

3. ARBITRATION

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The arbitration agreement

Scope of the arbitration agreement

3.1 The arbitration agreement is the source of the jurisdiction of the arbitral tribunal. Depending on the needs and intentions of the parties to an agreement, arbitration clauses may be very specific and narrow or very general and wide in application. Narrow and specific clauses may often be seen in insurance policies where typically only the question of quantum is to be determined by arbitration. Wider all-encompassing clauses may be found in standard “model clauses” recommended by arbitral institutions which are intended to cover all possible scenarios and issues that could arise from the parties’ dealings with each other. Such general and widely-worded clauses may employ terms like “all disputes”, “arising from” “arising out of”, “in connection with”, “whether in tort or contract” or numerous variations of such. While courts have attributed a general meaning to these terms in a series of cases, it is never always easy to construe its scope in particular circumstances.

3.2 In *Sabah Shipyard (Pakistan) Ltd v Government of the Islamic Republic of Pakistan* [2004] 3 SLR 184, the court had to consider whether a second arbitration commenced to recover costs incurred in an earlier terminated arbitration was within the scope of the arbitration clause. There, Sabah Shipyard commenced arbitration in Singapore pursuant to the International Chamber of Commerce (“ICC”) Rules against Pakistan in 1998, under an agreement in which Sabah Shipyard had agreed to design, finance, construct and operate a barge-mounted electric power plant for Pakistan. The arbitration was terminated by the ICC due to Pakistan’s default in the payment of its share of the ICC’s advance on costs. Following the termination of that first arbitration, Pakistan commenced a second arbitration, also under the ICC Rules, for the recovery of the costs incurred by them in the first arbitration. Sabah Shipyard challenged the jurisdiction of the arbitrator to determine the costs of the first arbitration in this subsequent arbitration proceeding. The arbitrator held that he had jurisdiction over the dispute on the basis of the arbitration clause in the

agreement that “any dispute or difference between the parties arising out of or in connection with this Agreement” shall be submitted for arbitration. Aggrieved, Sabah Shipyard sought recourse against that decision in accordance with Art 16(3) of the UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”) found in the First Schedule of the International Arbitration Act (Cap 143A, 2002 Rev Ed).

3.3 Judith Prakash J noted that the principles applicable to the construction of an arbitration clause were that courts would make the *prima facie* assumption that the parties intended all disputes relating to a particular transaction to be resolved by the same tribunal and that where words of broad import were used, they were to be given their natural meaning in the context in which they were found, and were not to be cut down by reference to earlier decisions giving a narrower meaning to the same or similar expressions in other contexts. The phrase “arising out of ... this Agreement” was generally to be considered as having a more limited ambit than the phrase “arising ... in connection with ... this Agreement”. The phrase “arising out of” would require a more direct connection between the dispute and the contract than the phrase “arising in connection with”. Thus, from the language of the arbitration clause, the court determined that the parties had intended that all disputes which might arise in relation to the agreement would be submitted for arbitration under the ICC Rules. This, in the learned judge’s view, would include the question of costs arising out of the arbitration. The parties, having chosen ICC arbitration to resolve their disputes, would also have contemplated that the costs of such resolution would also be settled in this same manner. The dispute over the costs of arbitration arose by virtue of the dispute between the parties on the termination of the agreement and hence, the dispute on costs was intimately connected with and arose from the application of the agreement.

3.4 No doubt the factual situation in the Sabah Shipyard decision is exceptional and not typical of most arbitrations. The ICC Court, in deeming the arbitration withdrawn, had in those circumstances expressly stipulated that the withdrawal was without prejudice for parties to re-commence arbitration. The case nevertheless raises the question of when an arbitration clause exhausts its life or whether it will ever exhaust its life. Where an “all-dispute” clause is relied upon, would it oblige the parties to bring before the tribunal all matters in difference? Can a party invoke the arbitration for one or more of its claims and should that fail, then commence fresh arbitration under the same arbitration clause based on a new cause of action or claim?

