3. ARBITRATION

Lawrence **BOO**
LLB (University of Singapore), LLM (National University of Singapore); FSIArb, FCIArb, FAMINZ, Chartered Arbitrator;
Solicitor (England and Wales), Advocate and Solicitor (Singapore).

Enforcement of the arbitration agreement

Stay of court proceedings – international and domestic arbitration – "no dispute referable to arbitration"

3.1 An arbitration agreement is irrevocable and any action commenced in breach of the agreement may be stayed. Stay of such court proceedings is mandated in an arbitration considered as "international" under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"). Where, however, the arbitration agreement falls outside the definition of "international", the court has the discretion to grant or refuse stay under the domestic Arbitration Act (Cap 10, 2002 Rev Ed) ("AA"). The question of whether a dispute exists has often been canvassed as one of the starting blocks for a party to seek a stay in favour of arbitration. For many years, Singapore courts have treated this question as applicable to both domestic and international arbitration agreements: see *Sintal Enterprise Pte Ltd v Multiplex Constructions Pty* Ltd [2004] 4 SLR 841; *MAE Engineering Ltd v Dragages Singapore Pte Ltd* [2002] 3 SLR 45; *JDC Corporation v Lightweight Concrete Pte Ltd* [1999] 1 SLR 615; *Kwan Im Tong Chinese Temple v Fong Choon Hung Construction Pte Ltd* [1998] 2 SLR 137; *Batshita International (Pte) Ltd v Lim Eng Hock Peter* [1997] 1 SLR 241; *Aurum Building Services (Pte) Ltd v Greatearth Construction Pte Ltd* [1994] 3 SLR 330; and *Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd* [1993] 1 SLR 876.

3.2 A more enlightened approach appears to have been taken in the decision of Woo Bih Li J in *Dalian Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd* [2005] 4 SLR 646. There, Dalian Hualiang had first contracted to buy from the defendants 55,000mt of soya beans. This contract was subsequently assigned to the second plaintiff, Dalian Jinshi. The contract contained a clause requiring "any dispute [arising] between the contracting parties to which no agreement can be reached … [to] be settled by arbitration, which shall take place in London as per FOSFA [Federation of Oils, Seeds and Fats Associations]". On the basis of this, the defendant applied for a stay of proceedings under s 6 of the IAA. The defendant also sought to set off a claim under a different contract against the plaintiffs'

claims. The plaintiffs resisted the application on several grounds including that there was no dispute capable of arbitration as the debt was admitted by the defendant and that the set-off fell outside the scope of the arbitration clause in the contract. The court found that there was clear admission by the defendant of the debt but nevertheless proceeded to deal with the important question of whether a court could examine the existence of a dispute to be referred to arbitration.

3.3 Singapore courts had hitherto laboured under the impression that the stay provisions under the Singapore legislation were similar to the English Arbitration Act 1950 (c 27). In fact, English courts were able to consider in each case whether there was a dispute before allowing a stay application because of the specific extending words in s 1(1) of the English Arbitration Act 1950: "or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred". These extending words have never been in the Singapore statute. In England, the Arbitration Act 1996 (c 23) has since removed these extending words and with that, English courts have since taken the view that whether or not there is a dispute is a matter to be considered by the arbitral tribunal and not the courts: see s 9 of the English Arbitration Act 1996; *Halki Shipping Corporation v Sopex Oils Ltd* [1998] 1 Lloyd's Rep 465; Lord Saville, "The Arbitration Act 1996" [1997] LMCLQ 502. This difference has also been pointed out several times in *Halsbury's Laws of Singapore* vol 2 (Butterworths Asia, 1998) at para 20.042 and (LexisNexis, 2003 reissue), at para 20.043; and "Arbitration" (2004) 5 SAL Ann Rev 53 at paras 3.19–3.22.

3.4 Woo J observed and very rightly clarified that the position in Singapore in relation to international arbitration has indeed been different from the English position prior to 1996. He explained (at [75]) that as regards international arbitration in Singapore:

> [O]nce there is a dispute, a stay must be ordered unless the arbitration agreement is null and void, inoperative or incapable of being performed. The court is not to consider if there is in fact a dispute or whether there is a genuine dispute.

The judge pointed out that the more difficult question was who should determine if a dispute existed. This, he held, could be properly decided by the court without necessarily trespassing into the examination of the validity or merits of the dispute. His Honour illustrated as follows (at [75]):

> For example, is there a dispute when the defendant simply refuses to pay or to admit the claim or remains silent? Although there have been statements

> that suggest that such conduct is sufficient to constitute a dispute I do not share that view. A defendant may refuse to pay or to admit a debt or remain silent because he has no money to pay or simply because he is intransigent. To my mind that is not a dispute. It is different if the defendant at least makes a positive assertion that he is disputing the claim. If he is prepared to and does assert that, then there is a dispute even though it can be easily demonstrated that he is wrong. However, an admission by a defendant will, generally speaking, be contrary to a dispute but not every admission will necessarily avoid a stay order.

3.5 Woo J also distinguished the approach that could be taken with regard to cases coming within the AA. In those cases, he said (at [35]) that the court retains a residual power under s 7(2) with the words "if it is satisfied that there is no sufficient reason", to ascertain "if in fact there is a dispute" before granting a stay, citing *Kwan Im Tong Chinese Temple v Fong Choon Hung Construction Pte Ltd* (*supra* para 3.1) and *Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd* (*supra* para 3.1) in support.

