4. ARBITRATION

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Recourse against awards – Domestic arbitration

Institutional rules operating as "exclusion agreement"

4.1 An arbitral award made under the Arbitration Act (Cap 10, 2002 Rev Ed) ("AA") may be appealed against on a question of law, upon notice to the other parties and to the arbitral tribunal. Such a right may nevertheless be excluded by agreement of the parties. The mere declaration by the parties that the award is intended to be "final and binding" is not of itself sufficient to constitute such an agreement: see *Holland Leedon Pte Ltd v Metalform Asia Pte Ltd* [2011] 1 SLR 517 at [5]. Adoption of the institutional rules which excludes an appeal to court without specific reservation has the effect of an exclusion agreement: *Halsbury's Laws of Singapore* vol 1(2) (Singapore: LexisNexis, 2011 Reissue) at para 20.126.

4.2 In *Daimler South East Asia Pte Ltd v Front Row Investment Holdings (Singapore) Pte Ltd* [2012] 4 SLR 837, the parties entered into a joint venture agreement which provides for all disputes arising out of the said agreement to be finally settled under the International Chamber of Commerce ("ICC") Rules of Arbitration 1998. Disputes arose and the plaintiff commenced arbitration to which the defendant lodged a counterclaim. Both claim and counterclaim were dismissed by the first arbitrator ("First Award"). The defendant applied and obtained an order setting aside the First Award in relation to the dismissal of its counterclaim. The defendant thereafter commenced another arbitration ("second arbitration") against the plaintiff to pursue its claim (the counterclaim in the first arbitration). The second arbitrator issued a partial award holding that the defendant was not precluded from pleading its claim for breach of contract in the second arbitration. Dissatisfied, the plaintiff sought leave to appeal against the partial award. The defendant resisted the application on the basis that both parties had agreed to exclude their right to appeal to the High Court under s 49(1) of the AA.

4.3 The ICC Rules 1998 which were adopted by agreement provide in Art 28(6) that "[b]y submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form or recourse in so far as such waiver can validly be made". Woo Bih Li J held that the parties, by agreeing to the ICC Rules without reservation, had agreed to exclude the right of appeal under s 49(1) of the AA. This decision reflects the court's recognition of institutional rules and its role in international arbitration. Parties who have adopted institutional rules must be held to abide by the rules so agreed. To do otherwise would undermine the important role played by institutions such as the ICC and the Singapore International Arbitration Centre ("SIAC") in the development of arbitration in Asia.

No power to declare award a "nullity"

4.4 The AA also provides for setting aside as another means of recourse against domestic awards. The grounds for setting aside require the applicant to prove procedural irregularities spelt out in s 48(1) of the AA, including the ground that the "breach of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced".

4.5 In *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 ("*L W Infrastructure Pte Ltd*"), the plaintiff was the defendant's subcontractor in a building project. The defendant terminated the subcontract on the basis of the plaintiff's failure to complete certain works on the agreed completion date which the plaintiff disputed. Arbitration was commenced by the defendant resulting in a final award being made generally in favour of the plaintiff. Both parties appealed against the award on questions of law under s 49 of the AA. The High Court dismissed the plaintiff's appeal but substantially allowed the defendant's appeal. The arbitrator then resumed the arbitration and issued a Supplementary Award No 2 where the defendant was awarded liquidated damages. In both awards, the arbitrator awarded only post-award interest. The defendant subsequently wrote to the arbitrator requesting for an additional award for pre-award interest. The arbitrator made an "Additional Award" on pre-award interest without hearing the plaintiff, who then applied to set aside the Additional Award under s 48(1)(*a*)(vii) of the AA on the ground that it was made in breach of natural justice and that the Additional Award be declared a nullity. The High Court set aside the Additional Award but decided against declaring it a nullity.