Construction of the arbitration clause: Institutional rules

3.5 Institutional rules adopted by parties may from time to time be amended or modified. Sometimes old rules are replaced and new ones adopted. It is not unusual that at the time when an arbitration agreement is entered into, making reference to a set of institutional rules then in force, the rules can, at the time a dispute arises and the arbitration invoked, be different from those applicable at the time the agreement was made.

3.6 In *Jurong Engineering Ltd v Black & Veatch Singapore Pte Ltd* [2004] 1 SLR 333 the arbitration clause made a general reference to the rules of the Singapore International Arbitration Centre (“SIAC”). When the agreement was signed, SIAC only had rules for international arbitration, generally called the SIAC Rules. When the dispute arose, however, SIAC had issued another set of rules for the conduct of domestic arbitration. The plaintiffs commenced arbitration under the SIAC Domestic Rules on the basis that the parties were both local entities carrying on businesses within Singapore. The defendants objected, arguing that as the SIAC Domestic Rules had only come into existence after the making of the contract, the applicable rules should be the SIAC Rules. The plaintiffs then sought a declaration from the court that the arbitration clause contained a general reference to the arbitration rules of the SIAC and that in the circumstances of the case, the Domestic Rules ought to apply.

3.7 Lai Kew Chai J determined whether the arbitration clause contained a general or specific reference to the arbitration rules of the SIAC and if a general reference was made out, whether the appropriate rules to apply to the dispute were the Domestic Rules of the SIAC. The court held that given the language in the arbitration clause, the parties indicated that they had intended to refer to the arbitration rules of the SIAC generally and that if the parties had intended a specific reference, they would have so indicated by referring to the “Arbitration Rules of the Singapore International Arbitration Centre” which was the full title of the SIAC Rules. As the arbitration clause contained a general reference to the arbitration rules of the SIAC, it was probably the parties’ intention to apply the most appropriate rules to the dispute, even if such rules were not in force at the time the contract was concluded between the parties. Where general reference was made to the arbitration rules of the SIAC, the Domestic Rules would apply to a domestic arbitration case and the SIAC Rules would apply to an international arbitration case. As it was not disputed between the parties that the case fell within the domestic arbitration regime, following the reasoning above, the Domestic Rules of the SIAC ought to apply.

3.8 The defendants appealed to the Court of Appeal in *Black & Veatch Singapore Pte Ltd v Jurong Engineering Ltd* [2004] 4 SLR 19. Woo Bih Li J, on behalf of the Court of Appeal, affirmed the decision of the High Court. The court relied on *Bunge SA v Kruse* [1979] 1 Lloyd's Rep 279 and *Peter Cremer v Granaria BV* [1981] 2 Lloyd's Rep 583 which ruled that where the arbitration clause provided that the rules of a specific institution will apply in the event of a dispute between the parties, a presumption exists in favour of the application of arbitration rules in force at the time the dispute arose. Such *prima facie* inference applies where the rules contain mainly procedural provisions. However, where the rules contain mainly substantive provisions, then the rules in force at the date of the conclusion of the contract will apply. The defendants attempted to overcome this presumption by highlighting the substantive differences between the International Arbitration Act and the Arbitration Act (Cap 10, 2002 Rev Ed) ("Arbitration Act 2001"). The court rejected this argument, saying that the arbitration clause did not refer to arbitration legislation in Singapore but to arbitration rules in the SIAC. The defendants' argument, that the presumption ought not to apply where the rules to be applied to the arbitration were not simply an amendment of the SIAC Rules but a wholly different set of rules, was rejected by the Court of Appeal as one of form rather than substance. Whether the Domestic Rules of the SIAC were promulgated as an independent set of rules rather than as an additional set of rules included within the SIAC Rules would make no difference.