3.6 This decision signifies a departure from the long-held belief by some judges that a court can in all cases examine the validity of the defence such as whether there is "a genuine dispute", or "no real dispute", or "a case to which there is no defence", or "there is no arguable defence", or whether it can be said that the claim "is indisputably due" as if it is an application for summary judgment. It is instructive of the correct approach that should be taken in relation to applications for stay under the IAA.

3.7 The court's view in relation to applications under s 6 of the AA for domestic cases is further supported by the Court of Appeal decision in *Multiplex Constructions Pty Ltd v Sintal Enterprise Pte Ltd* [2005] 2 SLR 530 where Judith Prakash J reiterated that if there was no real dispute between the parties, then generally, there would not be sufficient reason to allow a stay of court proceedings as there would be nothing to refer to arbitration. There, Sintal, the subcontractor, sued Multiplex over four interim certificates for payment in respect of marble supplied. Although Multiplex had received payment for these, it did not make payment to Sintal as it claimed to set off losses it had allegedly sustained by reason of Sintal's delay under the subcontract. The judge in chambers refused to grant a stay, reasoning that the contract provided damages to be claimable only if the employer had imposed damages, whether general or liquidated. Multiplex appealed. The Court of Appeal allowed the appeal in part, taking the view that it was arguable that there could still be a right to claim general damages for the delay, and as such, the matter must go to arbitration. It, however, only granted a stay in respect

of the claim in which the notice for set-off complied with the procedural requirements of the contract.

3.8 It is clear from the approach taken by the Court of Appeal that in dealing with a matter under the AA, a Singapore court would go beyond ascertaining whether there was a dispute, to the extent of weighing if there was an arguable case or plausible defence. The court would, as was done here, even go to the extent of considering if the party seeking to rely on a contractual right had actually complied with the procedural requirements set out in the contract.

Arbitration agreements and non-parties

3.9 An arbitration agreement, as with any agreement, is binding only as between the parties. A stranger to the agreement cannot claim any right to arbitrate under the agreement. In the same way, parties cannot claim to include a non-party to the arbitration. Unlike court proceedings where the Rules of Court may compel a third party to participate in the proceedings if the latter is within the court's jurisdiction, an arbitrator cannot order a third party to be joined or consolidate arbitrations without the consent and agreement of all the parties.

3.10 In *Yee Hong Pte Ltd v Tan Chye Hee Andrew* [2005] 4 SLR 398, the plaintiff, the main contractor of a condominium project, claimed against the defendant, the architect, in tort for breach of duty to act fairly and impartially in administering the main contract between the contractor and the employer. The employer was added by the defendant as a third party in the proceedings. The contractor alleged that the architect's issuance of a delay certificate had deprived it of extensions of time which the architect knew the contractor was entitled to. Following the joinder of the employer as third party, the latter applied to stay the proceedings. The relationships between the parties were regulated by two separate contracts: the main contract between the contractor and the employer, and the service contract between the employer and the architect. In each of these, there were arbitration clauses. An earlier action commenced by the contractor against the employer was stayed in favour of arbitration. Lai Siu Chiu J allowed the appeal, ruling against the assistant registrar's decision refusing stay of the proceedings, and ordered that the contractor's claim against the architect also be referred to arbitration under the main contract. Citing s 6(5) of the AA, Lai J held that the architect would be entitled to rely on the arbitration clause in the main contract as he was making a claim for an indemnity or contribution

"through or under" the employer. She added that the arbitration clause in the main contract was widely worded to include claims in contract as well as tort.

3.11 Section 6(5) of the AA reads:

> For the purposes of this section, a reference to a party includes a reference to any person claiming through or under such party.

3.12 The court's interpretation of the term "claiming through or under such party" extends the understanding of the term beyond one who is claiming a derivative right to the contract, such as a principal, whether disclosed or undisclosed, of a party who merely acted as agent in the agreement (see *Overseas Union Insurance Ltd v Turegum Insurance Co* [2001] 3 SLR 330) or a beneficiary whose interests were represented by a trustee in the agreement, or an assignee or a trustee in bankruptcy. There can be no doubt that the court had taken a pragmatic approach in relation to a purely domestic arbitration where the award, if eventually made, would probably not be challenged for misjoinder. If, however, the parties involved are foreign entities or have places of business outside Singapore, enforcement of such an award eventually made against a party who is not a party to the arbitration agreement could face serious challenge under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention 1958").

3.13 In admiralty proceedings *in rem*, the right to arrest a ship or cargo as security for a maritime claim has long been recognised. The right of arrest is extended even to cases where the party who commences the *in rem* action intends to eventually pursue the claim in arbitration. It is not clear from earlier decisions in Singapore (see *The Sunwind* [1998] 3 SLR 954; *Hyosung (HK) Ltd v Owners of the Ship or Vessel Hilal I* [2001] 1 SLR 387) whether the court would permit such *in rem* actions to be commenced solely for the purpose of arresting a ship for a foreign arbitration. The case of *The Inai Selasih* [2005] 4 SLR 1, however, seems to suggest that an *in rem* action could be maintained for the purpose only of seeking security in a foreign arbitration. There, Jan de Nul NV ("JDN"), having commenced arbitration proceedings in Switzerland, commenced *in rem* proceedings in Singapore and arrested the ship *Inai Selasih* as security to abide the outcome of the Swiss arbitration proceedings. The court examined the case primarily on the basis of whether the arrangement between the parties amounted to the "use or hire of a ship" to empower JDN to invoke the *in rem* jurisdiction under s 3(1)(*h*) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed). The parties as well as the court appeared to accept that if there should be jurisdiction *in rem*, the fact that the arrest was intended to secure the Swiss

arbitration proceedings was not relevant. In the event, the court held that the charterparty arrangement upon which JDN relied to invoke the court's *in rem* jurisdiction was a sham and JDN as such had no maritime claim to justify the arrest of the ship. The decision was affirmed on appeal although the order for damages was set aside.