4.6 The Court of Appeal affirmed the High Court's decision not to declare the Additional Award a nullity. In arriving at this decision, Sundaresh Menon JA (as he then was) interpreted s 47 of the AA as the

equivalent provision of Art 5 of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") and adopted the view (at [38]) that s 47 has been enacted to provide certainty which "would be significantly undermined if the courts retained a concurrent 'supervisory jurisdiction' over arbitral proceedings or awards that could be exercised by the grant of declaratory orders not expressly provided for in the [AA]". The court also found support for its view by the legislature's removal of what was previously O 69 r 2(3) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) which expressly provided for a court to declare that an award was not binding. The court also referred to the observation in *Halsbury's Laws of Singapore* vol 1(2) (Singapore: LexisNexis, 2011 Reissue) at fn 6 of para 20.120 where it was stated that "aggrieved parties may only seek recourse against an award on the bases set out under the [AA] *viz* to set aside for procedural irregularities or appeal on a question of law … The new RC O 69 … no longer contains any procedural rule to allow for such a declaration".

Breach of natural justice – "Actual and real prejudice"

4.7 It has been established in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 that not every breach of the rules of natural justice justifies the intervention of the court to set aside an award. There must be some causal link between the breach and the making of the award in order to establish actual and real prejudice (at [86]). Starting on that basis, Menon JA (as he then was) in *LW Infrastructure Pte Ltd* then proceeded further to say (at [51]) that what was needed to be established is actual or real prejudice, a "lower hurdle than substantial prejudice". In his Honour's view (at [54]), the real question was "whether the breach of natural justice was merely technical and inconsequential or whether as a result of the breach, the arbitrator was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to his deliberations".

4.8 Disabusing the suggestion by the defendant's counsel that as s 43(4) of the AA does not specifically require the arbitrator to provide an opportunity for parties to be heard, his Honour pointed out that the notice requirement demands within it that the other party be provided an opportunity to respond to the request for additional award. As such, the arbitrator should have given to the plaintiff what was rightfully due to it, notwithstanding the lack of express reference to such right. This right to be heard extends to both (a) whether the requirements of s 43(4) of the AA were met – *ie*, whether pre-award interest was a presented claim that had been omitted from the final award; and (b) if the requirements of s 43(4) of the AA were met, whether pre-award interest should be awarded and if so, to what extent. The court found on both counts that the arbitrator had not afforded the plaintiff the

opportunity to respond after the defendant submitted its request to the arbitrator.

4.9 Although the decision in *LW Infrastructure Pte Ltd* was made in the context of a domestic arbitration, the Court of Appeal's analyses of ss 43(4) (on the power to make additional awards) and 48(1)(*a*)(vii) (on breach of natural justice) of the AA would equally apply to considerations arising from the application of Art 33(3) of the Model Law and s 24(*b*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") in the context of an international arbitration under the IAA. Arbitrators must take heed that the right of a party to be heard cannot be given short shrift. Although some delay and inconvenience may result from waiting for some response from the plaintiff, the haste in which the additional award was made deprived the plaintiff of the opportunity to present its case against the additional award which the tribunal eventually made.

Setting aside of awards under the IAA

Interim orders are not awards

4.10 The distinction between awards and interim orders or directions does at times give rise to issues or confusion. The Court of Appeal had in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*") made a clear statement on the substance-procedure distinction of an award and an order. Decisions on interlocutory matters pertaining to procedure such as security for costs or for the claim, preservation of property, discovery of documents or inspection, or admissibility of witnesses, are not awards but orders or directions. Such orders or directions, not being awards, are not subject to any of the recourse process under Art 34 of the Model Law.

4.11 This issue arose again in *PT Pukuafu Indah v Newmont Indonesia Ltd* [2012] 4 SLR 1157. There were disputes between the parties arising from various agreements, one of which was a release agreement, pursuant to which the plaintiffs were to discontinue two suits that had been commenced in the Indonesian courts. The plaintiffs failed to comply with the release agreement and thereafter commenced three more proceedings before the Indonesian courts. The defendants commenced arbitration seeking reliefs for alleged breaches of various agreements including the release agreement and applied to the arbitral tribunal for an interim order under r 26.1 of the SIAC Rules 2010 to restrain the plaintiffs from continuing the court proceedings in the Indonesian courts. The tribunal made the order sought ("Order") and the High Court granted leave to enforce the same. The tribunal issued a partial award in which it made a substantive finding in the defendants' favour,

viz, that the plaintiffs had breached the release agreement by continuing the proceedings pending before the Indonesian courts. The plaintiffs then applied to set aside the Order pursuant to s 24 of the IAA and Art 34 of the Model Law.