3.9 The approach taken by the High Court and the Court of Appeal in *Black & Veatch Singapore Pte Ltd v Jurong Engineering Ltd* is a pragmatic one. Institutional rules of arbitration are constantly being evolved, amended and modified to suit changing practices and needs. By adopting institutional rules, parties must be taken to have accepted that such procedural rules may from time to time be amended and modified or even replaced wholly. In implementing new rules, institutions will also normally implement corresponding changes to its administrative processes. Arbitral institutions too must bear in mind that the arbitration rules that they make are intended to facilitate the conduct of arbitration and they should be careful not to make rules that may engender controversies and differences between the parties. The Domestic Rules of the SIAC with its strict time lines, deeming provisions and overriding clauses, more akin to rules of court, are likely to continue to invite challenges and spawn litigation. Perhaps it is time to reconsider whether there is a need for SIAC to maintain two different sets of rules for arbitrations conducted under its auspices.

Enforcement of the arbitration agreement

Stay of court proceedings: Domestic arbitration and “step in the proceedings”

3.10 An arbitration agreement may be enforced by an application to stay proceedings filed in court over a dispute that is subject to a valid arbitration agreement between the parties. Section 6(1) of the Arbitration Act 2001 provides that such an application for stay of court proceedings in favour of arbitration may be made “at any time after appearance and before delivering any pleading or taking any other step in the proceedings”. What constitutes a “step in the proceedings” has been the subject of many court decisions. The issue is further complicated where a stay application has been submitted by the defendant and the plaintiff issues a notice to serve the Defence under pain of a default judgment or summary judgment.

3.11 The High Court in *Chinese Chamber Realty Pte Ltd v Samsung Corp* [2003] 3 SLR 656 attempted to get over this problem by directing the defendant to file its Defence but deeming that its “filing of its Defence, its filing of affidavits, and its participation in the O 14 proceedings shall not be construed as steps in the proceeding” (at [26]). This inconsistent and compromise practice should not be encouraged. Otherwise there could well be many more such cases necessitating courts to make “deeming” orders to override clear statutory provisions and the Rules of Court (Cap 322, R 5, 2004 Rev Ed) (see author’s comments on this decision in (2003) 4 SAL Ann Rev 48 at paras 3.9–3.11). The matter went up to the Court of Appeal in *Samsung Corp v Chinese Chamber Realty Pte Ltd* [2004] 1 SLR 382 (“*Samsung Corp*”).

3.12 Chao JA (sitting with Woo Bih Li J) allowed the appeal, reversing the order directing the service of the Defence and ordered that no summary judgment application ought to be brought before the final determination of the stay application. The Court of Appeal took the view that when the question of stay is put in issue that should first be determined before any further step is taken by either party in the action. The “compromise” order made by the judge which required the defendant to file his Defence is clearly inconsistent with s 6(1) of the Arbitration Act that a defendant who applies for a stay on the ground of there being an arbitration clause must not take any step in the proceeding and, on the other hand, it “deems” that a defence so filed by the defendant would not be taken to mean that the defendant had taken a step in the proceeding. The Court of Appeal put it most aptly when it observed at [24] that a court should not go “to the extent of performing what

appears to be a ‘gymnastic’ exercise in order to achieve a result, which as a matter of principle, is far from logical”.

3.13 The Court of Appeal’s decision in *Samsung Corp* has properly balanced and brought perspective into what has hitherto been a confusing and illogical practice relating to O 14 applications, the filing of the defences and the applications for stay pending arbitration under the Arbitration Act. In essence, the Court of Appeal endorses the position that when an application for stay in favour of arbitration is pending, that application must be determined first before any further steps are taken in the proceedings.

3.14 Belinda Ang Saw Ean J, however, in her decision in *Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2005] 1 SLR 168 took a slightly different approach when she was considering an application to set aside a judgment entered in default of service of defence. There, the defendant had also applied to stay the action on the basis of an arbitration clause and did not file its Defence, arguing that to do so might be construed as a “step in the proceedings” which could adversely affect its stay application. The plaintiff proceeded to enter judgment in default of defence. The defendant applied to set it aside.