The arbitral process

Ad hoc *or institutional arbitration*

3.14 The arbitration agreement, whether set out as an elaborate contract or simply as a clause in the commercial contract, is the basis for commencement of arbitration. It may make reference to an appointing authority, an administering body or none at all. The notice of arbitration is the equivalent of an originating process in arbitration. A defect in the notice or wrongly addressing the notice could lead to some serious consequences. Ambiguous drafting is often the root cause of unnecessary litigation over the meaning of arbitration agreements.

3.15 In *Bovis Lend Lease Pte Ltd v Jay-Tech Marine and Projects Pte Ltd* [2005] SGHC 91, Bovis had appointed Jay-Tech as its subcontractor to supply and install structural steel works in a building project in Singapore. A dispute arose over a claim for $755,729.98 for alleged additional works carried out by Jay-Tech. The subcontract contained an arbitration clause which read:

> Unless otherwise agreed by the parties, the arbitrator will be appointed by the President of the Institute of Architects in Singapore (or such other body as carries on the functions of the Institute) or his nominee … The arbitrator must conduct the proceedings in accordance with Rules of the Singapore International Arbitration Centre.

3.16 On 5 October 2004, Jay-Tech served a notice of arbitration on Bovis and copied the same to the Singapore Institute of Architects and paid the deposit. The parties were unable to agree to an arbitrator. The question then arose as to who should be the appointing authority. Jay-Tech gave notice of arbitration under the Singapore International Arbitration Centre ("SIAC") Domestic Arbitration Rules ("the Domestic Rules") and applied to the SIAC to appoint the arbitrator. Bovis objected. Both parties sought declarations from the court as to who ought to be the proper appointing authority as well as the applicability of the Domestic Rules. Judith Prakash J held that on her reading of the arbitration clause, the arbitrator should be appointed by the Singapore Institute of Architects and not the SIAC. The learned judge

considered the arbitration as an *ad hoc* reference and that the parties had not submitted their reference to be administered by the SIAC notwithstanding the reference to the "Rules of SIAC" The judge further held that it would be up to the arbitrator to be appointed in this case to decide the extent to which and which of the Domestic Rules should be followed in the context of an arbitration that is not administered by the SIAC.

3.17 There is no doubt that the court made the orders on the basis that the arbitration clause contemplated an *ad hoc* arbitration. It is, however, quite unclear how Prakash J came to find that the arbitration was an *ad hoc* arbitration and not one to be administered by the SIAC. As she had rightly observed, an arbitral institution's role and involvement may vary. It therefore must follow that the mere fact that parties had agreed on an appointing authority could not of itself deprive the authority of SIAC to administer the arbitration. It is not disputed that the Singapore Institute of Architects does not administer arbitrations, it merely acts as the appointing body when requested to do so. The reference in the clause to the "SIAC Rules" should at the very least be a strong indication that apart from permitting the appointment of the arbitrator to be made by the Singapore Institute of Architects, all else could and should be conducted in accordance with the SIAC Rules. If parties had contemplated an *ad hoc* arbitration, they could and would have adopted *ad hoc* rules like the United Nations Commission on International Trade Law ("UNCITRAL") Rules of Arbitration or made no reference to any rules or any mention of the SIAC. This would otherwise be unduly fettering party autonomy and should be discouraged.

3.18 Prakash J also commented *obiter*, that the Domestic Rules which state that the parties, by agreeing to submit or to refer their dispute to the SIAC for arbitration agree that the Domestic Rules "will take precedence over any and all provisions in the underlying contract between the parties relating to dispute resolution by arbitration" is an unwarranted limitation on party autonomy (at [20]). This observation is no doubt a valid one especially when one considers that the Domestic Rules, which were introduced in 2001, were sought to be applicable even to cases which had not made specific reference to them. The Domestic Rules have adopted many features of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) and have generally been seen as inappropriate for arbitration proceedings. Perhaps it is time for SIAC to take heed of the learned judge's observation and re-visit the necessity for maintaining them.

Pre-arbitral discovery

3.19 The use of discovery to obtain documents in the opposing party's possession to support a party's own case or defence is a common tactic employed by lawyers in litigation. Court rules have specific provisions as to when and how discovery may be given or ordered by the court. In the arbitral process, however, the law, while empowering the tribunal to order discovery, gives no clear guidelines as to how and when a tribunal should order discovery, the extent of such discovery and the consequences for failure to obey an order for discovery. The power to make such orders are set out in s 12(1)(*b*) of the IAA and s 28(2)(*b*) of the AA. Such powers are exercisable concurrently by the court and the arbitral tribunal. The power to order pre-action discovery is, however, set out in s 18 read with para 12 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed).

