4. ARBITRATION

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Enforcement of arbitration agreements

Stay of court proceedings – Whether claim on dishonoured cheques comes within the scope of arbitration agreement

4.1 The court's power to grant a stay of proceedings commenced before it where there is an arbitration agreement falling within the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") is said to be mandatory. Questions of whether the subject matter falls within the scope of the arbitration agreement or that there was in fact a matter in dispute, have sometimes been raised to challenge such a reference to arbitration.

4.2 A cheque, regarded as a bill of exchange, has been considered under English law as an instrument separate and distinct from the underlying contract. A claim for damages arising from the underlying contract cannot thus operate as a defence to the claim based on the bill of exchange: see *Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH* [1977] 1 WLR 713 ("*Nova*"). In the case of *Piallo GmbH v Yafriro International Pte Ltd* [2014] 1 SLR 1028 ("*Piallo*"), the question of whether the dispute over a dishonoured cheque made pursuant to the contract ought to come within the scope of the arbitration agreement was considered.

4.3 In *Piallo*, the parties entered into a distributorship agreement ("the Agreement") pursuant to which Yafriro International Pte Ltd ("Yafriro") issued post-dated cheques to Piallo GmbH ("Piallo") for the exclusive right to sell the latter's products. The cheques were countermanded by Yafriro and dishonoured by the bank. Piallo commenced court proceedings and Yafriro put forth its cross-claims. The Agreement had a clause providing for arbitration in Geneva and that the laws of Switzerland were to govern the contract. Yafriro successfully applied for a stay of the proceedings in favour of arbitration before the assistant registrar. On appeal, Piallo, relying on *Nova*, *inter alia*, advanced the argument that each cheque was a distinct and

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separate contract from the Agreement and the claim arising therefrom would not fall under the scope of the arbitration clause. It added that even if it would, there could be no defence to the claims under the dishonoured cheques and there was thus no dispute referable to arbitration.

4.4 In dismissing the appeal, the High Court noted the wide terms of the arbitration clause in the Agreement and could find no suggestion that the parties could have intended to exclude any matter from the said clause and concluded that the parties had most likely intended to have their disputes arising from their business relationship decided by the same tribunal.

4.5 The High Court held (at [36]) that the "presumption against taking bills of exchange into arbitration" may be revisited if there are "clear words" in the arbitration clause to include claims such as the claim on the cheques in this case. The court did not elaborate on what could be understood as "clear words" but proceeded on an analysis of the nature of the claim and cross-claim and concluded that they all arose from the same incident. The learned judge reasoned (at [38]) that the parties had most likely intended such claims to be resolved by arbitration as they were so intertwined that "an agreement to arbitrate on one can properly be construed as covering the other". The court thus concluded that the subject matter in the court action fell within the purview of the arbitration clause and stay of the court proceedings was accordingly upheld.

4.6 Piallo's second line of defence was that there could, in any event, be no dispute that could be referred to arbitration as it was a claim under a bill of exchange. Referring to the Hong Kong decision of *Getwick Engineers Ltd v Pilecon Engineering Ltd* [2002] HKCFI 189 at [26(4)] for the proposition that a dishonoured cheque was "to be regarded as a clear and unequivocal admission on the defendant's part of its liability and quantum", Piallo argued that there would therefore be no dispute in existence that could be referred to arbitration. To this the court said that Yafriro had countermanded the cheques and had refused to make payment. It then considered the fact that Yafriro subsequently denied the claim when it countermanded the cheques and had averred grounds to refuse payment to Piallo. This was considered as sufficient to constitute a dispute, just as was the case in the Court of Appeal's decision in *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732. Any admission as to liability and quantum by Yafriro must be made clear and unequivocal, and the same had not been forthcoming from Yafriro.

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4.7 One aspect of the case that needs noting is that while the governing law of the Agreement was Swiss Law and the seat of the arbitration was Geneva, the parties had agreed with each other not to address the court on the application of Swiss Law to aid in the interpretation of the arbitration clause but had instead agreed to proceed on the assumption that Swiss law was the same as Singapore law in relation to the construction of the arbitration clause. This is a pragmatic move and the court did nothing to disturb the arrangement. In her order affirming the grant of stay of the proceedings before the Singapore court, Belinda Ang Saw Ean J also granted liberty for Piallo to apply for a lifting of the stay should the tribunal subsequently find in favour of Piallo that Yafriro had no defence to the claims on the cheques. In doing so, the court adopted the *prima facie* approach that a court should take when considering matters of scope and jurisdiction, and was quite rightly content to leave the determination of substantive defences to the arbitral tribunal.

Interim measures – Grant of injunctions

4.8 Singapore courts have been robustly supportive of international arbitration and have on many occasions granted interim measures including injunctions and anti-suit injunctions in support of arbitration. The power to grant such interim measures is undeniably discretionary. In granting such measure, courts must be circumspect and must fully apprise itself of the consequences of making or not rendering such support. The case of *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 ("*Maldives*") involved an issue which straddles both commercial interest of a party and the need to be conscious of the principle of international comity.

4.9 In *Maldives*, the High Court had granted an interim injunction against the Government of the Republic of the Maldives and Maldives Airports Co Ltd ("Maldives Airports") (collectively, "the Appellants") from doing anything that may interfere in the performance of the obligations of GMR Malé International Airport Pte Ltd ("GMR"). The dispute between the parties arose from a concession agreement ("the Concession Agreement") under which the consortium was granted a concession to modernise and maintain the Malé International Airport for 25 years. The consortium incorporated GMR and assigned all its rights and obligations under the Concession Agreement to GMR. The Concession Agreement contained an arbitration agreement. The principal dispute concerned the clause in the Concession Agreement that allowed GMR to impose a fee on departing passengers, which the Appellants said was contrary to the laws of Maldives and the Maldives court upheld such assertion. As a consequence, the Appellants issued a letter ("first letter") agreeing to a variation of the fees payable by GMR to Maldives

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Airports under the Concession Agreement to compensate GMR for any expected loss of revenue.

