# 4. ARBITRATION

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## Nature of arbitration

### *Confidentiality obligation*

4.1 Confidentiality as a distinct feature of arbitration has often been assumed. However, the UNCTRAL Model Law on International Commercial Arbitration ("Model Law") does not prescribe confidentiality. Whilst such an obligation has often been included in the rules of arbitration (*eg*, SIAC Rules, LCIA Rules) not all institutional rules contain such provisions (*eg*, International Chamber of Commerce ("ICC") Rules 1998 – the ICC 2012 Rules retain the same feature, but allows the tribunal to make orders concerning the confidentiality of the arbitration proceedings). The concept of privacy in arbitration is derived from the fact that parties have agreed to submit their disputes to arbitration only between them. To such a rule there are exceptions such as (a) where the parties consented to disclosure; or (b) disclosure is made pursuant to an order of court; or (c) disclosure is made following grant of leave of court; or (d) if disclosure is reasonably necessary for the protection of the legitimate interests of a party *vis-à-vis* a claim by a third party; or (e) where the interest of justice requires such disclosure (see *Halsbury's Laws of Singapore* vol 1(2) (LexisNexis, 2011 Reissue) at para 20.004).

4.2 The case of *AAY v AAZ* [2011] 1 SLR 1093 ("*AAY*"), raised several aspects of the confidentiality obligation that deserve attention. The plaintiffs in that case were formerly employed by a New Jersey company, AAZ, in their Singapore branch. The AAZ Singapore branch was subsequently reorganised and incorporated as CCZ and was involved in the marketing, distributing, producing and servicing of equipment, including automated industrial cleaning systems and test equipment. The plaintiffs resigned *en bloc* together with 19 other employees from CCZ's third-party distributorship division in 1992. Following discussions with the first and second plaintiffs, AAZ sold all its shares in CCZ to the plaintiffs. The sale agreement provided for

disputes arising out of, or in connection with, the agreement to be referred to, and finally resolved by, arbitration. Shortly thereafter the plaintiffs rejoined CCZ. The defendant, who believed that it was a victim of the plaintiffs' conspiracy to take over CCZ, started civil proceedings in the United States in July 1993 alleging fraud, conspiracy, negligent misrepresentation, conversion and federal securities fraud. The suit was dismissed *forum non conveniens* and the dismissal was upheld by a United States Court of Appeal. AAZ then started arbitration in Singapore in August 1994 against the first and second plaintiffs. That arbitration did, however, not proceed. Then in 1997, AAZ received a letter which supported his suspicions that the plaintiffs had committed various fraudulent acts in depressing the net asset value of CCZ and decided to commence court action in the High Court. On the application of the plaintiffs for stay, the parties agreed to refer the entire dispute to arbitration. This agreement was embodied in a consent order of court dated 23 February 1999 ("Consent Order").

4.3 By its partial award on liability made on 30 June 2005, the tribunal found the plaintiffs liable for fraudulent misrepresentation, conspiracy and breach of fiduciary duties owed to the defendant and ordered damages to be assessed. The plaintiffs' application to set aside the award was rejected by the court. The assessment phase of the arbitration then resumed with the tribunal issuing orders for the discovery of documents relating to the accounts of CCZ. On 8 August 2006, the defendant made a report to the Commercial Affairs Department ("CAD") and provided to the CAD several documents including the partial award of 30 June 2005 and a document received from the plaintiffs pursuant to an order of discovery made by the tribunal. The plaintiffs took the view that by lodging the report, AAZ had repudiated the arbitration agreement. Following confirmation that CAD would not be taking any action, the plaintiffs commenced court action seeking to set aside the Consent Order, a declaration that they be discharged for the obligations to arbitrate and an injunction against the continuation of the arbitration. The main issues the court had to consider were whether there was an obligation of confidentiality attached to the arbitration commenced pursuant to the Consent Order and if the obligation was breached and whether the plaintiffs were entitled to terminate the arbitration.

4.4 On the issue of confidentiality, the plaintiffs argued, that by reason of the parties' adoption of the SIAC Rules 1997 ("SIAC Rules"), the parties were obliged under r 34.6 of the SIAC Rules to treat all matters relating to the arbitration as confidential including the existence of the arbitration proceedings, as well as any award made. Chan Seng Onn J found, however, that although the arbitrator had proceeded on the basis that the SIAC Rules applied to the arbitration (applying the same in relation to security for costs application), he did so without the

express agreement of the parties. Instead, in a direction made in 1998 the arbitrator had recorded that the parties agreed that "Model Law set out in the First Schedule to the International Arbitration Act (Cap 143A, 1995 Rev Ed) would be referred to as the 'Rules'" in the arbitration. The learned judge pointed out, quite properly, that such a direction was superfluous as that would be the *lex arbitri* and not the procedural rules of the arbitration. The SIAC Rules not having been adopted by the parties, and the Model Law being silent on confidentiality, the court then had to consider whether, absent express agreement, there was an implied covenant of confidentiality.