3.15 The court rejected the defendant’s contentions and refused to set aside the judgment of default, holding that a pending stay application would not stop time from running for the service of the Defence under the Rules of Court. The learned judge prescribed that the defendant ought to have sought an early hearing of the stay application, or an extension of time to file the Defence before time ran out. The court then proceeded on the basis that in an application to set aside a judgment that was regularly obtained, the defendant must show that it has a defence on the merits with a real prospect of success, to justify a setting aside. The court was satisfied that based on the final account signed off by the parties the amount claimed in the action was due and payable. The defendant had no defence to the claim.

3.16 In proceeding as she did, Ang J attempted to distinguish the Court of Appeal’s decision in *Samsung Corp* on the basis that it related to an application to waive the filing of a defence in an O 14 r 1 application. That decision, in the learned judge’s view, was more applicable if cited in support of an application for extension of time rather than in an application to set aside a judgment. She supported her decision with the observation at [16] that:

[T]he Rules of Court have their own self-contained provisions relating to the service of defence, time extension and default judgment. Unless and

until there is a stay order to halt proceedings, the plaintiff is entitled to give notice to the defendant to serve its defence.

3.17 This observation contradicts directly Chao JA in *Samsung Corp* when he said at [18]:

The timeframe prescribed in the Rules of Court for the filing of Defence is a general rule and should be applied in the normal sort of a case where there is no dispute as to the jurisdiction of the court. Where, in a case, an application has been made for a stay of proceeding on the ground that the dispute ought to be referred to arbitration there is, in our opinion, much force in the contention that this question must first be determined before any further steps be taken in the proceeding. If the stay application should succeed, the dispute will be transferred to a different forum for determination. If it should fail, the court would no doubt make the necessary consequential orders, including setting the time-limit for the filing of Defence.

3.18 The justice of the case in *Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* may seem to balance in favour of not setting aside the judgment as it appears that Ang J was convinced that the defendant in that case had no substantive defence. However in doing so, the court has unwittingly added a question mark to the practice in relation to the filing of the Defence, as suggested by the Court of Appeal in *Samsung Corp*.

“No dispute referable to arbitration”

3.19 Amongst the most common arguments that have been raised to resist an application to stay court proceedings commenced in breach of an arbitration agreement is the existence of a “dispute”. In *Sintal Enterprise Pte Ltd v Multiplex Constructions Pty Ltd* [2004] 4 SLR 841, the plaintiff, Sintal, agreed to supply and install stonework for main contractor Multiplex’s project at Haig Road. The contract incorporated the Singapore Institute of Architects Conditions of Sub-contract (2nd Ed, August 1999). Sintal claimed various sums allegedly due from Multiplex under the contract and damages for delay. Included in the claims was \$485,268.55 (“the certified sum”) due under the interim certificates certified by the project architects. The defendant’s answer to the certified claims was the right to set-off for which they claimed notices were duly given. Multiplex applied for a stay in favour of arbitration under s 6 of the Arbitration Act 2001. The Assistant Registrar granted a stay for all claims except the claims for the certified sum. Multiplex’s appeal was dismissed by Lai Siu Chiu J. The decision turned on

whether there was a “dispute” in relation to the certified sum that could be referred to arbitration.

3.20 The learned judge cited several Singapore decisions which had considered this question under the repealed Arbitration Act (Cap 10, 1985 Rev Ed (“repealed Act”), namely, *Kwan Im Tong Chinese Temple v Fong Choon Hung Construction Pte Ltd* [1998] 2 SLR 137 for the proposition that the court could apply principles used in summary judgment proceedings in an application for stay under s 7 of the previous Act but it should not be an exhaustive means of weighing the claims: see *JDC Corp v Lightweight Concrete Pte Ltd* [1999] 1 SLR 615 for the view that a stay should not be granted if there is no genuine dispute. All these decisions were, however, based on English court decisions prior to 1996. Lai J quoted Saville J’s view in *Hayter v Nelson* [1990] 2 Lloyd’s Rep 265 at 268 from which the proposition must be that:

[I]f a claim is indisputable then it cannot form the subject of a “dispute” or “difference” within the meaning of an arbitration clause. If this is so, then it must follow that a claimant cannot refer an indisputable claim to arbitration under such a clause; and that an arbitrator purporting to make an award in favour of a claimant advancing an indisputable claim would have no jurisdiction to do so.