4.10 Following a change in the Government in Maldives, Maldives Airports issued another letter ("second letter") stating that its first letter had been issued by its former chairman without authority. The Government then purportedly withdrew the consent that it had "ostensibly given" on the variation of fees set out in the first letter. GMR continued to operate the airport on the basis that it was entitled to a variation of fees under the first letter.

4.11 GMR commenced arbitration against the Appellants ("the First Arbitration") on 5 July 2012 seeking a declaration that it was entitled to the variation of fees. On 27 November 2012, the Appellants gave notice to GMR that the Concession Agreement was void *ab initio* and gave seven days for GMR to vacate. The Appellants thereafter commenced arbitration against GMR seeking for a declaration that the Concession Agreement was void and of no effect ("the Second Arbitration"). GMR applied to the High Court for an injunction against the Appellants from interfering with GMR's performance of its obligations under the Concession Agreement and from taking possession and control of the airport. The court granted an injunction in terms of the interference but no order was made in relation to the taking of possession of the airport. The Government and the airport authority appealed.

4.12 In considering the matter, the court had to be concerned with several issues of jurisdiction, sovereign immunity and the balancing of the harm that could befall the parties whether it grants or refuses to grant the interim injunction sought.

Waiver of immunity under the State Immunity Act

4.13 The Appellants raised two jurisdictional objections, namely, (a) an injunction could not be granted against a state pursuant to s 15(2) of the State Immunity Act (Cap 313, 1985 Rev Ed) unless the State gives its consent ("First Objection"); and (b) the Singapore court had no jurisdiction to grant an injunction as it offends the "act of State" doctrine ("Second Objection"). The Appellants argued that the Concession Agreement was void *ab initio* and, as such, cl 23 which expressly stated that Maldives "irrevocably and unconditionally agrees not to claim and hereby irrevocably and unconditionally waives any such immunity to the fullest extent permitted by the laws of such jurisdiction" would follow in their reasoning that no waiver of immunity and no consent was thus given to submit to the Singapore court's jurisdiction and thus no injunction could be issued.

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4.14 The Court of Appeal took the view that it could not resolve whether cl 23 was void without delving into the main issue in the Second Arbitration, *viz*, whether the Concession Agreement was also void. Such an argument would also require the court to form a judgment on the non-severability of cl 23 should the Concession Agreement be found to be void *ab initio*. Drawing from its decision in *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at [46]–[47], where it was held that a "choice of law clause was enforceable even where the main contract containing the clause was declared to be void on the grounds of mistake, duress, or even fraud" (*Maldives* at [20]), the court extended this principle to find that cl 23 may still be relied upon notwithstanding allegations that the Concession Agreement was void *ab initio*. The Government must therefore be held to have waived any immunity against the granting of injunctive relief by the Singapore courts.

Act of State and assertion of right to private law remedies

4.15 The Government's Second Objection for immunity was based on the "act of State" doctrine. An "act of State" has been defined as a conduct "done in the exercise of the State's supreme sovereign power" (see *Salaman v Secretary of State in Council of India* [1906] 1 KB 613 at 613 and 639) and not a private dealing. The right is ascertainable by the nature of the transaction rather than the stature of the entity.

4.16 The court noted that the Appellants had commenced the Second Arbitration to assert its rights. By doing so, the Appellants have sought "private law remedies" through a private resolution process of arbitration. Its claim in the arbitration, that the Concession Agreement was void *ab initio* or had been frustrated, was one that was essentially contractual in nature. As such, the Government did not act pursuant to "an exercise of sovereign power" and the injunction order granted could not have offended the "act of State" doctrine.

Courts power to grant injunctions

4.17 The injunction sought by GMR was framed in the form of a preservation of rights, *viz*, the right to be served appropriate notice of termination under the Concession Agreement, the right to have the dispute over its entitlement under the Concession Agreement resolved in arbitration before the entitlements were destroyed ("the Second Right"), and that GMR's interest in the land on which the airport is situated be preserved. The question which then arose for consideration was whether the court had the power to grant an order to preserve these rights.

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4.18 The power to grant injunctions and make orders in relation to an international arbitration has been specifically extended to the court by s 12A(2) of the IAA. The court's power is, however, subject to certain conditions, including that it must be exercised for the "purpose of preserving evidence or assets": s 12A(4) of the IAA. This power is not limited to making Anton Piller or Mareva injunctions but making any such orders as may be necessary to preserve assets or evidence in the arbitration. GMR took the position that the order was necessary to preserve the "assets" pending the resolution of disputes in arbitration.

4.19 The Court of Appeal examined the English Court of Appeal decision in *Cetelem SA v Roust Holdings Ltd* [2005] 1 WLR 3555 ("*Cetelem*") at [57] which had held that "assets … included choses in action and contractual rights" (*Maldives* at [36]), a point that was also raised in the Second Reading speech moving the enactment of the amendment to the IAA in 2009 and in the Explanatory Note to explain that assets would include rights under a contract. Acknowledging that its function in interpreting statutory provisions is to give effect to parliamentary intent, V K Rajah JA nevertheless cautioned that the contractual rights contemplated must be confined to such contractual rights as lend themselves to being preserved. The court took the view that the decision in *Cetelem* does not stand for the rule that all contractual rights may be the subject matter of a preservation order under s 12A(4) of the IAA, reasoning that if that be the case (*Maldives* at [40]):

> … it would ineluctably open the floodgates to applications for interim mandatory injunctions to compel parties to perform any and all types of contractual obligations pending the resolution of the dispute.

4.20 In examining the rights which GMR sought to preserve by the injunction, the court ruled that the right to be served proper notice of termination is not within the scope for granting an injunction under the provision.

4.21 In relation to the right to continue to preserve the current situation pending the outcome of the arbitration, GMR complained (at [46]) that the conduct of the Appellants would have "the effect of irretrievably and irreversibly displacing" GMR's right to perform its obligations under the Concession Agreement referring to cl 21.5 of the Concession Agreement which provided that (at [72]):

> …during the pendency of any Dispute and the resolution thereof, both Parties shall continue to perform all their respective obligations under this Agreement … except to the extent that the obligation constitutes the subject matter of such Dispute.