4.5 Chan J examined the decisions from the UK (*eg*, *Dolling-Baker v Merrett* [1990] 1 WLR 1205; Colman J in *Hassneh Insurance Co of Israel v Steuart J Mew* [1993] 2 Lloyd's Rep 243; the English Court of Appeal in *Ali Shipping Corporation v Shipyard Trogir* [1999] 1 WLR 314; the English Privy Council on appeal from Bermuda in *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1041 and *John Forster Emmott v Michael Wilson & N Partners Ltd* [2008] 2 All ER (Comm) 193) which recognised an implied obligation of confidentiality, albeit characterised by varying exceptions, and contrasted them against the approach of the Australian High Court in *Esso Australia Resources Ltd v Plowman (Minister for Energy and Minerals)* (1995) 128 ALR 391, which recognised privacy in arbitration, but rejected a general duty of confidence. He also noted that both Kan Ting Chiu J in *Myanma Yaung Chi Oo Co Ltd v Win Win Nu* [2003] 2 SLR(R) 547 and Lai Siu Chiu J in *International Coal Pte Ltd v Kristle Trading Ltd* [2009] 1 SLR(R) 945 had decided to adopt the English approach and recognised a general implied obligation of confidentiality in arbitration. Chan J concluded that "as a principle of arbitration law at least in Singapore and England, the obligation of confidentiality in arbitration will apply as a default to arbitrations where the parties have not specified expressly the private and/or confidential nature of the arbitration": *AAY* at [55].

4.6 Chan J stated that as a principle of Singapore law, confidentiality is now a substantive common law-developed doctrine of arbitration. Chan J also went on to consider if the disclosure by AAZ, or on its behalf to the CAD, fell within any exception to such an obligation to maintain confidentiality. The plaintiffs argued that such disclosure undermined the public interest in encouraging and protecting arbitrations and their confidentiality and could be abused by a party using such information as a threat or bargaining tool and as such should be proscribed. AAZ on the other hand submitted that, if materials obtained in arbitration revealed a *prima facie* commission of criminal offences, it would be in the public interest to except it from confidentiality obligations for a report being made to the law enforcement authority.

4.7 Chan J adopted a balanced approach and took the view that "confidentiality is a lesser interest than the public interest of having criminal wrongdoing revealed to the relevant authorities for their investigation" and accordingly "disclosure to the appropriate authorities where there is reasonable suspicion of criminal conduct is thus an exception to the obligation of confidentiality": *AAY* at [72].

4.8 The plaintiffs also argued that the report to the CAD was actuated by the motive to coerce them to settle on the terms of AAZ. To this, Chan J's response was that, as such disclosure to the appropriate authorities is an exception and not a defence to the confidentiality obligation, the motive for doing so became irrelevant. In any event, Chan J held that, even if there was a breach of confidentiality, it could not be said that the plaintiffs had been deprived of the benefit of the arbitration to entitle them to repudiate it nor did the defendant objectively evince an intention to no longer be bound by the arbitration agreement.

4.9 The decision in *AAY* also raises some questions concerning the duty of arbitrators to report any suspected commission of a crime or suspected criminal activities. If a positive duty is indeed so imposed, the consequences of a failure to report is something about which arbitrators may have some degree of unease.

## Enforcement of arbitration agreements

### *Stay of court proceedings: Incorporation by reference; conflicting jurisdiction and arbitration clause*

4.10 A party to an arbitration agreement who commences a court action to litigate a claim coming within the arbitration agreement will have its action stayed and be directed to arbitration unless the arbitration clause is "null and void, inoperative or incapable of being performed" (an obligation imposed under Art II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) (330 UNTS 38; entered into force 7 June 1959)). Where a transaction involves more than two parties or is linked by several contractual arrangements, the presence of an arbitration agreement in one document, but absent in another often give rise to complications. A reference in a contract to another document containing an arbitration clause could constitute an arbitration agreement between the parties to the contract only if the reference is such as to make that arbitration clause part of the contract.