3.21 Lai J reasoned that the defendant, Multiplex, did not dispute the interim certificates. Indeed, by claiming the right to set off the certified sum against its losses due to delay, Multiplex implicitly accepted the correctness of the interim certificates. If there were any “dispute”, it related only to the right to set-off.

3.22 Singapore courts have for a long time laboured under the impression that the stay provision under the English Arbitration Act 1950 (c 27) was similar to the repealed Act. 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 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. Perhaps, it is time for Singapore courts to review

their earlier decisions and make the distinction as the New Zealand Court of Appeal did in *Baltimar Aps Ltd v Nalder & Biddle Ltd* [1994] 3 NZLR 129.

Anti-arbitration injunction

3.23 The supervisory powers of the courts over pending arbitrations had previously included the removal of arbitrators for misconduct, setting-aside or modifying interlocutory orders made by arbitrators, granting injunctions against arbitrators from proceeding with arbitration, *etc.* The role of courts over arbitration in Singapore was re-defined in 1994 when the UNCITRAL Model Law was adopted as having the force of law, with emphasis on party autonomy, encouragement for judicial support and injunction against judicial intervention in on-going arbitration proceedings. Article 5 of the Model Law provides that “[i]n matters governed by [the Model] Law, no court shall intervene except where so provided in this Law”.

3.24 The scheme as provided in the Model Law and the provisions of the International Arbitration Act is one of judicial support and not intervention, *eg* it provides for or envisages court involvement in the following Articles: Art 8 (arbitration agreement and substantive claim before court), Art 9 (interim measures), Art 11 (appointment of arbitrators), Art 13 (challenge procedure), Art 14 (failure or impossibility to act), Art 16 (competence of arbitral tribunal to rule on its jurisdiction), Art 27 (court assistance in taking evidence), Art 34 (setting aside an award) and Arts 35 and 36 (recognition and enforcement of awards).

3.25 The case of *Mitsui Engineering and Shipbuilding Co Ltd v Easton Graham Rush* [2004] 2 SLR 14 illustrates the supportive rather than interventionist attitude of Singapore courts when called upon to exercise interventionist powers over arbitrations. There, Mitsui and Keppel Engineering Pte Ltd were joint venture partners in a consortium which was awarded certain contracts by the Port of Singapore Authority. Disputes arose among various parties and the disputes between Mitsui and Keppel were referred to arbitration pursuant to an arbitration provision in the agreements between them. Mr Easton was appointed by Mitsui and Keppel as the arbitrator. The arbitrator made an interim award setting out his decisions on several issues. Mitsui was dissatisfied with the interim award, alleging that the interim award dealt with matters outside the scope of what had been submitted for decision and that Mr Easton had pre-judged some of the issues which were to be dealt with at subsequent hearings. Mitsui informed Mr Easton of its concerns and challenged his position as arbitrator on 9 January 2004 and invited him to withdraw accordingly, taking the position

that pending an intended application to remove Mr Easton and to set aside the interim award, there should be no further hearing before Mr Easton. They applied to the court for an injunction to enjoin Mr Easton from proceeding with the arbitration.

3.26 The issue before the court was whether there was any jurisdiction or judicial power to grant such an injunction against an arbitrator from proceeding with the arbitration hearing pending a decision for his removal or recourse against the interim award. Realising that there was no specific provision in the Model Law or in the International Arbitration Act allowing the courts to grant such an injunction, Mitsui suggested that there was a residual power lying with the court to make such an order, arguing that as the law allows the court to set aside an award on grounds no less serious than the power to remove an arbitrator, it must follow that the court would have the power to grant an interlocutory injunction under Art 34 of the Model Law and s 24 of the International Arbitration Act, if not under Art 13 of the Model Law in order not to render the court's eventual decision on the application to set aside an award nugatory.