The court answered this simply by pointing out that as the right to arbitrate was never affected, an injunction was not required to preserve

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that right. What GMR had in fact sought was to require the performance of the Concession Agreement, the very root of which was the subject matter in dispute. In the court's view (at [48]), cl 21.5 of the Concession Agreement could not save the situation in these circumstances, as:

> … even an obligation to continue performing a contract despite the existence of a dispute (*ie*, a cl 21.5-type obligation) would not give rise to a contractual right amounting to an 'asset' that may be preserved by way of an interim injunction under s 12A(4) unless it can be shown that its breach is not adequately compensable by damages…

4.22 It is not uncommon for contracts of such nature that the parties would agree to perform their respective obligations despite the existence of a dispute. This is particularly so as the agreement involved the operation of an international airport the disruption of which would necessarily cause much cost and inconvenience to the public. The court, however, emphasised (at [48]) that the dispute in this case goes to the very "foundation and continuance of the contract" and the parties would have been aware of the possibility of such a dispute as they agreed to provide a proviso that stated "except to the extent that the obligation constitutes the subject matter of such Dispute". The court was thus not convinced that a breach of the Second Right would not be adequately compensated by damages and an injunction was, therefore, not necessary.

4.23 In relation to GMR's assertion that it was the lessee of the site under a lease agreement with Maldives Airports which gave it the "exclusive right to occupy, use and peacefully enjoy the Site", the court accepted that such contractual right as a lessee would be capable of being treated as an "asset" under s 12A(4). In principle, therefore, an injunction may be necessary to preserve such right or "asset" and the Singapore court has the power to grant it. Whether the court ought to do so is dependent on the further test of balance of convenience.

4.24 The court noted that GMR's potential loss if it be found right could be ascertainable and records of the airport's operations would be kept and any direct loss calculable. This alone would justify a refusal of the injunction sought. It also rejected press reports on the financial difficulties of the Government as sufficient evidence to suggest that it would be unable to pay damages if found to be so liable. At best, it would be a neutral factor in the balance of convenience test as the financial standing of the Appellants must have been considered when GMR entered into the Concession Agreement.

4.25 On the other hand, if the injunction were to be granted, it would be difficult for the Government (and other agencies of the Government) to have any certainty of what was required of them under the order. The restrictions that the injunction order would impose on

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the operations and duties of regulators relating to the operation of an international airport would have to spill over to the duties of the Maldives' Department of Immigration, Civil Aviation Authority, and could, *inter alia*, affect tourism and even defence. The balance of convenience test clearly tilted in favour of disallowing such an injunction.

4.26 The court has carefully set the approach in considering when and whether injunctive relief in support of arbitration ought to be granted. The decision brings clarity to the scope of s 12A of the IAA, that not all "contractual rights" whether tangible or intangible, qualify as "assets" to engage the court's power in granting interim measures. The refusal to grant the relief sought by GMR is consistent with the court's desire to adhere as closely as possible to the parties' bargained position. Had the injunction been granted, it would run contrary to the contractual provision for expropriation specifically provided for in the Concession Agreement. This decision reflects again the court's well-recognised support for international arbitration. In its decision, the court constantly reminded itself that the adjudication of the substantive dispute lay not with it but the arbitral tribunal and that any observations made are not to be binding on the arbitral tribunal, a constant refrain that what it was merely doing was to maintain the *status quo* leaving the rest to the arbitral process.

Setting aside of awards under IAA

Incorporation of arbitration clauses

4.27 In another reversal of a ruling of the High Court by the Court of Appeal, the case of *International Research Corp plc v Lufthansa Systems Asia Pacific Pte Ltd* [2014] 1 SLR 130 ("*IRCP*") revisits the interesting issue of the joining of non-signatory parties via an incorporation by reference to the arbitration agreement. This case also gives a fresh look into the court's stand on conditions precedent to arbitration, in particular pre-arbitral mediation efforts.

4.28 Datamat Public Co Ltd ("Datamat") had contracted with Thai Airways to provide them with an electronic data protection ("EDP") system. Datamat subcontracted its work to (a) Lufthansa under a co-operation agreement ("Co-operation Agreement") to supply and undertake the maintenance repair and overhaul system of the EDP; and (b) International Research Corp Public Co Ltd ("IRCP") under a contract for sale and purchase, to supply the hardware and software products for the EDP system and provide a banker's guarantee to Thai Airways. Datamat's payments due from Thai Airways had also been assigned to Siam Commercial Bank from which payments to IRCP would be paid, who would then pay Lufthansa. Datamat went into

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financial difficulties and Lufthansa notified IRCP and Datamat that they would cease work under the Co-operation Agreement.

4.29 Two supplemental agreements were entered into by Lufthansa, Datamat and IRCP. Supplemental Agreement No 1 would oblige IRCP to use moneys received from Thai Airways to pay Lufthansa for works and services rendered under the Co-operation Agreement. IRCP would also provide a letter of credit in favour of Lufthansa. Under Supplemental Agreement No 2, IRCP, Lufthansa and Datamat agreed that the sums due to Lufthansa from Datamat under the Co-operation Agreement would be settled by deducting those sums directly from IRCP's account with the bank.

4.30 The Co-operation Agreement contained a multi-tiered dispute resolution clause and provided for arbitration at the fourth level as a last resort on such matters that "cannot be settled by mediation".

4.31 Lufthansa, claiming that IRCP had failed to meet its payment obligations, commenced arbitration pursuant to the arbitration clause in the Co-operation Agreement. IRCP challenged the tribunal's jurisdiction on the basis that the supplemental agreements did not contain any dispute resolution process, much less an arbitration agreement.

4.32 The High Court affirmed the tribunal's ruling upholding jurisdiction (see *International Research Corp plc v Lufthansa Systems Asia Pacific Pte Ltd* [2013] 1 SLR 973) ruling that by using language which stressed that the supplemental agreements were "annexed to and made a part of the [Co-operation Agreement]", the parties' objective intention was for the latter to be binding on all three parties to the supplemental agreements.