4.11 In *Astrata (Singapore) Pte Ltd v Tridex Technologies Pte Ltd* [2011] 1 SLR 449 ("*Astrata*"), Philip Pillai J had to consider a supply

agreement ("Supply Agreement") entered into between Astrata and Tridex under which Astrata as supplier undertook to develop and adapt a vehicle control system (both for the hardware and software) which involved the embedding of electronic devices in licensing plates of vehicle for a state user. The Supply Agreement required the supplier to deliver comprehensive source codes and engineering diagrams to an escrow agent to be appointed. The Supply Agreement was subject to English law and provided for arbitration under the ICC Rules.

4.12 By an escrow agreement ("Escrow Agreement") entered between Astrata, Tridex and Portcullis Escrow Pte Ltd ("PEPL"), PEPL was appointed the escrow agent to hold the source codes and documents containing the proprietary information with strict instructions on the conditions for release. One such condition was that if Astrata or its parent company Astrata Group Incorporated ("AGI") "ceased or threatened to cease to carry on its business or has had a receiver, administrator or similar officer appointed over all or any part of its assets or undertaking or has made any arrangement for the benefit of its creditors or gone into liquidation save for the purpose of a genuine amalgamation or reconstruction". The Escrow Agreement provided for Singapore law and the non-exclusive jurisdiction of the Singapore courts.

4.13 Unfortunately for Astrata, AGI, which was based in the United States, filed under Chapter 11 of the United States Bankruptcy Code and its final "Plan of Reorganization" ("AGI's Chapter 11") and the same was confirmed by the United States court on 15 December 2009. Tridex invoked the provision in the Escrow Agreement and demanded the release of the source codes and the other proprietary documents from PEPL. Astrata objected to this demand and argued that the condition for release by PEPL was not satisfied as AGI was under a "genuine … reconstruction". The escrow agent applied to the High Court for a determination as to whether Tridex had satisfied the condition to demand release of the source codes and documents. Astrata also applied to the court seeking several orders including an injunction against release of the source codes and documents and seeking a stay of the escrow agent's application for a court declaration relying on the arbitration clause in the Supply Agreement. In relation to the stay application, the learned judge held that Astrata's application was misplaced as the Escrow Agreement provided for disputes to be referred to the Singapore court's curial jurisdiction and that reliance could not be properly placed on the arbitration clause in the Supply Agreement. Astrata had argued that s 11A of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), which provides that, where relief by way of interpleader is granted by a court, "any issue between the claimants is one in respect of which there is an arbitration agreement between them", may be referred to arbitration in accordance with the

agreement. Astrata had submitted that under the Supply Agreement, which provided for the provision of source codes and proprietary documents, disputes between it and Tridex should be referred to arbitration. As such, notwithstanding the reference to submission to jurisdiction clause in the Escrow Agreement, the court should refer the dispute to arbitration and only upon the ruling of the tribunal should an order be sought from the court. Pillai J rejected this argument, ruling that this was not a case for a stay in favour of arbitration as the application for a declaration by the escrow agent was made pursuant to the Escrow Agreement and not the Supply Agreement. The arbitration agreement under the Supply Agreement had no relevance to the escrow agent's application. The learned judge proceeded to find that AGI's Chapter 11 bankruptcy was not a "reconstruction" and granted the declaration sought by the escrow agent.

4.14 The court in *Astrata* was without doubt dealing with the Escrow Agreement and had proceeded as such relying purely on the jurisdiction clause in the Escrow Agreement. The approach and decision adopted by the court is probably practical and efficacious, but it should nevertheless be noted that, in the given scenario, the tussle was not one between the escrow agent and Astrata, but between the competing claimants Astrata and Tridex. The rights to the source codes and documents did arise out of the Supply Agreement and the Escrow Agreement was but an arrangement to facilitate the release in appropriate circumstances. Astrata's argument that it be given an opportunity to have its competing claim against Tridex arbitrated in accordance with the arbitration agreement in the Supply Agreement did merit consideration. On the other hand, the parties had by the Escrow Agreement specifically provided for the release of the source codes and proprietary documents in certain special circumstances and subjecting disputes arising from the same to the decision of the courts of Singapore. This indicates the parties' intention that, even if the competing rights of Astrata and Tridex fell within the arbitration regime in the Supply Agreement, the parties had in fact carved out this class disputes to be dealt with by the courts of Singapore.