3.27 Woo Bih Li J saw through Mitsui's argument and rejected the same swiftly. The learned judge pointed out that if an award was indeed set aside, whatever that had been done in reliance on the award would be set aside too. If Mitsui's nugatory argument was accepted, it would mean that every dissatisfied party could seek an interlocutory injunction pending the determination of the setting aside application, a situation clearly contrary to the overall scheme of minimal court intervention in on-going arbitrations contemplated under the Model Law. The court was conscious that its power to intervene in any arbitration must necessarily be provided for under the law. There was no express provision in the Model Law and the International Arbitration Act that permitted the court to do so. Woo J correctly pointed out that the proviso in Arts 13 and 16 of the Model Law, on the other hand, expressly state that the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings irrespective of the fact that the challenge was pending with the court. This decision is sound and clearly reflects the positive and supportive attitude of the Singapore courts for arbitration.

3.28 Another noteworthy aspect of this decision is Woo J's constant reference to Howard M Holtzmann & Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer, 1989). Section 4 of the International Arbitration Act directs that when interpreting the provisions of the Model

Law, the *travaux préparatoires* may be referred to. The court made effective use of these documents, by carefully following the development of the discussions in the UNCITRAL Working Sessions, and the bases for the amendments made to the draft provisions of the Model Law. One of the objectives of the Model Law was to achieve as far as possible greater harmonisation of laws – not just of black-letter law but in its application, its rationale and the legal basis of how the provisions should work in practice.

Recourse against arbitral awards

Domestic arbitration: “Question of law” or “error of law”

3.29 The available remedies against an arbitral award are statutorily provided and may only be exercised in compliance with the requirements and procedures prescribed. Singapore arbitration laws provide two separate regimes governing domestic arbitration and international arbitration. An award rendered in pursuance of domestic arbitration proceedings under the Arbitration Act 2001 may be appealed to the High Court on a “question of law” arising out of an award made in the proceedings, either with the agreement of all the parties to the proceedings or with the leave of the court: s 49 Arbitration Act.

3.30 In *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd* [2004] 2 SLR 494, United Engineers claimed against Northern Elevator in arbitration for defective work in the installation of cargo lifts for two warehouses. Northern Elevator in turn counterclaimed for the unpaid balance due under the contract. In an interim award, the arbitrator awarded United Engineers the costs of rectification, which sum was to be assessed; and also found for Northern Elevator on its counterclaim for the balance due under the agreement. In the assessment of the costs of rectification, United Engineers claimed a total of \$975,160 but was awarded \$320,699.12. United Engineers was dissatisfied with the amount awarded and appealed against the decision on the ground that the arbitrator had not applied the compensatory principle in his assessment of damages. As the arbitration was commenced before the coming into force of the Arbitration Act 2001, the applicable law of the arbitration was that under the repealed Act.

3.31 United Engineers argued that the question of law in this case was one which concerned the general principles relating to the assessment of damages, and any decision on this point would have an impact on the assessment of damages in future claims. As such, United Engineers argued

that this was not a “one-off” point of law. Northern Elevator opposed the grant for leave contending that there was no “question of law” arising from the award. What was posed was actually a question of fact disguised as a question of law. Even if the question was valid, it was a “one-off” point and did not warrant leave to be granted, since there was nothing obviously wrong with the arbitrator’s decision. The High Court (see *United Engineers (Singapore) Pte Ltd v Northern Elevator Manufacturing Sdn Bhd* [2003] SGHC 158) granted leave to appeal, ruling that the arbitrator had erred in law on the amount of damages he awarded on United Engineers’ claim. Lai Siu Chiu J then proceeded to examine the various heads of claim and the manner the arbitrator had treated them, finally holding that the arbitrator had under-compensated United Engineers and remitted the award back to the arbitrator for re-assessment. Northern Elevator succeeded in its appeal to the Court of Appeal.