4.33 The Court of Appeal addressed the same issues confronting the High Court, *viz*, whether the dispute resolution clause in the Co-operation Agreement binds IRCP; if yes, whether the conditions precedent in such a multi-tiered dispute resolution mechanism had been complied with.

Strict approach?

4.34 IRCP reiterated its stand that under Singapore's "strict approach", the arbitration agreement in the Co-operation Agreement could not have been incorporated by reference into the supplemental agreements absent any clear indication and thus the tribunal had no jurisdiction over IRCP.

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4.35 In the case of *Star-Trans Far East Pte Ltd v Norske-Tech Ltd* [1996] 2 SLR(R) 196 ("*Star-Trans*"), the Court of Appeal ruled that clear and express reference to an arbitration clause contained in one contract was required before a court would find that the clause had been incorporated into a separate contract. This strict approach was adopted from the English Court of Appeal decision in *Aughton Ltd v MF Kent Services Ltd* (1991) 31 Con LR 60. More recently in *Haba Sinai Ve Tibbi Gazlar Isthisal Endüstri A v Sometal SAL* [2010] Bus LR 880, Christopher Clarke J examined various scenarios where an arbitration clause from another document could be considered for incorporation and suggested a gradation of strictness when considering such incorporation, terming them as "single contract" or "two contract" cases.

4.36 It must be noted, however, that *Star-Trans* was decided under the Arbitration Act (Cap 10, 1985 Rev Ed) (repealed) which was based on English legislation. The new Arbitration Act (Cap 10, 2002 Rev Ed) ("AA") follows significantly the IAA which implements the United Nations Commission on International Trade Law ("UNCITRAL") Model Law of 1985 ("1985 MAL"). The Court of Appeal observed that the analysis developed in English law is no longer helpful and that it is time to "put the English authorities" aside in construing the provisions under the AA and IAA.

4.37 As the IAA is to be construed in accordance with MAL principles, the Court of Appeal turned to the *travaux préparatoires* of the 1985 MAL and noted it is sufficient if reference is made to the document containing the arbitration clause; there need not be specific mention of the arbitration clause. Article 7(2) of the 1985 MAL does not ascribe to the same constraints as that of the English authorities in respect of the circumstances in which the court may legitimately find that an arbitration clause in one agreement has been incorporated, by reference, into another agreement. The court took the view that the question on what approach to take is generally one of construction. The task, therefore, in this case was to look into a contextual approach or the parties' objective intentions surrounding the subject contracts as was the approach in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029.

4.38 The court read the provisions of the supplemental agreements as indicating that IRCP's only substantive role was to act as payment agent. The Co-operation Agreement remained the main contract setting out the rights and obligations between Datamat and Lufthansa only. IRCP's obligation was thus merely a payment conduit of Datamat and nothing more.

4.39 Clause 5 of Supplemental Agreement No 1 had set out that Lufthansa and Datamat agreed that IRCP shall have no other obligation

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beyond those provided under the supplemental agreements. The fact that the supplemental agreements had been "annexed to and made a part of" the Co-operation Agreement was to link IRCP's role as payment agent for Lufthansa and nothing more. The Court of Appeal found that the obligation to arbitrate under the Co-operation Agreement had, thus, been excluded by cl 5 of Supplemental Agreement No 1. In the court's view, IRCP would not have expected to get involved in an arbitration concerning disputes as to whether Lufthansa had or had not performed its substantive obligations in relation to the works and services stipulated in the Co-operation Agreement. This was further buttressed by the fact that Supplemental Agreement No 1 had also set out that Datamat remains to be primarily liable for the services rendered to it by Lufthansa under the Co-operation Agreement. It also did not appear to the court that IRCP's obligations under the supplemental agreement was dependent on Datamat's obligation under the Co-operation Agreement. It did not assist that the procedure, language and form set out in the arbitration clause of the Co-operation Agreement appeared to work against the incorporation of the same into the supplemental agreements. The detailed preconditions, *viz*, the meetings and mediation between senior officers of Datamat and Lufthansa, could not be made workable in relation to IRCP.

4.40 The Court of Appeal, therefore, ruled that on the basis of a contextual interpretation of the supplemental agreements, the parties had not intended that the dispute resolution mechanism in the Co-operation Agreement was to be incorporated into the supplemental agreements, and IRCP was, thus, not bound by the said mechanism. The tribunal, therefore, did not have jurisdiction over IRCP.

4.41 The Court of Appeal's decision in *IRCP* reaffirms the departure from the rather archaic, technical and often inconsistent "strict" approach of the English courts which necessitated the creation of various exceptions to achieve a just outcome. Anchored upon MAL, the contextual approach allows the court to ascertain in each given context, whether the incorporating words are such as to make the arbitration clause part of the underlying contract entered into between the parties.

Multi-tiered dispute resolution mechanism enforceable

4.42 The Court of Appeal in *IRCP* also took the opportunity to express its views on the multi-tiered dispute resolution mechanism. Clause 37 of the Co-operation Agreement in the case spelt out a four-tier process in which disputes arising from the agreement should be resolved. The first three tiers required the parties' designates to meet and to resolve the matters in dispute through mediation, the last of which was to refer the unresolved matters to arbitration.

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4.43 Parties who commence arbitration before taking steps in the pre-arbitral dispute resolution process often attempt to cast pre-arbitral dispute mechanisms as non-mandatory. The courts too sometimes ignore them, labelling them ambiguous, uncertain and merely exhortatory and, therefore, unenforceable. Other times, the courts have given cursory recognition and easily accepted symbolic attempts as sufficient compliance. The Court of Appeal in *IRCP*, however, gave such a clause a strong stamp of affirmation, holding that cl 37 had spelt out with specificity how a dispute would be escalated up the hierarchies of the respective parties with representatives of increasing seniority meeting to attempt resolution. This was not done as none of Lufthansa's personnel with such designations attended the meetings with IRCP. It was also not clear what had been discussed in those seven meetings. The Court of Appeal disagreed with the High Court's finding that the seven meetings prior to commencement of arbitration constituted substantial compliance with the preconditions.