4.12 Lee Seiu Kin J dismissed the application. He held that the court's jurisdiction to set aside relates only to an "award" coming within the meaning of s 2 of the IAA. In his Honour's view, while the Order made was a substantive relief granted by the tribunal in the nature of an interim anti-suit injunction, it had only "interim effect" for the purpose of maintaining the status quo pending completion of the arbitration proceedings. It was made pursuant to r 26.1 of the SIAC Rules 2010, a provision clearly intended for the granting of "Interim and Emergency Relief". His Honour also pointed out (at [21]) that the scheme of the IAA is to provide for the court enforcement of interim orders and directions made under s 12 "without broadening the definition of 'award' to allow the court to set aside these orders". The court thus has no jurisdiction to set aside such interim orders.

4.13 Explaining why interim orders require this "more nuanced balance", Lee J expressed caution that to allow challenge for every interim order may unduly delay the progress of the arbitration proceeding pending any determination by the court on such challenge. In his view, the check against any possible abuse of the grant of such interim measures is the residual power of the court to refuse grant of leave for their enforcement.

Incorporation of arbitration clauses, enforceability of Multi-Tiered Dispute Resolution Mechanism

4.14 Article 2A(7) of the IAA provides that an arbitration clause in a contract could in certain circumstances be incorporated in another "if the reference is such as to make that clause part of the contract".

4.15 While "general words of inclusion may be sufficient to incorporate terms referred to in another document [and which are germane to the underlying contract] as part of the contract, an arbitration clause being a collateral agreement cannot be so incorporated": see *L & M Concrete Specialists Pte Ltd v United Eng Contractors Pte Ltd* [2000] 2 SLR(R) 852 at [9], citing *Skips A/S Nordheim v Syrian Petroleum Co Ltd, The Varenna* [1984] QB 599; [1983] 3 All ER 645. Singapore courts have for some time tended to construe words of incorporation restrictively: see *Star-Trans Far East Pte Ltd v Norske-Tech Ltd* [1996] 2 SLR(R) 196; *Concordia Agritrading Pte Ltd v Cornelder Hoogewerff (Singapore) Pte Ltd* [1999] 3 SLR(R) 618; *L & M Concrete Specialists Pte Ltd v United Engineers Contractors Pte Ltd* [2000] 2 SLR(R) 852;

Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp [2010] 2 SLR 821.

4.16 A different approach was earlier made by Tay Yong Kwang JC (as he then was) in *Mancon (BVI) Investment Holding Co Ltd v Heng Holdings SEA (Pte) Ltd* [1999] 3 SLR(R) 1146 and Sundaresh Menon JC (as he then was) in *Econ Piling Pte Ltd v NCC International AB* [2007] SGHC 17, where in both cases, the courts read the documents as a composite whole to import or extend the application of the arbitration clause. The Court of Appeal later took on this approach of examining whether the agreements are to be construed independently or read together as a composite whole in *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732, holding that the arbitration clause in the main agreement extends to disputes arising from the fourth supplemental agreement as the latter could not exist independently without the main contract. In *Astrata (Singapore) Pte Ltd v Portcullis Escrow Pte Ltd* [2011] 3 SLR 386, however, it found that both the two related agreements had "entire agreement" provisions and while one contained an arbitration clause the other provided for the "non-exclusive jurisdiction of Singapore courts". As such, the arbitration clause in one agreement was inapplicable to the other.

4.17 A more difficult situation involving different parties to the different agreements confronted Chan Seng Onn J in *International Research Corp plc v Lufthansa Systems Asia Pacific Pte Ltd* [2013] 1 SLR 973 ("*International Research Corp plc*"), where Lufthansa Systems Asia Pacific Pte Ltd ("Lufthansa") and Datamat Public Company Ltd ("Datamat") were parties to a co-operation agreement. Two supplemental agreements were entered into by Lufthansa, Datamat and International Research Corp plc ("IRCP"). 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. The supplemental agreements did not contain any dispute resolution process. IRCP was not a party to the original agreement.

4.18 Chan Seng Onn J examined the provisions in the supplemental agreements and came to the view (at [62]) that "the object and purpose of the Supplemental Agreements was to ensure that Lufthansa would be paid for its work and services done under the Cooperation Agreement". His Honour found that there was a close association between the supplemental agreements and the co-operation agreement as reflected in the preambles of both supplemental agreements, which provided that the respective supplemental agreements were to be "annexed to and made a part of" the cooperation agreement, and in the event of inconsistency, the terms in the supplemental agreements would prevail over those in the co-operation agreement.