3.32 The Court of Appeal made a clear distinction between a “question of law” and an “error of law”, emphasising that the law only permitted an appeal on a “question of law” and not an “error of law”. Delivering the judgment of the court, Choo Han Teck J distinguished the two thus (at [19]):

To our mind, a “question of law” must necessarily be a finding of law which the parties dispute, that requires the guidance of the court to resolve. When an arbitrator does not apply a principle of law correctly, that failure is a mere “error of law” (but more explicitly, an erroneous application of law) which does not entitle an aggrieved party to appeal.

3.33 United Engineers’ complaint that the arbitrator had disregarded the compensatory principle in his assessment of damages was an allegation that the arbitrator had committed an *error of law* in failing to apply the compensatory principle and was not a “question of law” between the parties that still required determination. As the real contention of United Engineers was that the arbitrator had *failed to correctly apply* the compensatory principle, no question of law was involved but an error of law which could not be reviewed by the courts on appeal.

3.34 The fundamental basis for appeal under the repealed Act and the current Arbitration Act 2001 remains the same, that there must be a “question of law” for determination. The Court of Appeal’s decision in *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd* is therefore instructive of how the Singapore courts would treat the threshold question of the existence of a “question of law”. This decision also signals a rejection by the Singapore court of the English position taken in *Italmare Shipping Co v Ocean Tanker Co Inc (The Rio Sun)* [1981] 2 Lloyd’s

Rep 489 at 492 where Robert Goff J (as he then was) took the view that “it does not follow that, simply because there is no dispute as to the general law, the application of the law to the facts cannot itself raise a question of law” (at 492). The parting of ways on this issue hopefully closes the case for the resurrection of the old basis for appeal on an “error of law on the face of the award”.

3.35 It is, however, never always easy for a court to ascertain if an issue is a question of law that the arbitrator had wrongly decided or that it was an error of law he had committed in the course of coming to his final decision. In *Liew Ter Kwang v Hurry General Contractor Pte Ltd* [2004] 3 SLR 59, Judith Prakash J, in considering an application for leave to appeal under the repealed Act (Cap 10, 1985 Rev Ed), was given three “questions of law”, namely:

- (a) whether failure to consider a delay event fell within the applicable clause allowing for time extension;
- (b) whether extension of time could be based on estimates without methodical analysis; and
- (c) whether the arbitrator was to review the decisions of the architect only if there was clear evidence that the architect had failed to act professionally, independently or fairly in reaching such decision.

In granting leave to appeal, the court ruled there was a *prima facie* case that:

- (a) The arbitrator was wrong in his approach as he had not looked at the contract provisions to determine whether the delaying event referred to fell within any of the applicable sub-paragraphs of the clause for time extension.
- (b) The arbitrator erred in agreeing that estimates would be sufficient and that detailed analysis was not required.
- (c) The arbitrator did not appear to have carried out a proper evaluation or review of the architect’s decision. Instead, he seemed to presume that the architect was right unless it could be proved that he did not act professionally, independently and fairly.

3.36 When considering these questions, the court examined how the arbitrator had come to the findings he did in his award; analysing the

reasoning and his application of the contractual provisions to the facts as he had found them. There were issues of law mixed with issues of fact in his award but it was not entirely clear that there were “questions of law” as between the parties that had required his determination. The questions before the court that were framed by the appellant were undoubtedly questions of law but were they questions that required determination? If the principle espoused in *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd* is faithfully applied, the answer to this is probably in the negative.

