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* cast its lot in favour of the independence and autonomy of the tribunal. This signifies the Singapore court's commitment to the support of international arbitration and Singapore's strict adherence to its treaty obligations under the New York Convention.