4.44 The Court of Appeal, thus, ruled that where the parties have clearly agreed on a specific manner, procedures or preconditions to resolve their disputes, those must be complied with to the letter. The burden is on the party commencing arbitration to show that the preconditions have been complied with. The preconditions in this case not having been complied with, the arbitration agreement could, therefore, not be invoked. The Court of Appeal's expression of support for pre-arbitral resolution processes augurs well for the development and timely institutionalisation of non-adversarial and non-adjudicative forms of dispute resolution in Singapore.

Breach of natural justice – Ground for setting aside

4.45 In *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM*"), Chan Seng Onn J had the occasion to rule on a setting aside application on the allegation that there was a breach of natural justice, reliance being placed on s 24(*b*) of the IAA. The dispute arose out of a purported repudiation of two memoranda of agreement ("MOAs") for the sale and purchase of two vessels between TMM Division Maritima SA de CV ("TMM") (the buyer) and Pacific Richfield Marine Pte Ltd ("Pacific Richfield") (the seller). TMM commenced arbitration but the tribunal dismissed all its claims. TMM's major complaints were that the tribunal ignored its submissions and failed to fully explain the reasons for the conclusions in the award and that the tribunal had exceeded its jurisdiction by determining an issue not listed in the memorandum of issues ("MOI"), *ie*, whether cl 11 of the MOAs was a condition which if breached entitled Pacific Richfield to terminate the MOAs.

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4.46 On the issue of excess of jurisdiction, the court referred to the case of *PT Prima International Development v Kempinski Hotels* [2012] 4 SLR 98 which held that an excess of jurisdiction deals with a tribunal dealing with a dispute not contemplated by or not falling within the terms of the submission of the arbitration or a tribunal deciding on matters that are outside the scope of submission. What constitutes such "matters" had, in turn, been dealt with in the case of *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [37], *viz*, the tribunal "has no jurisdiction to decide any issue not referred to it for determination": *TMM* at [51].

4.47 TMM's case that the tribunal did not have the jurisdiction to determine whether cl 11 of the MOA was a condition precedent did not bode well with the court. The MOI was explicit in its intention to be inclusive rather than exhaustive or exclusive. Even if it were meant to be exhaustive, the issue relating to cl 11 fell within the determination of an issue in the MOI on whether TMM's refusal to accept the notice of readiness ("NOR") was a repudiatory breach. In doing so, the tribunal would also have to determine whether cl 11 was a condition due to its effect on the issue of repudiatory breach. The parties' submissions were also clear that how cl 11 was to be construed was an issue to be determined. The court, therefore, found that the tribunal, in determining whether cl 11 was a condition, had not acted in excess of jurisdiction.

4.48 In dismissing the challenge, Chan J remarked, quite properly so, that curial recourse against the award had been improperly used to invite the court to judge the full merits and conduct of the arbitration. It is imperative that "an application to set aside an award under s 24 read with Art 34(2) of the [MAL] is not a guise for a rehearing of the merits": at [2]. The court remarked (at [2]) that "sieving out the genuine challenges from those which are effectively appeals on the merits is not easy under the present law".

4.49 The court (at [125]) provided a cautionary note that:

> … for challenges against an award founded on breach of natural justice, the court's role is, in very general terms, to ensure that missteps, if any, are more than arid, hollow, technical and procedural … Any real and substantial cause for concern should be demonstrably clear on the face of the record without the need to pore over thousands of pages of facts and submissions.

If no real and substantial cause is shown by the aggrieved party, a challenge may well be running against the very nature of what was originally designed to be a time-efficient and cost-effective dispute resolution mechanism: at [126].

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Failure to decide a counterclaim – Breach of natural justice?

4.50 A tribunal has the duty to consider all essential issues placed before it. The failure to do so may render the award impeachable under Art 34 of the MAL and s 24 of the IAA. The case of *BLB v BLC* [2013] 4 SLR 1169 is one of the rare cases where such a challenge succeeded. The parties in this case were two groups of companies, the P Group in Malaysia and the D group in Germany, which had entered into a joint venture in hydroforming technology. Disputes arose and it was said that P could not fulfill all the orders prescribed under the business operations agreement ("BOA") and failed to deliver all the products ordered within the time prescribed by the BOA. D claimed P was in breach for delay of supply, failure to adequately stock raw materials and for defective goods in breach of the licence agreement ("LA"). P counterclaimed for receivables on the purchase price and bank balances it had sold to D ("receivables counterclaim").

4.51 The crux of the issue before the court was that the tribunal did not include as an issue to be decided whether D was indebted to P in respect of the receivables counterclaim. Instead, the receivables counterclaim was set out as one of the remedies sought by P should the tribunal find in favour of P. In the tribunal's view, should it find that P was in breach of the BOA and the LA, P would not be entitled to any of its counterclaims, including the receivables.

4.52 The tribunal ruled that D was entitled to recover loss of profits and rectification costs for defective products and concluded that P, on the other hand, having failed to establish breach by D of its obligations under the joint venture, the remedies and reliefs it had sought (including the receivables counterclaim) did not arise for determination. The tribunal took the view that P ought to prove breach and loss, and as it had failed to do so, there was no need to consider the remedies and reliefs sought by P.

4.53 P applied to set aside the award on the basis of, *inter alia*, s 24(*b*) of the IAA (breach of the rules of natural justice). The court found that the tribunal had failed to address the substantive merit of the receivables counterclaim, an "entire head of counterclaim" pleaded by P and it was not mentioned at all in the award. It had not been disputed that the goods from which P claimed receivables had been delivered to D and there was no claim for rectification on the said goods.

4.54 It is clear that the receivables counterclaim had not been rejected on the basis that it had not been proven. The tribunal had assumed that the receivables counterclaim was a relief sought dependent on P having to prove breaches by D, when it was, as it should be, an

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independent and distinct claim and a substantive issue that ought to be addressed.