Setting aside an award: Role of experts in the decision-making process

3.37 Under the international arbitration regime, no appeal is available to an aggrieved party against an award. The only recourse available to an aggrieved party under the International Arbitration Act is to set aside the award on the grounds and procedures set out in s 24 of the International Arbitration Act and Art 34 of 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 failure to abide by agreed procedure. All of these grounds of challenge seek to ensure that the aggrieved party is given a reasonable opportunity to be heard and that rules of natural justice are observed.

3.38 An arbitrator’s duty of adjudication is a non-delegable one. He must apply his own mind to the issues and make his findings and rulings in his award. Most procedural rules allow the tribunal to appoint experts to assist them on technical or legal aspects of the dispute. The use of experts and tribunal advisers, however, must be properly measured and controlled such that the arbitral tribunal retains the decision-making responsibility and does not abdicate its adjudicatory function both as to fact and law to the experts or advisers.

3.39 The question on the role of the tribunal’s expert arose for consideration in *Luzon Hydro Corp v Transfield Philippines Inc* [2004] 4 SLR 705. Luzon Hydro had engaged Transfield to design and construct a power station on the Bakun River in the Philippines. The project involved the construction of a tunnel under a mountain in order to channel water to the power station for the generation of electricity. Disputes were referred to arbitration in Singapore in accordance with the ICC Rules of Arbitration. With the consent of parties, the arbitral tribunal engaged a technical expert

to assist the tribunal. The scope of the work done by the expert was made known to the parties. There was no written report from the expert and nothing was put to the parties for responses. The tribunal awarded Transfield extensions of time and determined that it was entitled to recover certain items in its claim for outstanding payments. Luzon succeeded in its counterclaim in respect of certain items involving the design of certain tunnels.

3.40 Luzon applied to set aside the award under Art 34(1) of the Model Law on the ground that the arbitral procedure was not in accordance with the agreement of the parties or that a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of a party had been prejudiced. The principal allegation made by Luzon was that the tribunal had delegated to the expert so much of its functions that it had effectively abdicated its decision-making responsibility. Luzon pointed out that the expert had taken an active part in the hearing by asking questions which arose out of his personal expertise and experience. Luzon also complained that they were deprived of the opportunity to comment on the views of the expert as required by the ICC and the Model Law.

3.41 Judith Prakash J dismissed the application. She held that the parties were aware of the terms of engagement of the expert. They would be entitled to a written report if one was made. As no written expert report was submitted, there was nothing that would oblige the tribunal to disclose confidential communications between the tribunal and the expert. The judge criticised Luzon's complaint as being premised on the worst possible interpretation to descriptions of the work done by the expert. She held that the communications between the expert and the tribunal were confidential in the same way as communications amongst the tribunal members were confidential and unless there was strong and unambiguous evidence of irregularity in the manner in which the arbitration was conducted, no aspersions should be cast on what the tribunal did or said that it did.

3.42 Disagreement with the opinions of the expert and the arbitral tribunal's findings cannot be grounds to set aside the award. Often counsel, in their eagerness to nullify the award, would use the grounds to set aside an award as a disguised attempt for the court to make a judgment on the merits of the case and overturn the findings of fact and law by the arbitral tribunal.

3.43 This decision has spawned some discussion on whether the court had effectively imposed a confidentiality bar that prevented Luzon from accessing evidence to support its application to set aside the arbitration

award. One arbitrator, schooled in the English tradition (Mr Hew R Dundas, Chartered Arbitrator, London), thinks that this decision would be considered a serious irregularity under English law as it offends the notion that “justice ... should manifestly and undoubtedly be seen to be done”: *per* Lord Hewart CJ in *The King v Sussex Justices* [1924] 1 KB 256 at 259. A leading civil law practitioner (Dr Michael Schneider, attorney-at-law, Switzerland) however defended the judge’s decision and criticised the English cases as inducing “arbitrators to concentrate on making a demonstration that ‘justice’ is ‘manifestly and undoubtedly seen to be done’, emphasising the façade of ‘procedural’ justice at the expense of the substance of their decision”. The final word on this is being awaited from the Court of Appeal.