3.20 The Court of Appeal in *Woh Hup (Pte) Ltd v Lian Teck Construction Pte Ltd* [2005] SGCA 26 had to consider an interesting issue of whether the court has the power to grant "pre-arbitral" discovery, *viz* discovery, against a party even before the arbitration has commenced. The respondent, Lian Teck Construction Pte Ltd, was the subcontractor of the appellant for the earthworks of a few stations for a new mass rapid transit line. The appellant terminated the subcontract on the ground that the respondent failed to perform. The respondent commenced an originating summons in the High Court seeking specific discovery of documents relating to the main contract, minutes of site meetings, drawings and plans on the basis that the documents were required for an intended reference to arbitration for the appellant's repudiation of the subcontract. The respondent subsequently changed its mind and informed the court that it required the documents for intended court litigation. The court granted some of the documents sought. The appeal to the Court of Appeal was dismissed.

3.21 Lai Kew Chai J (delivering the Court of Appeal's decision) affirmed the High Court's view that the application was one for pre-action discovery which the court had clear power to grant. In doing so, the learned judge defined any discovery prior to and for the purpose of commencing legal proceedings, including that sought by a party to an arbitration agreement, to be "pre-action discovery". A party to an arbitration agreement may therefore apply for discovery prior to commencing legal proceedings, and a court has jurisdiction to hear and grant the application for pre-action discovery notwithstanding the fact that the respondent is party to an arbitration agreement. To safeguard against the potential abuse of this process, the court said that in circumstances where, on a plain literal reading, the arbitration

clause *prima facie* covered the dispute in question, the court might refuse to grant discovery to prevent a possible abuse of process by the applicant.

3.22 Although the question of the court's power to order pre-arbitral discovery was no longer relevant given that the court held on the facts that the application was in effect for pre-action discovery, the Court of Appeal nevertheless opined that there was doubt as to the court's power to grant pre-arbitral discovery, suggesting that the spirit and scheme of the arbitral process required that discovery issues should be dealt with by the arbitral tribunal. In doing so, the Court of Appeal identified a gap in the arbitral process that may require future consideration. If a court does not have the power to order pre-arbitral discovery, it effectively means that there can never be pre-arbitral discovery, for until an arbitral tribunal is constituted there will be nobody to which a party can turn to for assistance in obtaining discovery prior to commencing arbitration. Arguably, institutional rules could provide for such an application to be considered by the institution with the usual safeguard that the order made is to be temporary in nature and should be varied or finalised by the arbitral tribunal when it is eventually constituted. Alternatively, the court's power under s 31 of the AA and s 12(7) of the IAA could be extended to be exercisable even prior to commencement of the arbitration in support of the arbitration to be subsequently commenced.

Removal of arbitrator

3.23 There are limited instances where a court is empowered to intervene in an ongoing arbitration. The court is only permitted to intervene if specifically provided for in the legislation. Section 16 of the AA empowers a court to remove an arbitrator if he is physically or mentally incapable of conducting the proceedings. In addition, he could also be removed if he has refused or failed to properly conduct the proceedings or to use all reasonable dispatch in conducting the proceedings or making an award and it appears that substantial injustice has been or will be caused to a party. It should be noted that the term "misconduct" which had previously appeared in s 17 of the repealed Arbitration Act (Cap 10, 1985 Rev Ed) ("the repealed Arbitration Act") has been replaced by the phrase "failed to properly conduct the proceedings" together with the qualification that "substantial injustice has been or will be caused" to the applicant.

3.24 This change was aptly pointed out by Belinda Ang Saw Ean J in *Yee Hong Pte Ltd v Powen Electrical Engineering Pte Ltd* [2005] 3 SLR 512 where the learned judge refused to remove an arbitrator based on the allegation by

Yee Hong that the arbitrator had refused to hear an application for extension of time to file witness statements and for specific discovery by issuing a peremptory order on 11 January 2005 directing Yee Hong to file the witness statements by 14 January 2005, failing which the statements would not be considered by the arbitrator when drawing up the award. It should be noted that Yee Hong had earlier defaulted in not serving the witness statements and had not applied for an extension of time. It was Yee Hong's case that it had not been aware that the arbitrator would make such a peremptory order before receiving its application for time extension and discovery and in doing so, the arbitrator had breached the rules of natural justice by not affording Yee Hong the opportunity to be heard. The court robustly defended the arbitrator's decision, holding that he had properly balanced the considerations of progressing the reference against the need to afford Yee Hong a fair opportunity to test the case of the claimant and put forward its own defence. Ang J added at [26] that it would be "extremely undesirable if arbitrators were discouraged from approaching the situation presented ... by threats of applications under s 16(1)(*b*) of the Act".

3.25 Ang J analysed the current provision set out in s 16 of the AA and pointed out that unlike the previous position, it was no longer sufficient to merely show that the arbitrator had "misconducted" himself or the proceedings. While there is a duty on the part of the arbitrator to ensure that he acts "fairly and impartially and shall give each party a reasonable opportunity of presenting his case" (s 22 of the AA), the fact that a party could have missed such an opportunity without proof of substantial injustice will not suffice. The court, under the new provision, can only remove the arbitrator if it can be shown that substantial injustice has been or will be suffered as a result. Yee Hong's attempt to suggest that the injustice it had suffered was that it had only three days before the substantive hearing to prepare the witness statements and that it had lost confidence in the arbitrator was rejected by the court. Ang J added (at [48]) that "loss of confidence in an arbitrator's ability to come to a fair and balanced conclusion is itself not capable of being substantial injustice".