4.55 In her decision, Belinda Ang Saw Ean J noted that this case was a "borderline case" where there was a very thin line between a mere error on the part of the tribunal and that of an unjustified omission to consider an essential issue. In this case, it was clear on the facts that there was an "oversight" or a "wholesale omission" to consider an entire head of a counterclaim. While the tribunal may not be under a duty to consider all the arguments raised by the parties, it, nevertheless, had an obligation to consider all the "essential issues". The receivables counterclaim was such an "essential issue", and failure to regard the same in the award was tantamount to a denial to a party of the opportunity "to address its position to the judicial mind". The award had, thus, breached the principles of natural justice pursuant to s 24(*b*) of the IAA: at [85]–[88].

4.56 The court emphasised (at [89]), however, that even if there were a breach, it must have resulted to such level of prejudice as to "at the very least, have actually altered the final outcome of the arbitral proceedings in some meaningful way". The issue that had not been given due regard by the tribunal must be so material that it could reasonably have made a difference to the final outcome of the case. There must be "real or actual prejudice" and the failure to give due regard to the receivable counterclaim was such "real or actual prejudice": at [90].

4.57 In the present case, D had made submissions that any sums found to be due to P in its counterclaim should be set off against any damages awarded to D. P's counterclaim was uncontested during the proceedings. The court noted (at [91]) that had the receivables counterclaim been considered, it might have effected a material difference in the outcome of the case.

4.58 Article 34(2)(a)(iii) of the MAL was also engaged by the court when it ruled that the tribunal had exceeded or failed to exercise the authority that the parties had granted to it or failed to consider all the issues that had been submitted to it or what had been referred to as "*infra petitia*": at [98].

4.59 The court noted (at [103]) that Art 33(3) of the MAL could have provided redress for the tribunal's failure to address the receivables counterclaim which permits the parties to request the tribunal to make an additional award as to claims presented in the arbitral proceedings but have been omitted from the award and cautions parties to be mindful of such remedy before recourse to the courts may be had. If P had resorted to this, it may have saved further time and costs from having been incurred in the application to set aside.

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Is there residual power to remit award?

4.60 Ang J's final decision was to set aside that part of the award relating to the receivables counterclaim and ordered that that issue be remitted for determination to a new tribunal to be constituted. While this is a novel remedy, it is indeed unclear where the court found its power to do so. Prior to the enactment of the IAA, the court had the general power to remit an award to the tribunal for further consideration: see s 28(2)(*b*) of the Arbitration Act (Cap 10, 1985 Rev Ed) (repealed). This power of remission has since been removed. Under the IAA, the court's power in relation to an award, recourse to which is made under s 24 or Art 34 of the MAL, is to set it aside in whole or in part or to suspend the setting aside proceedings to enable the tribunal to take steps to address the procedural defect under Art 34(3) of the MAL. Such a suspension power is intended not to substitute the tribunal but to revive the tribunal's jurisdiction to the extent necessary to rectify any procedural defect. In ordering the "remission", the court in effect created a judicially ordered process which, unless both parties consent, could suffer from further jurisdictional challenge when enforcement of the subsequent "award" is sought.

Enforcement of awards

Choice of remedies – Granting leave to enforce under s 19 of the IAA

4.61 The High Court had in August 2012 declined to set aside the awards made against Indonesia's Lippo Group ("Lippo") in favour of the Astro Group of Malaysia ("Astro") in *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2013] 1 SLR 636 ("*Astro (HC)*"). The matter went on appeal and was finally disposed of by the Court of Appeal in October 2013 in *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 ("*Astro (CA)*"). In its decision, the High Court had ruled that an award with a seat in Singapore that has not been set aside under Art 34 of the MAL and s 24 of the IAA becomes final and binding under s 19B(1) of the IAA and, therefore, it must be enforced. Lippo, having failed to do so within the prescribed time, could no longer challenge the enforcement of the award that had become final and binding and must, accordingly, be enforced. As to the award on jurisdiction, the High Court likened Art 16(3) and Art 34(2)(a)(i) of the MAL to an option to purchase, which if not exercised, the right lapses. Having opted not to appeal the award on jurisdiction within the time limits prescribed under Art 16(3), Lippo had accepted the tribunal's decision as final and binding and "allowing [Lippo] to now come in under the guise of refusal of recognition and enforcement to have a second bite at the cherry would be contrary to the finality principle

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promoted by Art 16(3) and extended by s 10 of the IAA": *Astro (HC)* at [159].

4.62 The Court of Appeal at the outset emphasised that the awards in question were international commercial arbitral awards made in the seat of arbitration where enforcement was also sought and were, thus, not governed by the New York Convention. The court then had to consider the same threshold issues before the High Court, *viz*, whether Lippo was entitled to raise, at the enforcement stage, its objection to the joinder of the three Astro companies.

Section 19 – Power to refuse enforcement of award?

4.63 The Court of Appeal noted that s 19 of the IAA has its roots in s 26 of the English Arbitration Act 1950 (c 27) (UK) ("EAA") and observed that there are two options available to the award debtor against the award, namely, the active remedy of setting aside and the passive remedy of resisting enforcement (see *Prodexport State Co for Foreign Trade v ED & F Man Ltd* [1973] QB 389 and Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 1982) at p 489): *Astro (CA)* at [38]. Even prior to the enactment of Singapore's IAA, a party could resort to a passive remedy at enforcement even without resorting to the active remedy at the first instance: *Astro (CA)* at [44]. When the IAA was enacted, the MAL became part of our laws. Parliament opted not to abrogate any of the power hitherto contained in s 20 of the Arbitration Act (Cap 10, 1985 Rev Ed) (repealed) when it re-enacted it as s 19 of the IAA: *Astro (CA)* at [45].