### *Existence of dispute*

4.15 The existence of a valid arbitration agreement between the parties to a pending action is of itself not sufficient to seek a stay of the pending court proceedings. Parties who commence such court proceedings may sometimes resist stay, arguing that there was, in fact, no dispute referable to arbitration and accordingly the arbitration agreement is not engaged. Singapore courts have, however, consistently adopted the approach that a positive assertion by the defendant in an action commenced in breach of an arbitration agreement is sufficient to constitute a dispute. The Singapore courts have held that they have no

power to investigate the reality of, or whether in fact, a dispute exists so long as there is no unequivocal admission of the claim as to liability and quantum and that the same was due and payable (see *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 and *Dalian Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd* [2005] 4 SLR(R) 646 ("*Dalian*")). (See also this author's comments on the *Dalian* decision in (2004) 5 SAL Ann Rev 47 at paras 3.2–3.7 and *Tjong Very Sumito v Antig Investments Pte Ltd* in (2009) 10 SAL Ann Rev 53 at paras 4.26–4.32.)

4.16 Tan Lee Meng J in *The Makassar Caraka Jaya Niaga III-39* [2011] 1 SLR 982 also adopted a similar approach when PT Djarkata Llyod's ("PTDL") vessel was arrested by the plaintiff, ANL Singapore Ltd ("ANL") for non-payment of US$719,440.17 being slot fees due and owing under invoices rendered pursuant to a slot charterparty entered into between the parties. PTDL's application to set aside the warrant of arrest on the basis that the ship was owned beneficially by the Government of Indonesia was rejected, but its application to stay the action in favour of arbitration was granted by Tan J. Although in its application for the warrant of arrest ANL had stated that it was "ready, willing and able to refer their disputes to arbitration", when the application for stay was made ANL questioned whether there was a "dispute" between the parties to warrant a stay of proceedings as PTDL had in a letter admitted owing it "an estimated US$2.8m". PTDL however argued that there was no unequivocal admission and that the same was written on a "without prejudice" basis. The court held, following the Court of Appeal's decision in *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732, that even if PTDL could be said to have prevaricated in its alleged admission, the dispute as to the admission and the substantive claims should all be referred to arbitration.

***Subject matter arbitrability: Insolvency claims***

4.17 Whilst parties have almost complete autonomy in determining the type of matters that may be included in arbitration, not all matters are arbitrable. It is generally accepted that issues, which have public interest elements, may not be arbitrable. These include, for example, citizenship or legitimacy of marriage, grants of statutory licences, validity of registration of trade-marks or patents, winding-up of companies, bankruptcies of debtors, regulatory legislation relating to anti-trust, trade practices, consumer protection, environmental protection and planning.

4.18 Section 11 of the IAA provides that any dispute is arbitrable unless "it is contrary to public policy to do so". The issue of subject matter arbitrability may be brought by the opposing party, before the court, on an application for stay of judicial proceedings to resist the

enforcement of an arbitration agreement on the basis that the matter is not arbitrable and/or contrary to public policy. The challenge of jurisdiction based on arbitrability addresses the question of what could be referred to arbitration, as opposed to what falls within the scope of the arbitration agreement.

4.19 The question as to what extent claims by or against an insolvent company may be permitted to be resolved through the arbitral process, was examined by the Court of Appeal in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414 ("*Petropod*").

4.20 Petroprod Ltd ("Petropod") was a Cayman Islands company, which has had a number of wholly-owned one-ship companies. It had no employees of its own. By a management agreement ("Management Agreement") dated 21 December 2006 between Larsen Oil and Gas Pte Ltd ("Larsen") and Petropod, Larsen was to provide management services to Petropod and its subsidiaries. The Management Agreement contained an arbitration clause. Petropod was placed in liquidation by the court of Cayman Islands in July 2009 and subsequently was also ordered to be wound up by an order of the High Court of the Cayman Islands in August 2009. All the subsidiaries of Petropod, though not in liquidation, were technically insolvent. Petropod commenced an action in Singapore against Larsen seeking avoidance of a number of payments made to Larsen on the ground that these payments amounted to unfair preferences or transactions at an undervalue within the meaning of ss 98 and 99 of the Bankruptcy Act (Cap 20, 2009 Rev Ed), read with s 329(1) of the Companies Act (Cap 50, 2006 Rev Ed) and the avoidance of a number of payments made by the subsidiaries to Larsen pursuant to s 73B of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed) on the ground that they were made with the intent to defraud it as a creditor of the subsidiaries. Larsen, relying on the arbitration clause in the Management Agreement, sought a stay of the action. Tan Lee Meng J in the High Court ruled that the avoidance of certain transactions following insolvency were intended to protect the general body of creditors and would override transactions which were justifiably binding on the insolvent company under general law. He took the view that such a policy would be compromised if its enforcement was subject to private arrangements, including an agreement to arbitrate.