3.26 The decision in *Yee Hong Pte Ltd v Powen Electrical Engineering Pte Ltd* points to the proper approach to be taken by courts when considering applications for removal of arbitrators. Legislative prescriptions have been made to ensure that there should be minimal judicial interference with the ongoing process of arbitration. Previous decisions arising from applications under s 17 of the repealed Arbitration Act are no longer helpful (see *Koh Bros Building and Civil Engineering Construction Pte Ltd v Scotts Development (Saraca) Pte Ltd* [2002] 4 SLR 748).

Recourse against awards – setting aside

3.27 The only recourse against an award made under the IAA is to set it aside under s 24 of the IAA and Art 34 of the Model Law on International Commercial Arbitration found in the First Schedule to the IAA ("the Model Law"). These grounds are exhaustive and courts do not have the discretion to add to or expand the ambit of the grounds for setting aside. The primary basis for challenge against an award is that the award suffers from some serious procedural defect such as lack of arbitral jurisdiction, wrong constitution of tribunal and the failure to abide by agreed procedure. All of these grounds of challenge seek to ensure that the aggrieved party has been given a reasonable opportunity to be heard and that rules of natural justice are observed.

3.28 The case of *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] 1 SLR 197 ("*PT Asuransi Jasa*") is one of those rare instances where a tribunal's decision that it lacked substantive jurisdiction is challenged by a party. The respondent there was Dexia Bank who was one of the holders of guaranteed notes ("BI Notes") issued by Rekasaran BI Ltd ("the Issuer"), a special-purpose company formed as part of the debt restructuring of Indonesian enterprises in 1997. The BI Notes were guaranteed by PT Asuransi Jasa Indonesia ("Jasindo"). In 2000, Jasindo proposed to re-structure its obligations under the notes, which if carried through would replace them with a new set of notes to be issued by another company, Mega Caspian Petroleum ("MCP"), an entity registered in the British Virgin Islands and secured by shares owned by MCP in Central Asia Petroleum ("CAP"), a company registered in the British Virgin Islands that owned oil fields in the Republic of Kazakhstan. Jasindo would then be released from its guarantees under the BI Notes. This scheme was said to have been approved by a majority of the noteholders who attended a noteholders' meeting held on 29 February 2000 ("the February 2000 meeting"). Dexia Bank, together with a few other holders of BI Notes, opposed the restructuring scheme and commenced arbitration to enforce recovery under the BI Notes in the SIAC in Arbitration No 23 of 2001 ("the First Arbitration"). While the First Arbitration was ongoing, Jasindo convened noteholders' meetings on 18 May 2001 and 4 June 2001 at which the sole attendee, PT Bhakti, which held more than one-third of the BI Notes, voted to approve the resolutions put before the meeting. The tribunal in the First Arbitration was sent minutes of that meeting. The Issuer took no part in those proceedings. Jasindo was not represented at the proceedings but raised issues of sovereign immunity in correspondence addressed to the SIAC and the tribunal. In the event, Dexia

Bank and the other BI noteholders prevailed in that First Arbitration and obtained an award for US$8.6m ("the First Award") in October 2001.

3.29 In January 2002, Jasindo commenced another arbitration in SIAC against Dexia Bank ("the Second Arbitration") seeking a declaration that the re-structuring scheme had been approved by the noteholders' meeting in June 2001 and was binding on Dexia Bank and other BI noteholders. The tribunal was asked to consider the preliminary issue of its jurisdiction. In its award ("the Jurisdiction Award"), the tribunal ruled that it lacked jurisdiction and dismissed Jasindo's claims in the arbitration. Jasindo applied to set aside the Jurisdiction Award alleging that:

> (a) the Jurisdiction Award was in conflict with the public policy of Singapore in that the tribunal had made findings conflicting with the findings made in the First Award;
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> (b) the tribunal in the Jurisdiction Award went beyond the scope of its reference when it stated that the June 2001 meeting was "irrelevant to the issues requiring determination" in the First Arbitration and that the tribunal in the First Arbitration had declined to consider the minutes of the June 2001 meeting; and
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> (c) Jasindo was not given a full opportunity to present its case and/or was otherwise unable to present its case in that it was not aware that the tribunal would be making findings that were critical to the jurisdiction issue.

Jasindo also made the point that the tribunal did not hold an oral hearing which it had initially directed to be held.

3.30 Jasindo failed to set aside the Jurisdiction Award. Judith Prakash J, noting that while Jasindo might be dissatisfied with the way in which the legal principles encapsulated in s 19B of the IAA seemed to have been ignored by the tribunal when it made findings that appeared to be in conflict with the First Award, held that the Jurisdiction Award itself was not contrary to public policy.