4.19 The court affirmed the tribunal's ruling upholding jurisdiction, 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. Against the factual matrix in the case, Chan J came to the view (at [69]) that "the proper contextual interpretation … yields the conclusion that the parties, [by using the language that the supplemental agreements were annexed to and made a part of the co-operation agreement], had intended the same Dispute Resolution Mechanism in the Cooperation Agreement to bind all three parties to the Supplemental Agreements".

4.20 Chan J's decision in *International Research Corp plc* appears to add fodder to the evolution of a more liberal approach to incorporating an arbitration clause or expanding the reach of such a clause beyond the document it is written on. It is nevertheless highly unlikely that such an approach would be adopted in distinct separate transactions with an arbitration clause in one and not the other and involving different parties.

Wrong interpretation of the choice of law clause

4.21 The arbitral tribunal in making an award is bound under Art 28 of the Model Law to "decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute". It is increasingly accepted that the substantive "rules of law" need not necessarily be the national laws of a state: see *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334; *X v Z* Decision 4A_240/2009 (16 December 2009) (SC, Switzerland). A question may arise as to whether the failure by the tribunal to apply the agreed substantive law or the law found as applicable to the transaction would justify a setting aside of the award.

4.22 Such a situation was attempted to be made out in *Quarella SpA v Scelta Marble Australia Pty Ltd* [2012] 4 SLR 1057 ("*Quarella SpA*") when the court was asked to set aside an award on the alleged basis that the tribunal had applied the wrong governing law in determining the merits of the case. The disputes in that case arose out of a distributorship agreement under which the defendant agreed to distribute the plaintiff's stone products in Australia ("the Agreement"). The Agreement provided in cl 25 that it would be governed by the "Uniform Law for International Sales under the United Nations Convention of 11 April 1980 (Vienna) ("CISG") and where not applicable by Italian law". Clause 26 of the Agreement provided that any dispute which might arise would be decided by arbitration in Singapore, in English, according to the rules of the ICC.

4.23 The parties initially appeared to agree that Italian law governed the terms of the Agreement. About three weeks before the oral hearing, the plaintiff's solicitors wrote stating its position that pursuant to cl 25 of the Agreement, the parties had chosen CISG as the "rule[s] of law" applicable to the dispute. The tribunal heard parties and decided that the correct interpretation of cl 25 was that the parties intended the CISG to apply to the extent that the CISG was applicable according to its own rules on applicability, and if it did not apply in part or in whole, then Italian law would apply. On further examining the provisions of the CISG, the tribunal decided that the CISG was not applicable because the Agreement was not a contract of sale but was a mere framework agreement. The tribunal applied Italian law and made awards in favour of the defendant (claimant in the arbitral proceedings). The plaintiff argued as a ground for setting aside that the tribunal failed to apply the law chosen by the parties (*viz*, CISG) and thus failed to conduct the arbitration in accordance with the agreement of the parties, and/or the award had dealt with matters falling outside the scope of submission.

4.24 Judith Prakash J astutely distinguished a case where a tribunal fails to apply the law chosen by the parties or simply refuses to apply such law, as against the tribunal in this case, which had come to the conclusion that the CISG did not apply and that Italian law applied. In the court's view, the tribunal respected the parties' choice and applied the parties' chosen law but came to a conclusion different from what the plaintiff had wished.

4.25 Although not expressly so stated, the decision in *Quarella SpA* appears to be an affirmation that the choice of substantive law in arbitration need not be limited to laws of national origin but includes laws of a transnational nature.

Scope of reference – Role of "pleadings"

4.26 In *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98, the Court of Appeal reinstated three awards which were earlier set aside in the High Court on the ground that matters in the awards were outside the scope of the submission to arbitration (*viz*, Art 34(2)(*a*)(iii) of First Schedule to the IAA).