4.21 V K Rajah JA in the Court of Appeal upheld Tan J's decision, holding that Petroprod's claims against Larsen were founded on the avoidance provisions of the Bankruptcy Act and Companies Act which allow for the adjustment of concluded transactions upon the onset of insolvency and not on any breach of contractual provisions in the Management Agreement and, as such, fell outside the scope of the

arbitration agreement in the Management Agreement. The Court of Appeal went on, however, to examine the important issue of the extent to which claims involving an insolvent company may be resolved in arbitration.

4.22 Whilst accepting that there is a presumption of arbitrability where the words of an arbitration clause are wide enough to embrace a dispute, Rajah JA drew a line between disputes involving the insolvent company's pre-insolvency claims and claims that arise only after the onset of insolvency due to the operation of the insolvency regime. The court held that "disputes arising from the operation of the statutory provisions of the insolvency regime *per se* are non-arbitrable even if the parties expressly included them within the scope of the arbitration agreement": *Petropod* at [46]. At the same time, whilst disputes involving pre-insolvency rights and obligations are arbitrable, such agreements to arbitrate "should not be allowed to be enforced against the liquidator where the agreement affects the substantive rights of other creditors": *Petropod* at [50].

4.23 The Court of Appeal's decision in *Petropod* makes clear that claims which have arisen within the insolvency regime belong to the pool of non-arbitrable subject matters. Such a position is clearly justifiable as being within the wider public interest to have such matters dealt within the insolvency regime. In dealing with pre-insolvency claims however, it remains unclear when, other than in a situation which involves only a single creditor, would such claims not affect the substantive rights of the other creditors.

## International arbitration under the International Arbitration Act: Setting aside

4.24 Arbitral awards made under the IAA are final and binding and the only recourse against an award is by way of setting aside on the strict and narrow grounds set out in Art 34 Model Law and s 24 of the IAA. Singapore courts have thus far been slow to set aside awards made in international arbitrations and have consistently emphasised the importance of arbitral finality and loathed interfering in awards made in international arbitrations.

### *Failure to follow agreed procedure: "Award" not dealing with substantive disputes*

4.25 In *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] 4 SLR 672, Belinda Ang Saw Ean J found occasion to set aside an award made by an International Chamber of Commerce ("ICC") tribunal seated in Singapore (see (2010) 11 SAL Ann Rev 74

at para 4.48). This decision was affirmed by the Court of Appeal in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*Persero (CA)*"), signalling that, in appropriate cases, Singapore courts would not hesitate to set aside where the statutorily prescribed grounds for setting aside are made out.

4.26 The dispute arose out of a pipeline construction contract entered into between PT Perusahaan Gas Negara (Persero) TBK ("PGN") and CRW Joint Operation ("CRW") for the construction of a pipeline and an optical fibre cable running from Grissik to Pagardewa in Indonesia. The contract adopted the Federation Internationale des Ingenieurs Conseils ("FIDIC") Conditions of Contract for Construction (1st Ed, 1999) ("1999 FIDIC") which provided for a tiered dispute resolution first by a Dispute Adjudication Board ("DAB") whose decision shall be binding "unless and until it shall be revised in an amicable settlement or an arbitral award" (sub-clause 20.4) and if a notice of dissatisfaction be filed against a DAB decision, the matter would then be referred to arbitration. When a dispute arose relating to some variation orders, they were referred to adjudication whereupon the DAB directed PGN to pay US$17,298,834.57. PGN then filed its notice of dissatisfaction ("NOD") and refused to make payment, leading to CRW commencing arbitration seeking immediate payment of the US$17,298,834.57.

4.27 The award impugned in the CRW case was made by the majority members of the tribunal in the form of a final award ("Final Award") holding that the DAB decision obliged PGN to make immediate payment to CRW under the contract and ordered PGN to make the payment of US$17,298,834.57 directed by the DAB. The majority ruled that the tribunal's power to open up and review the DAB decision would not operate as a defence to CRW's claim for immediate payment. The award also reserved for PGN the right to commence another arbitration to open, review and revise the DAB decision.