4.64 It follows that even after the adoption of the MAL into Singapore law, the "philosophy of choice of remedies" against awards made in Singapore has been retained such that our courts have the power to refuse enforcement of domestic international awards under s 19 of the IAA even if the award could not have been attacked by an active remedy. Choice of remedies is the heart of the MAL design. The provisions in the MAL are clear as to recourse against awards (Art 34) as distinct from the remedies and defences against enforcement of the award (Arts 35 and 36). "[T]he Model law recognises both a substantive and linguistic division between active and passive remedies": *Astro (CA)* at [68]. It is one of the "interstitial doctrines" that interposes the relationship between the court of the seat and the court of enforcement, so that a party is not precluded from resisting the enforcement by virtue of the fact that it failed to utilise the available active remedy of attacking it at the seat. This is also consistent with the philosophy behind the New York Convention when each enforcement court is to determine for itself the merits of each challenge against enforcement: *Astro (CA)* at [75].

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4.65 The next question was whether the "content" of the said power was changed upon the enactment of the IAA, *viz*, whether the power remain unchanged and remained to be guided by English authorities.

4.66 The Court of Appeal relied on our rule on statutory interpretation, *viz*, s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed), which provides for "embracing an interpretation which promotes the purpose or object underlying the legislation over one which does not": *Astro (CA)* at [50]. Read in the context of the MAL, s 19 must, therefore, "be exercised in a manner which is compatible with the overarching philosophy of the Model Law": *Astro (CA)* at [50].

4.67 In response to Astro's argument that reference to Arts 35 and 36 of the MAL may not be made because Parliament had expressly stated by s 3(1) of the IAA that those articles shall not have the force of law, the Court of Appeal ruled that the conclusion that the grounds set out in Art 36(1) are guides to the "discretion" of the courts under s 19 is not the same as saying that Art 36 has force of law in Singapore: *Astro (CA)* at [85].

4.68 Again, the legislative history of the IAA was looked into. Indeed, the rationale behind the exclusion of Arts 35 and 36 in the IAA was, as the court noted, to de-conflict them in the enforcement of foreign awards and to avoid questions that it may have to address on reciprocity if Arts 35 and 36 were retained. It, thus, had nothing to do with limiting the court's power to refuse enforcement pursuant to s 19: *Astro (CA)* at [87].

4.69 The court came to the conclusion that the most efficacious method of giving full effect to the MAL philosophy would be to recognise that the same grounds for resisting enforcement under Art 36 would be available to a party resisting enforcement under s 19 of the IAA: *Astro (CA)* at [84] and [99].

Whether Art 16(3) is a "one-shot remedy"

4.70 Lippo's failure to appeal against the award on jurisdiction under Art 16(3) of the MAL raised the question of whether it barred Lippo from raising it to resist enforcement for lack of jurisdiction.

4.71 Astro argued that when a tribunal had ruled on a preliminary ruling on jurisdiction, the only option left for an aggrieved party was to appeal the same to the court pursuant to Art 16(3). If the same had been invoked by the aggrieved party, it cannot object to jurisdiction again at the setting aside stage or at the enforcement stage after the award had been rendered. It was also submitted that a party who elected not to appeal cannot challenge the validity of the award on the same grounds

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as those on which the initial challenge was based. Lippo countered it by saying that Art 16(3) was only intended to be an additional active remedy and did not affect the availability of passive remedies under Art 36.

4.72 Looking again into the *travaux* of the MAL, the Court of Appeal came to the view that Art 16(3) was not intended to be a one-shot remedy. It was to provide for instant or immediate court control if the tribunal decided to make a jurisdictional decision as a preliminary issue. This, however, did not mean that it was in the sole control of the supervisory court. This control is separate and distinct from the control of the enforcing court over recognition and enforcement of awards. "Instant court control" does not imply sole court control: *Astro (CA)* at [130]. The court also pointed out that the use of the term "may request" in Art 16(3) suggests that an aggrieved party may have additional options and not just a "one-shot remedy".

4.73 On this issue, the Court of Appeal concluded that Art 16(3) is neither an exception to the "choice of remedies" policy of the MAL nor a one-shot remedy. It follows, therefore, that an unsuccessful challenge or lack of challenge under Art 16(3) could not prevent the aggrieved party from raising it at a later stage.

Joinder of persons who are non-parties to the arbitration agreement

4.74 The crux of Lippo's objection was the absence of an arbitration agreement between Lippo and the three Astro companies; and that the tribunal rendered the award without jurisdiction. It had no power under the Singapore International Arbitration Centre ("SIAC") Rules 2007 to order or allow such a joinder.

4.75 The court pointed out at the outset that the issue may not only be characterised as an issue on the existence of an arbitration agreement but also as an issue that may refer to a proper interpretation of the institution rules and/or challenge to improper procedure adopted by the tribunal: *Astro (CA)* at [146].

4.76 The court referred to r 24(b) of the SIAC Rules 2007 which provides:

> [T]he Tribunal shall have the power to: … (b) allow other parties to be joined in the arbitration with their express consent, and make a single final award determining all disputes among the parties to the arbitration.

4.77 The tribunal had taken the view that r 24(b) allowed it to join into the arbitration parties outside of the arbitration agreement and there was nothing in the said rule that required express consent by the

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parties in the arbitration; and that the phrase "other parties" refers to strangers to the arbitration agreement and this must be the interpretation of "other parties" if r 24(b) were to avoid redundancy. To require further express consent of all parties to the arbitration would, in the tribunal's view, have resulted in "little or no practical value": *Astro (CA)* at [169].

4.78 The court referred to the 1998 London Court of International Arbitration ("LCIA") Arbitration Rules ("1998 LCIA Rules") and Art 4(2) of the Swiss Rules of International Arbitration (June 2012) ("2012 Swiss Rules"): *Astro (CA)* at [174]–[175]. The 1998 LCIA Rules confer on the tribunal the power to join non-parties who are not parties to the arbitration agreement without first obtaining the consent of all the parties in the arbitration agreement. The 2012 Swiss Rules confer a broader discretion on the tribunal whether to join a non-party and if the consent of any party in the arbitration agreement is required. The tribunal is only required to consult with the parties to the arbitration and the person(s) to be joined, "taking into account all relevant circumstances".