4.27 Kempinski Hotels SA ("Kempinski") and PT Prima International Development ("PT Prima") entered into a contract under which Kempinski was obliged to market, operate and manage a hotel owned by PT Prima ("the Contract"). During the term of the Contract, the Indonesian Ministry of Tourism imposed certain compliance requirements ("the Three Decisions") that affected the Contract in this case. Prior to the end of the term, PT Prima gave notice of material breach to Kempinski for non-compliance with these requirements and

subsequently purported to terminate the Contract. Kempinski commenced an arbitration claiming wrongful termination and this arbitral proceeding resulted in four interim awards and a costs award by the sole arbitrator. The first award held that the Three Decisions did not render the Contract invalid but the continued performance of the Contract had become impossible except in the manner prescribed in the Three Decisions. The arbitrator then made the second award in which he held that there was the possibility of damages available for Kempinski if it could show that the Contract had been wrongfully terminated. After the second award, PT Prima wrote to the arbitrator seeking clarifications of the first and second awards in light of its discovery that Kempinski had, before the issuance of the second award, entered into a contract to provide hotel management services to another hotel ("New Management Contract"). As a result of this new venture, which was inconsistent with Kempinski's obligations under the Contract, the arbitrator then made his third award holding that the methods of performance of the Contract that remained open after the Three Decisions were no longer possible. However, the arbitrator added that the possibility of damages still remained. In his fourth award, the arbitrator held that because no steps were taken to make performance of the Contract lawful, any award of damages for the period between the date of alleged wrongful termination and the date when the New Management Contract was entered into would be contrary to the public policy of Indonesia.

4.28 Dissatisfied, Kempinski applied to the court to set aside the third, fourth and the costs awards ("Awards") on the grounds that (a) the tribunal was *functus officio* when it issued the said Awards; (b) PT Prima should have been estopped from raising the New Management Contract in the proceedings after the second award was issued; (c) the Awards dealt with the New Management Contract which was an issue that had not been formally pleaded; and (d) there was a breach of natural justice. Judith Prakash J set aside the Awards by the High Court on the ground that the tribunal's decision went beyond the scope of the matters submitted to it and attributed the same to the deficiency in PT Prima's pleadings.

4.29 The Court of Appeal reversed its decision, holding (at [31]) that the "legal effect of the New Management Contract was part of, or directly related to, the dispute which the parties submitted for arbitration". Acknowledging that an arbitral tribunal has no jurisdiction to resolve disputes which have not been referred to it in the submission to arbitration and that a party cannot raise a new dispute in an arbitration without the consent of the other party, the Court of Appeal, however, added (at [47]) that "any new fact or change in the law arising after a submission to arbitration which is ancillary to the dispute submitted for arbitration and which is known to all the parties to the

arbitration is part of that dispute and need not be specifically pleaded". In the Court of Appeal's view, in deciding the question of whether Kempinski was entitled to damages or specific performance, evidence of the New Management Contract had to be adduced. On the issue of *functus officio*, the Court of Appeal agreed with the learned judge that the Awards all dealt with matters distinct from each other and therefore the arbitrator was not *functus* when he made the third and subsequent awards.

4.30 Apart from redefining clearly the role of formal pleadings in arbitration, the Court of Appeal showed that it was intent on ensuring that the arbitral process is not abused by any party to the prejudice of the other. Kempinski's withholding of the New Management Contract from the tribunal in an attempt to obtain an award of damages was given the just treatment by the tribunal and the court.

4.31 This case also holds many lessons on the framing of issues for determination, the need for precision in arbitral decisions and the considerations to be taken into account when bifurcating arbitral proceedings. There can be no gainsaying that issues should always be framed in such a manner for arbitrators to make definitive and precise decisions not premised on the occurrence of subsequent events or on some possibility of subsequent findings. Bifurcation is a useful tool in arbitration but it could delay the process, add to costs and often complicate the process beyond what parties had anticipated. The arbitration in this case was commenced in May 2002; the first award was made in February 2005, the second award in December 2006, the third award in May 2008 and the fourth award in October 2008. The final award on costs was made in April 2009. The arbitration took almost seven years to complete and an additional three years through the courts.