4.28 Belinda Ang J in the High Court set aside the award on the grounds that the award dealt with a dispute not contemplated by or falling within the scope of submission (violating Art 34(a)(iii) of the IAA). The learned judge however held that PGN was afforded the opportunity to be heard but was unable to answer the tribunal's enquiries on how much it owed CRW and thus no violation of Art 24 of the IAA occurred.

4.29 In the Court of Appeal, CRW argued that the majority members had acted within the terms of reference agreed to by the parties. It drew attention to its request for arbitration in which it specifically said that the arbitration "shall be limited to giving prompt effect to the [Adjudicator's] [d]ecision dated 25 November 2008 in which instance

shall be the fulfilment of [PGN's] obligation to perform payment of the US$17,298,834.57". In its answer to the request, PGN rejected this position and asserted that it had no obligation to pay because it had submitted an NOD, which rendered the adjudicator's decision "not yet final and binding" and contending that the tribunal ought to open up, review and revise the adjudicator's decision, as well as hear the case on the merits in accordance with the 1999 FIDIC.

4.30 The Court of Appeal examined the matters that the tribunal was entrusted to decide, the dispute resolution procedure under the 1999 FIDIC and whether the Final Award made by the majority members accorded with the process set out in the 1999 FIDIC. It ruled that: (a) the tribunal was appointed to decide not only whether CRW was entitled to immediate payment of the sum directed under the DAB decision, but to all issues of fact and law necessary for the purpose of rendering its award; (b) a DAB decision is binding but not final and that in the 1999 FIDIC, the final decision could only be made in the event of a DAB being challenged, which is by way of a re-hearing process in arbitration under sub-clause 20.6 of the 1999 FIDIC; (c) the majority members had, without examining the merits of the DAB decision, proceeded to make a Final Award which had failed to comply with sub-clause 20.6 of the 1999 FIDIC and had therefore acted in excess of jurisdiction leading to a real prejudice to PGN.

4.31 In its analysis of the dispute resolution mechanism in sub-clause 20.6 of the 1999 FIDIC, V K Rajah JA referred to the decision of the tribunal in ICC No 10619 where the tribunal ordered the "provisional enforcement" of a DAB decision/award without prejudice to the party against which it was made, to argue that the DAB decision was wrong. The court also referred to another ICC decision published in the Dispute Board Federation newsletter dated September 2010 highlighting another ICC decision, whereby the arbitral tribunal granted a partial award for the enforcement of two binding but non-final DAB decisions subject to the condition that the DAB decisions could be opened up, reviewed and revised by the arbitral tribunal subsequently in the same arbitration. Rajah JA also noted that the approach in ICC No 10619 was supported by the author of the article "Enforcement by an Arbitral Award of a Binding but not Final Engineer's or DAB's decision under the FIDIC Conditions" [2009] ICLR 414, where one Christopher R Seppälä ("Seppälä") described the arbitral tribunal in ICC No 10619 as having "perfectly understood" the function of the DAB decision.

4.32 The Court of Appeal adopted this same logical approach and said that the arbitral tribunal constituted under sub-clause 20 of the 1999 FIDIC had the duty to hear the parties on the merits "so that the entirety of the parties' disputes can be finally resolved": *Persero (CA)*

at [66]. In the court's view, the process contemplated under the 1999 FIDIC is "a single arbitration where all the existing differences between the parties arising from the DAB decision concerned will be resolved". As regards PGN's obligation to pay under the DAB decision, the tribunal could have given effect to it by an "interim award" as was done in ICC No 10619 and then proceeded to re-hear the parties fully before making a final award.

4.33 There can be no controversy that an arbitral tribunal should make an award in the arbitration only after hearing the arguments and evidence on the merits of the dispute. The fact in this case was that CRW had deliberately limited the scope of the tribunal's remit to "giving prompt effect to the [Adjudicator's] [d]ecision dated 25 November 2008". This, together with the PGN's stand that it would not be lodging a counterclaim, led the tribunal to labour under the impression that its scope was therefore limited to deciding whether the DAB decision ought to be enforced. The court observed, quite properly, that the lack of a counterclaim could not deprive PGN from asserting that the DAB's decision was wrong and ought not to be enforced. Indeed, there was no suggestion that a party responding to a DAB decision under sub-clause 20.6 was required under the 1999 FIDIC (or under any rule of law or practice) to put in a counterclaim in the arbitration in order for its objection to the DAB decision to be considered. As such, the assertion by PGN that the DAB decision was wrong must necessarily operate to oblige the tribunal to open up and consider if there was a case for reviewing or revising the DAB decision. Not having done so deprived PGN of its right to be heard on the merits and was fatal to the enforcement of the Final Award. The Court of Appeal also lamented that it was unfortunate for a member of the tribunal, Mr Kaplan, to criticise PGN for its inability to specify the amount it believed it owed to CRW at that stage of the proceedings when the hearing of the merits of the real dispute was not before the tribunal. It described such a criticism as an "affront to the principle that each party must be given a reasonable opportunity to present its case": *Persero (CA)* at [94].