3.31 Indeed, laws are enacted to regulate very varied affairs of society. They could cover social behaviour, rights and freedoms of individuals, education, care for the environment, defence and security measures, best practices, fiscal and other economic policies, *etc*, all of which should reflect the values, norms and shared responsibilities of its constituents. In a general sense, laws would reflect the generally accepted principles and policies of the

society. However, the term "public policy", when used in the context of determining if an act or omission constitutes a violation of public policy, is to be construed narrowly, such as an act which offends the "most basic notions of morality and justice" (see *Parsons & Whittemore v RAKTA* 508 F 2d 969 (2nd Cir, 1974); *Fotochrome*, ICCA Yearbook I, US 103 at pp 202–203; *Transport de Cargaison v Industrial Bulk Carriers* [1990] RDJ 136 or if there is a "serious shortcoming touching upon the fundamental principles of economic and constitutional life" (see *Case III ZR 269/88*, ICCA Yearbook XVII, Germany 38 at pp 503–508). Where the award reveals that the agreement is a cover for some sinister purpose abhorrent to Singapore law, it ought not to be enforced (see *Soleimany v Soleimany* [1999] QB 785). The mere fact that some regulatory provisions or laws could be violated would, however, not of itself taint the validity and enforceability of the award (see the backdating of documents in *American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 3 SLR 682).

3.32 Prakash J in *PT Asuransi Jasa* properly distinguished this when she reasoned that whilst a matter of public policy may be given legislative effect by being enacted as a law, it did not mean that every law had to be regarded as public policy. To allow a party to say that a breach of any legislative provision would render an award contrary to public policy would provide "fertile basis for attacking arbitration awards as to completely negate the general rule, at least in so far as international arbitrations covered by the Act are concerned, that awards cannot be set aside by reason of mistakes of law made by the tribunal" (at [29]).

3.33 Section 19B of the IAA has been enacted to reflect the final and binding nature of arbitral awards to ensure that such awards would be enforceable by the successful party. Its legislative history can be traced to the Court of Appeal's decision in *Tang Boon Jek Jeffrey v Tan Poh Leng Stanley* [2001] 3 SLR 237, where the court erroneously ruled that an arbitrator could recall his earlier award and amend or reverse it so long as he did so before the arbitration proceeding was terminated by the issuance of the final award. Section 19B has been enacted to address this error and to make clear that an arbitral tribunal has no power to "vary, amend, correct, review, add to or revoke the award" it has made (see *Halsbury's Laws of Singapore* vol 2, (LexisNexis, 2003 Reissue) at para 20.116; *Singapore Parliamentary Debates*, *Official Report* (5 October 2001) vol 73 at cols 2221–2225 (Prof S Jayakumar, Minister for Law and Minister for Foreign Affairs).

3.34 The court in *PT Asuransi Jasa* also ruled that if, in the course of determining its jurisdiction, the tribunal encountered an issue that had

already been decided by the tribunal in the First Arbitration, it had no authority to determine that issue afresh, as parties were then bound by the findings in the First Arbitration. The court found that the tribunal had, in the course of determining that it had no jurisdiction, made a finding that Jasindo did not participate in the First Arbitration when the tribunal in the First Award had recited that Jasindo had in fact written to the tribunal and the SIAC. This, the court held, was not permissible. The court, however, applied Art 34(2)(*a*)(iii) of the Model Law, and excised only this aspect of the tribunal's finding without affecting the tribunal's ruling that issue estoppel operated against Jasindo from raising the relevance of the June 2001 meeting in the Second Arbitration.

3.35 It is interesting that the court had delved into some detail as to how and why the tribunal came to such a finding. Bearing in mind that the court is not an appellate tribunal, there is really no necessity for the court to examine if the finding of the tribunal had been erroneous. By examining as it did and excising part of the basis for its ruling on issue estoppel, the court, in a less clear case, might be seen as re-hearing the matter and overruling a tribunal's finding. The court's ruling on the erroneous finding of the tribunal should be seen as *obiter*.

3.36 Jasindo's final ground to set aside the Jurisdiction Award was rejected by Prakash J, holding that there was no evidence that Jasindo did not fully appreciate what was being put against it as it had copies of all submissions made by Dexia Bank. The fact that the tribunal had made an issue of and finding on a point that was never raised by either party, *viz*, Jasindo's purported non-participation in the First Arbitration, was not determinative of its final conclusion, and therefore any breach of natural justice that might have occurred because the tribunal did not notify Jasindo that it considered this to be a point in issue, did not prejudice the applicant. As to the fact that no oral hearing was held, the court pointed out that neither party requested for one after the filing of written submissions. The earlier direction for oral hearings had long passed and it would not be reasonable in the changed circumstances, and in the absence of a request from parties, to say that Jasindo was entitled to an oral hearing.

3.37 Another interesting aspect of the decision in *PT Asuransi Jasa* is that it was an application based on s 24 of the IAA and Art 34 of the Model Law to set aside an award and the court dealt with the same as such. The tribunal in the Second Arbitration was asked by parties to determine the issue of jurisdiction as a preliminary issue. The Jurisdiction Award was thus a

decision on jurisdiction made pursuant to Art 16(3) of the Model Law which reads:

> The arbitral tribunal may rule on a plea referred to in paragraph (2) of this Article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in Article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

3.38 Article 16(3) provides only for a review of a tribunal's decision on jurisdiction if the tribunal upholds its own jurisdiction. There is no provision for review where the tribunal declines such jurisdiction. What Jasindo had done in *PT Asuransi Jasa* was to circumvent Art 16 and apply for a setting aside of the Jurisdiction Award. This appeared to have led Prakash J to accept that the procedure was correct when she said (at [30]):

> 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 Act.