Enforcement of awards

Jurisdiction decision under Article 16 of the Model Law

4.32 Issues of arbitral jurisdiction may be brought by a party at many different stages of the process. It may be before a court to resist an application for stay of judicial proceedings said to have been commenced in breach of an arbitration agreement, pursuant to Art 8 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) (330 UNTS 38; entered into force 7 June 1959) ("the NY Convention"); or following the making of an award in the arbitration, to set aside the award at the court of the seat of arbitration; or to resist enforcement of the award before an enforcement court pursuant to Art V of the NY Convention. It could also be made

before the arbitral tribunal as a preliminary question of jurisdiction. In this regard, if the tribunal makes a positive ruling on its jurisdiction, a party may challenge that decision to the court of the seat of arbitration pursuant to Art 16 of the Model Law. Finally, jurisdiction may also be raised when the award is sought to be enforced in any jurisdiction where enforcement proceedings are pending.

4.33 An interesting issue that arose in *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2013] 1 SLR 636 was whether a decision by the tribunal on its own jurisdiction made in accordance with Art 16 of the Model Law which has not been appealed under Art 16(3) of the Model Law is still open for challenge when the award is sought to be enforced in the seat of arbitration. The case involved two groups of companies, the Astro Group ("Astro") and the Lippo Group ("Lippo"), which entered into a joint venture to provide direct-to-home multi-channel digital satellite pay television, radio and interactive multimedia services in Indonesia. The parties executed a subscription and shareholders agreement ("SSA") for the joint venture. Three of the Astro companies, namely, Astro All Asia Networks plc, Measat Broadcast Network Systems Sdn Bhd and All Asia Multimedia Networks FZ-LLC ("the three Astro companies") were not signatories to the SSA but were contemplated as participants in providing support services, equipment and funding to the joint venture company ("JV Co").

4.34 Disputes arose over the provisions of the supporting services and funding and Astro claimed that they were not obliged to, and would not, continue to provide support services and funding to the JV Co. Lippo took the position that the three Astro companies were obliged to continue provision of support services and funding. Lippo commenced action in Indonesia. Astro commenced arbitration under the SSA and included the three Astro companies as claimants in the arbitration. The arbitration was conducted under the SIAC Rules 2007 with Singapore as the seat of the arbitration. Lippo challenged the jurisdiction of the tribunal on the basis that the three Astro companies were non-signatories and were not parties to the SSA. The three-member tribunal made an "award on jurisdiction" ("the jurisdiction decision"), ruling that r 24(*b*) of the SIAC Rules 2007 gave it the power to join the three non-signatories with their express consent and that "such joinder was both desirable and necessary in the interests of justice", and ordered Lippo to discontinue the Indonesian proceedings and to refrain from taking any other proceedings. Lippo protested against the order made, saying that it exceeded the tribunal's jurisdiction as a joinder related not to the powers of the tribunal, but to the issue of whether or not the tribunal had jurisdiction over the dispute. Lippo, however, decided not to appeal against the jurisdiction decision under Art 16 of the Model Law and opted to proceed to defend the substantive issues in the arbitration. While doing so, Lippo stated

(at [32]) in their statement of defence that their actions were to be taken "without prejudice to [their] position that any tribunal which is constituted has and will have no jurisdiction".

4.35 The tribunal eventually made four other awards, all in favour of Astro, allowing an aggregate sum of US$250m payable by Lippo to Astro. Lippo took no steps to set aside the awards under the IAA. The prescribed time periods under the IAA to set aside the jurisdiction decision and the four awards have long expired.

4.36 Enforcement actions on the awards were commenced in Hong Kong Special Administration Region. The jurisdiction decision was registered as a judgment in UK and Malaysia. Enforcement proceedings were filed in Singapore and an *ex parte* order was obtained for enforcement of the awards. When Lippo did not respond to the *ex parte* enforcement orders within the time allowed, judgments were entered accordingly. Lippo, however, managed to obtain an order to set aside the judgments on the ground that the *ex parte* enforcement orders were not properly served. Lippo then filed originating summonses to set aside the enforcement orders. Against this, Astro appealed. Belinda Ang Saw Ean J ruled that the service of the *ex parte* enforcement orders were defective and affirmed the setting aside of the judgments entered. The court then proceeded to hear Lippo's grounds for resisting enforcement. Lippo maintained that the non-signatories were not parties to the SSA and thus the tribunal lacked jurisdiction to make any of the awards.

4.37 The core question at issue is whether a party who had not applied to challenge a tribunal's decision on jurisdiction under Art 16(3) of the Model Law could later challenge the enforcement of the award (at the seat of arbitration) on the ground that the tribunal lacks jurisdiction.