4.34 The majority members were no doubt aware that PGN had to be eventually heard on the merits and had provided that the Final Award would not "affect [PGN]'s right to commence an arbitration to seek to revise the [Adjudicator's] decision". This statement, in effect, invalidated the very nature of what the majority had intended to do. If indeed the majority members intended to make a Final Award, that decision must necessarily carry with it the implication that it is "final and binding" (s 19B(1) IAA) giving rise to *res judicata* and issue estoppel operating fully against all the parties.

4.35 It is clear from this decision that the Court of Appeal had to, for sound reasons and with little option, set aside the Final Award made in

this instance. Surprisingly, Seppälä (who was the Special Advisor to the FIDIC contracts committee, and whose article was cited by the Court of Appeal) criticised the decision of the Court of Appeal in strong terms saying that the "guidance that the judgment offers is highly questionable" (*Global Arbitration Review* 8 January 2012).

4.36 Rajah JA had suggested that the majority members could have made an "interim award" reserving for itself the right to finally decide on the merits of the case. With respect, the use of the term "interim award" (no doubt inspired by ICC No 10619) to describe a decision which has only temporary or provisional binding force is probably inappropriate. Unlike the statutory framework under English law which provides for the making of "provisional awards" (see s 39 Arbitration Act 1996 (c 23) (UK)), an arbitral tribunal in Singapore and under Model Law does not have such a power to do so. An award by its nature must decide a matter in substance of the dispute (see definition of "award" in s 2 IAA) and does not permit a decision of a temporary or provisional nature. Matters of procedural or non-substantive nature should be made by way of orders or directions. The arbitral tribunal could have properly made an interim order giving effect to the DAB decision under s 12(6) of the IAA, leaving the merits of the PGN's defence to be finally resolved by the tribunal later in accordance with sub-clause 20.6 of the 1999 FIDIC.

4.37 Another noteworthy aspect of this decision is the Court of Appeal's recognition that the court has a residual discretion under Art 34 Model Law not to set aside an award even if one of the prescribed grounds for setting aside has been made out. The court however refused to accede to CRW's request to exercise such a discretion because in the court's view PGN had suffered real prejudice as a result of the majority members acting in excess of their jurisdiction and in breach of the rules of natural justice.

### *Award contrary to public policy*

4.38 It is not uncommon for unsuccessful parties in arbitration to contest the award made against it either to seek a vacation of the award with an application for setting aside or by resisting its enforcement. In considering whether an award is against public policy, or the enforcement of it would violate public policy, a court has to balance its duty to uphold the values, the basic notions of morality and its sense of justice against the need for it to hold the parties to their bargain, *viz* to be bound by the final and binding decision arising from a process they have agreed to. How the term "public policy" is applied as a ground to justify setting aside an award depends much on how the court views the arbitration process. Courts in jurisdictions that see itself as the supervisory authority tended to be more intrusive and take a liberal

view of the term, including setting aside or refusing to enforce awards that contain errors of law, or misapplication of law, holding that a court should never uphold an award which was "patently illegal". (See for example *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd* AIR 2003 SC 2629, where the Indian Supreme Court set aside the award because the tribunal failed to follow the terms of the contract to award liquidated damages, contrary to the provisions of the Indian Contracts Act (Act 9 of 1872). This decision was not followed by the Court of Appeal in Singapore, see *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597.)

4.39 Singapore courts have always resisted allowing the term to be used to justify anything other than decisions which "shock the conscience of the court" to so qualify it as being contrary to public policy (see for example *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86). Contracts entered into for an illegal purpose or object, such as money bribery, money-laundering, smuggling activities, human trafficking, *etc*, are some examples. Mere infractions of the law in the performance of commercial contracts, or misapplication of the law in the making of the award, do not justify setting aside an award made thereunder as being contrary to public policy.