3.39 Article 16(3) makes no provision for a situation where the tribunal declines jurisdiction. This omission is deliberate. An earlier draft which provided for recourse to the court in the event the tribunal made a negative ruling on jurisdiction was not adopted. The intention is to make such a negative ruling final and binding on the parties, the rationale being that the tribunal must not be forced to arbitrate a matter which it considers to have fallen outside its jurisdiction (see Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration (UN Doc A/CN.9/264) at pp 121–123. See also *UNCITRAL Yearbook* vol XVI (United Nations, 1985) at pp 441–443). The natural consequence of such a ruling is to allow the parties to proceed in whichever forum they consider appropriate. Therefore, the suggestion that a decision rejecting jurisdiction can be challenged by way of an application to set aside under Art 34 of the Model Law would appear to run contrary to the legislative intent behind Art 16(3).

Enforcement of awards

Judicial assistance in enforcement of award

3.40 Whilst most arbitral awards are known to have been honoured by the losing party, there remains the need in many cases for judicial assistance in the enforcement of awards. Awards, wherever made, are now enforceable in Singapore under s 46 of the AA and ss 19 and 29 of the IAA. Judicial assistance may be sought by way of pre-enforcement discovery or injunctive relief.

3.41 The court's power exercisable in aid of the enforcement of an arbitration award was examined in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR 112. The first defendant, Pertamina Energy Trading Ltd ("Petral"), was a Hong Kong company and was a 99% subsidiary of Pertamina. The second defendant, Pertamina Energy Services Pte Ltd ("PES"), was a Singapore company and a 100% subsidiary of Petral.

3.42 The plaintiff, Karaha Bodas Co LLC ("KB"), had in 1994 contracted with Pertamina, the Indonesian state oil company, to set up a joint venture to produce and develop energy resources in Indonesia. In a related contract, the parties agreed to sell all the energy produced by the joint venture to another state company, PT PLN ("PLN"). These contracts were signed during the time when Suharto was the President of Indonesia. They were signed in Indonesia and were subject to Indonesian law. In 1997, following a change of government in Indonesia, Indonesia sought funding from the International Monetary Fund ("IMF") and as a condition to such funding, the IMF required the Indonesian government to cancel these two contracts. Notices of termination were served on the plaintiff by Pertamina. KB challenged the terminations and commenced arbitration pursuant to the terms of the contracts. The place of arbitration was Switzerland. KB obtained an arbitral award ("the Award") of about US$261m against Pertamina on 18 December 2000, and proceeded to enforce the Award in various jurisdictions, including the US, Canada, Hong Kong and Singapore. The enforcement proceedings in Canada and Singapore were subsequently stayed by agreement of the parties pending the resolution of the Hong Kong enforcement proceedings.

3.43 KB obtained an enforcement order for the award in Hong Kong and a charging and garnishee order ("the Garnishee Order") against Petral on 24 May 2002. A receiver was also appointed by the High Court of Hong Kong ("the Receiving Order") to find out what debts were due from Petral to Pertamina, and consequently to KB. KB later issued a judgment debtor

summons against Petral in Hong Kong to find out the exact amount of the debts due from Petral to Pertamina. A Petral representative when cross-examined about money due from the Singapore company PES to Petral gave the impression that about US$36m had been sent from Hong Kong to Singapore in order to evade execution of the Garnishee Order. On that basis, KB applied for and obtained a worldwide Mareva injunction against Petral up to the sum of US$36,236,581.65 which KB claimed ought to be held in trust for Pertamina and could be garnished in part satisfaction of the Award, enforcement of which had been obtained in Hong Kong. KB then issued an originating summons in Singapore against Petral and PES and obtained a Mareva injunction against both respondents prohibiting them from removing or disposing of any of their assets in Singapore up to the value of US$36,236,581.65. The injunction was subsequently set aside on the application of the respondents.

3.44 The Court of Appeal affirmed the decision setting aside the injunction. Judith Prakash J (delivering the judgment of the Court of Appeal) held that in order to establish *locus standi*, the plaintiff had to show that it had a "real interest" in bringing the action or that there was a "real controversy" between the parties to the action for the court to resolve. The US$36m reflected in the accounts of Petral was due to Petral from PES. KB had no monetary claim *vis-à-vis* Petral, much less PES and, therefore, had no right in respect of which a claim for a declaration could be made. As KB had not shown a legitimate right to the money, there was no legitimate claim against the respondents and therefore no reasonable cause of action, and the injunction had to be discharged. The court also examined the issue of its jurisdiction to issue an injunction against the respondents. With regard to Petral, the court held that it lacked *in personam* jurisdiction over a foreign defendant where no substantive claim was made against it and it had no presence in Singapore. As against PES, although it was resident in Singapore, KB had no monetary claim against PES nor did KB have any standing to seek a declaration as regard the funds with KB, having no judgment against Petral to entitle it to garnish moneys that PES might have owed Petral.

3.45 The case of *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* illustrates the importance of choosing the correct party against whom an enforcement action ought to be pursued. The court's refusal to grant injunctive relief is well reasoned. It could not lend support to a party seeking to enforce an award in a foreign jurisdiction if there was no cause of action enabling it to exercise jurisdiction against strangers to the enforcement action. The action against Petral and PES was but an ancillary process of the Hong Kong enforcement action. The court's obligation under the New York

Convention 1958 to enforce an arbitral award does not extend to such ancillary processes. The outcome could well be different had KB proceeded with the enforcement action in Singapore against Pertamina and PLN. In such an enforcement action, KB could justifiably issue execution processes against the debtors and follow up with garnishee proceedings and the appointment of receivers as it did in Hong Kong. The purpose of tracking and determining the nature of the funds held by PES by a garnishee order could not be less effective than the attempt to enjoin PES under a Mareva injunction.