4.38 It should first be noted that this is not a case of a Singapore court dealing with an award made outside Singapore, where the Singapore court is merely an enforcement court. If that were the situation, the applicable provisions would be the NY Convention (set out in Part III of the IAA). Here, the court was dealing with an award made in Singapore; thus, the applicable law is Part II of the IAA, which adopts the Model Law.

4.39 Recognition and enforcement of awards made under the IAA in Singapore come within ss 19 and 19B. Article 36 of the Model Law, which deals with the grounds for refusing recognition and enforcement of arbitral awards wherever made, has not been adopted in Singapore and "has no force of law". This means that for the purpose of enforcement of awards made in Singapore, there are no statutory provisions as to when leave for enforcement would be refused.

4.40 Lippo argued that the underlying principles, policy considerations and drafting history of the Model Law leads one to conclude that as a matter of statutory construction, s 19 "imports" Art 36 of the Model Law and therefore Lippo invoked lack of jurisdiction as a ground for refusal of enforcement under Art 36(1)(*a*)(i). Alternatively, it "imports" Art 34 of the Model Law since the prescribed reasons for setting aside under Art 34 are similar to those for refusing enforcement under Art 36.

4.41 Lippo contended that the time limit within which it could apply to set aside an award under Art 34 applies only in relation to the setting aside application under Art 34, in which the court sits as a curial court, and could not prevent Lippo from raising similar ground to resist the enforcement of the award, in which the court sits as an enforcement court and to which s 19 imposes no time limit.

4.42 Ang J started by examining the use of the term "recognition and enforcement" in relation to arbitral awards. She came to the view (at [70]) that "recognition and enforcement of arbitral awards are concerned with giving effect to such awards. There is a difference between 'recognition' *per se* and 'recognition and enforcement'. An award may be recognised without being enforced, but a court cannot enforce an award which it does not recognise".

4.43 The court ruled (at [74]) that in relation to an award made in Singapore and "where such an award has not been set aside under any of the grounds for setting aside, it is *recognised* as final and binding, and is not subject to any further grounds for refusal of enforcement". If a party wishes to challenge the enforcement of the award, it must challenge its "recognition"; otherwise, it becomes "final and binding" under s 19B(1) of the IAA and must be enforced. Such challenge must be made under Art 34 of the Model Law and s 24 of the IAA to set aside the award.

4.44 As Lippo had failed to challenge the awards under Art 34 and the time to do so had long lapsed, the awards remained "final and binding" and accordingly had to be enforced. In the court's view (at [89]), "section 19B of the IAA recognises that for all practical purposes, judicial intervention in respect of domestic international awards is undertaken at the curial stage and s 19B thus makes no distinction between a court sitting in its curial capacity and in its enforcement capacity". The court therefore rejected Lippo's argument that s 19 permitted it to resist the enforcement even when the awards were not challenged under Art 34.

4.45 Implicit in the requirement for obtaining "leave of court" is that the court has discretion to grant or refuse enforcement. Like any judicial discretion, the same must be exercised judiciously. Ang J's analysis has

helpfully brought some perspective to this discretion. If a party who is entitled to raise a ground to set aside an award chooses not to do so, a court sitting in an enforcement action should not exercise such discretion in its favour.

4.46 It must be noted, however, that a court may exercise such discretion if events subsequent to the making of the award make such enforcement offensive to public policy. Such was the observation made by Chan Sek Keong CJ in the Court of Appeal's decision in *PT Asuransi* (above, para 4.10) after dismissing the appellant's attempt to set aside the award where he aptly said (at [76]):

> … that the outcome of this appeal, though disappointing for the appellant, is not necessarily the end of the road for it as the respondent has yet to enforce the First Award against it. To do so, the respondent has to obtain leave of court under s 19 of the Act, the very process of which, by definition, confers on the court some discretion in the matter: see *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue, 2003) at para 20.134. The question therefore arises as to whether, given the circumstances of this case, there is a legal basis for the court not to exercise its discretion to grant leave to the respondent to enforce the First Award, and in particular whether enforcing the First Award would be contrary to the public policy of Singapore …

4.47 In relation to the jurisdiction decision, Lippo argued that Art 16(3) and Art 34(2)(*a*)(i) of the Model Law were drafted as options and not obligatory provisions, which have the consequence, if breached, of causing the party in breach to lose its right to object to jurisdiction at the enforcement stage. Ang J agreed that it was an option but like an option to purchase, if it were not exercised, the right to purchase lapses or is lost. She aptly added (at [141]) that "where a party wishes to challenge the jurisdiction of a tribunal, it must raise the challenge at the earliest opportunity and, in any event, within the time limits prescribed; otherwise, it forfeits its right to challenge jurisdiction. Once the time limits under Art 16(3) have expired, it may be taken that the losing party has accepted jurisdiction".