4.79 The court, however, noted that in marked contrast, the SIAC Rules 2007 have been worded differently suggesting that it may not have been the intention of the draftsmen for the SIAC Rules 2007 to have the same effect on joinder as the LCIA and the Swiss Rules. Whilst r 24(b) confers on the tribunal broad powers to join non-parties to the arbitration, there appears to be no clear limits to this power. The court took the view that it could not have been the intention that this power could be exercised outside the subject matter of the arbitration between the original parties. It accepted Lippo's argument that the rule acts as a "procedural power" and not as a means for the tribunal to extend its jurisdiction. It behoves the court to assure arbitration practitioners that it cannot be intended for the tribunal to have unlimited jurisdiction.

4.80 The court observed that it was very telling that the SIAC Rules 2007 did not follow the path taken by the LCIA when it changed the term "other parties" to "third persons" in the 1998 LCIA Rules. The court quite properly pointed out that a procedure that makes parties to an arbitration agreement vulnerable to arbitrating further with non-parties should be treated with caution. If that were the intention, the SIAC could have provided for clearer and more certain terms than the current text of r 24(b): *Astro (CA)* at [180]. The court, thus, takes the view that the proper construction of r 24(b) is that it permits only "other parties to the arbitration agreement" who are not yet part of the arbitration proceedings to be joined in as parties and found that Lippo's joinder objection was well founded.

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4.81 Astro's final attempt to push forward its position on the joinder objection was its plea that Lippo had waived its right to object to the tribunal's jurisdiction after it had made the award on jurisdiction, or in the alternative, Lippo should now be estopped. Lippo averred it had reserved its rights on the jurisdictional issue, had considered filing an appeal on the award of jurisdiction and clearly stated in documents relevant to the proceedings (*eg*, the defence filed after signing the memorandum of issues) that it did not concede that the three Astro companies were parties to the arbitration. That Lippo did not accept the tribunal's jurisdiction was evident in its subsequent letters and e-mails.

4.82 The court found in favour of Lippo that there had been no waiver or estoppel on its part. Lippo had been consistent in stating in its pleadings even as it continued to participate in the substantive arbitral proceedings that its participation – was "without prejudice to the [Lippo's] position that any tribunal which is constituted has and will have no jurisdiction". Neither does filing a counterclaim nor payment of the costs on the award on jurisdiction, in the court's view, amount to a waiver of Lippo's rights on the joinder objection. It was, thus, held that the joinder of the three Astro companies was improper; r 24(b) did not confer upon the tribunal the power to join third parties and there was no waiver or estoppel on the part of Lippo.

4.83 There could never be any doubt that r 24(b) of the SIAC Rules 2007 which had existed since 1991 was not intended to force non-parties into the arbitration. The court seems to have missed the fact that under the SIAC Rules 2007, which was crafted in the context of the IAA (see r 32), the term "party" takes on the meaning given in s 2 of the IAA, *viz*:

> 'party' means a party to an arbitration agreement or, in any case where an arbitration does not involve all of the parties to the arbitration agreement, means a party to the arbitration.

4.84 If attention had been drawn to this, much of the argument as to whether the term "other parties" as used in r 24(b) of the SIAC Rules 2007 could mean anything other than the parties to the arbitration agreement who have as yet to participate in the arbitration. Indeed, the current text of the SIAC Rules 2013, with respect, ill-advisedly replaces the term "other parties" in r 24(b) with "third parties" which has added further confusion to the matter.

Resisting enforcement of a foreign award

4.85 Singapore has been known for its pro-enforcement stance in relation to awards made in a New York Convention state. Yet another unsuccessful attempt to resist enforcement of a foreign award was made in *Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium*

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(Singapore) Pte Ltd [2014] 1 SLR 814. This case is probably the first reported case in Singapore where a challenge has been premised on an allegation of corruption and fraud by the tribunal in the making of the award.

4.86 BSMI commenced arbitration against Goldenray under the auspices of the China International Economic and Trade Arbitration Commission ("CIETAC"). The tribunal made an award by consent in favour of Beijing Sinozonto Mining Investment Co Ltd ("BSMI"). BSMI took to the Singapore courts for the enforcement of the said award, and *Goldenray Consortium (Singapore) Pte Ltd* ("Goldenray") sought to resist the enforcement on the basis that the award was tainted with fraud or corruption and was, thus, contrary to the public policy of Singapore, pursuant to s 31(4)(*b*) of the IAA.

4.87 Belinda Ang Saw Ean J dismissed Goldenray's challenge in the absence of any cogent (*ie*, clear and convincing) evidence to substantiate its serious allegations. The allegations made by Goldenray were based on certain e-mails and documents that they found after the consent award was made and after partial payments of the consent awards had been made. The e-mails and the documents were presented to show that BSMI had allegedly entered into agreements with their lawyers who had unilaterally entered into an improper arrangement with the tribunal to get the tribunal to issue an award that supported BSMI's claim and to issue an award as soon as possible.

4.88 In doing so, the court emphasised that "public policy" under s 31(4)(*b*) of the IAA would not extend to erroneous legal reasoning or misapplication of law but an award obtained by fraud and/or corruption is very much a breach against the public policy of Singapore. However, the standard of proof must be such as to satisfy the court, on a balance of probabilities, that facts exist which make out the ground relied upon by the party.

4.89 The same "balance of probabilities" has been espoused in at least three High Court decisions, namely, *Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd* [2010] 3 SLR 661; *Strandore Invest A/S v Soh Kim Wat* [2010] SGHC 151; and *Galsworthy of the Republic of Liberia v Glory Wealth Shipping* [2011] 1 SLR 727.

4.90 The court emphasised that the more improbable an allegation, the stronger the evidence must be. The court found no evidence to support Goldenray's challenge and dismissed the same. Following a review of the e-mails and documents (which essentially were terms of the lawyer's engagement with incentive payments for success and early resolution), Ang J dismissed Goldenray's challenge.

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4.91 Resisting enforcement on the basis of the public policy exception was once again put to the test in this case and the Singapore court has once again proven itself not to take lightly applications of this nature. The threshold for the public policy exception that any party wishing to resist enforcement of an award will have to reach remains high in Singapore and the court's inclinations appear not to be tilted otherwise in the near discernible future.

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