3.46 The court's power to grant an injunction in aid of enforcement of an arbitral award has to be exercised judiciously. Where third party interests are affected, the court has to balance the rights of the third party as well as those of the successful party in the arbitration. In *Allied Marine Services Ltd v LMJ International Ltd* [2006] 1 SLR 261, the plaintiff, who had obtained an arbitral award in London, had registered it as an English judgment. The defendant, an Indian company, was said to have a cargo of iron ore on board a ship which was bunkering in Singapore. An *ex parte* injunction was granted to prevent the vessel from leaving Singapore with the cargo on the basis that the cargo should be retained as security to satisfy the plaintiff's award. The injunction was discharged notwithstanding that security of US$10,000 was offered by the plaintiff to cover third parties affected by the granting of the injunction. Tan Lee Meng J could not countenance such an order as the plaintiff would be interfering with the business rights of an innocent third party merely by proffering the third party an indemnity.

3.47 A successful attempt to seek judicial assistance for pre-enforcement discovery was made in *Asta Rickmers Schiffahrtsgesellschaft mbH & Cie KG v Hub Marine Pte Ltd* [2006] 1 SLR 283 where Tay Yong Kwang J granted the plaintiff an order for discovery against the defendant to determine if the defendant, Hub Marine Pte Ltd, was liable in any way for the payment of the arbitral award which the plaintiff had obtained against Hub Lines Pte Ltd ("Hub Lines"). The plaintiff in that case had chartered the vessel to the defendant for two years but the charter was terminated within two months by the defendant. Arbitration was commenced in London in February 2003 but shortly thereafter Hub Lines was wound up on a petition of a Thai company. The plaintiff's award for more than US$2.3m, interest and costs was unsatisfied. Tay J noted that there were some indications that the defendant was somehow related to Hub Lines, *eg*, the defendant was named in the survey report as the charterer, some hire payments were made by the defendant to the plaintiff, and sailing instructions were issued on the letterhead of the defendant. The court added (at [36]) that when deciding on

whether to grant such an application, adopting the *ratio* in *Kuah Kok Kim v Ernst & Young* [1997] 1 SLR 169 at [59], it would not "dwell into the merits of the case and … determine, based on what little available evidence, whether there is a good claim or not. The court's duty is only to ensure that the application was not frivolous or speculative or that the applicants were [not] on a fishing expedition".

3.48 The use of corporate vehicles as business entities in international business is a legitimate risk containment mechanism. A successful party in arbitration may, however, face several impediments to enforce the award if the debtor is insolvent or no longer in existence. Pre-enforcement discovery enables a successful party to ascertain whether the true party liable could be hidden behind the corporate veil of the party named in the arbitration.

Other dispute resolution processes

Expert determination

3.49 The role of an expert and that of an arbitrator was examined in the decision of V K Rajah J in *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR 634. The plaintiff had applied to set aside the "award" of the independent assessor who was appointed as an expert pursuant to a consent order in a pending action. He was mandated to "determine all issues of procedure for the assessment which shall be final, and that his decision and findings on all issues of procedure, liability and quantum were to be final". The plaintiff alleged that the expert had improperly disregarded the plaintiff's case and the underlying supporting documents and had also not given reasons for his award but had instead simply echoed the defendant's counterclaim.

3.50 In dismissing the plaintiff's application, Rajah J set out clearly the differences between the role of an arbitrator and that of an expert. The learned judge noted that the essential difference was in the duties and/or functions of the appointee and not the labelling. The paramount distinction was the obligations of the office holder. An expert need not act solely on the evidence before him and had the discretion to adopt inquisitorial processes and use his personal knowledge and experience to determine the matter without the obligation to seek the parties' views or consult them. He was freed from procedural and evidential intricacies or niceties that might attach to an arbitral process. An expert was also not obliged to make a decision on the basis of the evidence presented to him, but could act on his subjective opinion. Additionally, an expert did not need to hear the parties on all the

issues that were to be determined. This, the court said was the "single most significant distinction between expert determination and litigation/arbitration" (at [36]).

3.51 Of the plaintiff's complaint that the expert in this case had not given a reasoned award, Rajah J held that the plaintiff, having failed to respond to the expert's invitation to furnish contrary evidence, could not be allowed to now say that its case was not considered. The expert's award in that case did not contain just bare and bald assertions. The judge added (at [47]):

> A reasoned award or determination requires at the very least a reasoned consideration of the evidence and an explanation for the final determination – however brief that may be. Such an explanation can be verbose or taciturn but not wholly mute. A mere sparse statement narrating facts without dealing with and seeking to elucidate the basis for the determination of issues posed is not a reasoned award. In the award the [independent assessor] gave a reason for accepting the defendant's counterclaim.

3.52 There are no legislative provisions regulating the role of experts and the use of expert determination as a form of dispute resolution. While arbitral awards enjoy the enforcement machinery provided in the arbitration statutes and the New York Convention 1958, experts' decisions or "awards" are enforceable only as a contract as well as by virtue of the implied obligation that parties who agreed to employ an agreed dispute must be taken to have agreed to abide by the outcome. The decision in *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* has no doubt cleared the confusion some may have had over the role of expert determination and arbitration as distinct dispute resolution processes.