4.48 The court, therefore, held that Lippo, having opted not to exercise its right to appeal against the jurisdiction decision, had accepted the decision as final and binding. Their reservation of their rights "on any appeal" had no effect after the time limit for an appeal under Art 16(3) of the Model Law lapsed. Ang J ruled (at [159]) that she could not then allow Lippo, "under the guise of refusal of recognition and enforcement to have a second bite at the cherry", as it "would be contrary to the finality principle promoted by Art 16(3) and extended by s 10 of the IAA".

4.49 There can be no argument that the tribunal's decision to join the three Astro Companies is a controversial one. However, Art 16(3) of the Model Law provides full recourse against such a decision by the tribunal for a thorough review by the High Court and for the court to finally "decide the matter". A dissatisfied party may, with leave, seek further review of the court's decision to the Court of Appeal. Lippo, not having done that, had landed itself in an extremely uncomfortable situation in which it failed to extricate itself from. Whether the Court of Appeal would be prepared to look behind the decision of the tribunal would be an extremely interesting aspect to watch for.

Principle of "good faith" adopted

4.50 The recognition of the influence of civil law jurisdictions in the formulation of the Model Law and the decision to consider the interpretation and application adopted in civil law jurisdictions open up a new dimension for practitioners of international arbitration in Singapore.

4.51 The term "good faith" has hitherto been treated with varying degrees of disdain by common law lawyers and judges describing it as too nebulous and uncertain and, more often, ignored. To the common law lawyer, "good faith" is satisfied if no bad faith is shown. The civilian lawyer, on the other hand, sees "good faith" as a positive duty.

4.52 An interesting thread of judicial thinking which seems to be developing differently from our traditional English common law legacy appears in the case of *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738. The Court of Appeal in that case considered a situation in which contracting parties were required to negotiate, in good faith, "to agree on the prevailing market rental". Interestingly, the Court of Appeal did not repeat these usual comments and instead took the view that when a party has contracted to take certain steps in good faith, it is expected to act honestly and observe objective commercial standards of fair dealing as well as fairly having regard to the legitimate interest of the other party. Elements of "unfair profit" based on the "known ignorance" of the other party would, in the court's view, negate the duty of good faith.

4.53 This approach is indeed refreshing. If we transpose this into an arbitration clause in Asia which routinely calls for negotiations in good faith, there could well be a strong signal to move into a new paradigm of consensual dispute resolution. Drawing from the article by Associate Professor Phillip McConnaughay, "Rethinking the Role of Law and Contracts in East-West Commercial Relationships" (2000–2001) 41 Va J Int'l L 427 at 448–449:

> From a traditional Asian perspective, a 'confer in good faith' or 'friendly negotiation' clause represents an executory contractual promise no less substantive in content than a price, payment, or delivery term. It embodies and expresses the traditional Asian supposition that the written contract is tentative rather than final, unfolding rather than static, a source of guidance rather than determinative, and subordinate to other values – such as preserving the relationship, avoiding disputes, and reciprocating accommodations – that may control far more than the written contract itself how a commercial relationship adjusts to future contingencies.

4.54 The Court of Appeal admonishes us (at [40]) that "the 'friendly negotiations' and 'confer in good faith' clauses … are consistent with our cultural value of promoting consensus whenever possible. Clearly, it is in the wider public interest in Singapore as well to promote such an approach towards resolving differences" [emphasis in original omitted].

4.55 Such stream of thought is indeed very uncommon law where traditionally it is *caveat emptor,* where every relationship entails a process of bargaining and where "good faith" has often been equated with absence of bad faith. If this stream continues to flow from the Court of Appeal, we can expect even more impactful changes to come.