4.40 Elements of illegality or unusual bargain do of course attract judicial scrutiny. Such was the case in *AJU v AJT* [2011] 4 SLR 739 ("*AJU*") where AJU, a Thai public company, had in the course of the arbitral proceedings, lodged complaints of fraud and forgery against AJT's sole director and a related company to the Special Prosecutor's Office of Thailand. The parties subsequently reached an agreement in a concluding agreement in exchange for the "withdrawal and/or discontinuation and/or termination of all Criminal Proceedings" and payment by AJU to AJT of US$470,000. AJT would then withdraw and terminate the arbitration. AJU withdrew the complaints and made the payment agreed to AJT. The Thai Special Prosecutor's Office issued a cessation order not to prosecute the parties and confirmed that no prosecution would proceed because of insufficient evidence. AJT however, refused to withdraw and terminate the arbitration, arguing that the agreement was reached under duress, undue influence and was illegal. The tribunal made an award terminating the arbitration.

4.41 Chan Seng Onn J in the High Court set aside the award on the basis that the arrangement between the parties was intended "to stifle prosecution of non-compoundable offences which contravene public policy as they undermine the public interest in the maintenance of justice – particularly in the realm of law and order" (*AJU* at [33], *per* Chan Seng Onn J). In doing so, the judge took the approach that "in appropriate cases, the court, as part of its supervisory jurisdiction, may

examine the facts of the case and decide the issue of illegality. While there is a need to uphold the public interest in ensuring the finality of arbitral awards, the court must also safeguard the countervailing public interest in ensuring that its processes are not abused by litigants": *AJU* at [24]. The judge then went on to reopen the tribunal's finding on the legality of the concluding contract, re-evaluated the evidence of all the witnesses and came to a conclusion different from that of the tribunal. In the judge's view, the concluding agreement was intended to effect the withdrawal of the forgery charges as well and was thus illegal and contrary to public policy.

4.42 Chan Sek Keong CJ reiterated the Court of Appeal's position (see *PT AsuransiJasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [53]–[57]) that a tribunal's erroneous findings of fact or law would not *per se* engage the public policy of Singapore. Chan CJ agreed with Chan J's view that the Singapore court has the power to decide what the public policy of Singapore is and has the supervisory power to correct a tribunal's decision on this issue of illegality. The court is therefore entitled to decide for itself whether the concluding agreement was illegal in a setting aside application. Chan CJ pointed out, however, that the public policy objection under Art 34(2)(b)(ii) of the Model Law is limited to a finding on a "question of law on what the public policy of Singapore is" and is not extended to findings of fact made by the tribunal. There was no controversy that the tribunal had accepted and applied the principle that any agreement to stifle the prosecution of a criminal offence (particularly a felony, or a non-compoundable offence) would be illegal and against public policy, as undermining the administration of justice. What the judge had disagreed with was the tribunal's evaluation of the evidence and their finding as to the intentions of the parties when signing the concluding agreement. In the Court of Appeal's view, these are findings of fact and the judge should not have reopened the tribunal's findings and substitute its own findings.

4.43 Shortly after the High Court decision in *AJT*, Judith Prakash J in *Rockeby Biomed Ltd v Alpha Advisory Pte Ltd* [2011] SGHC 155 ("*Rockeby*") had to decide whether the respondent, who was engaged as an advisor under a consultancy agreement to advise the plaintiff on securing a Singapore listing through a reverse take-over or an initial public offering on the Singapore Stock Exchange, was required to be a licensed advisor under the Securities and Futures Act (Cap 289, 2006 Rev Ed). The arbitrator had rejected the plaintiff's argument and held that the respondent was not so required to be licensed and therefore the agreement was not illegal. Prakash J adopted the view expressed by Chan CJ in the High Court decision in *AJT* and took the position that the court has the "power to examine the facts of the case afresh": *Rockeby* at [19]. She agreed, however, with the tribunal's finding

and affirmed the award. As such, Chan CJ in *AJU* at [71], had to point out that the decision in *Rockeby* would be inconsistent with the decision of the Court of Appeal.

4.44 The Court of Appeal's decision in *AJU* demonstrates that the Singapore courts have not only been vocal in their support, but would steadfastly stand by the factual findings of arbitral tribunals even if the court could have come to a finding different from the tribunal. Such an approach is markedly different from the often inconsistent and interventionist approaches adopted by the English courts (see, *eg*, the UK Supreme Court in *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs Government of Pakistan* [2010] UKSC 46 where the court rejected the enforcement of an award made in France, after making its own "independent investigation" and came to a factual finding that the Government of Pakistan was not a party to the agreement and rejected the tribunal's finding and ignored the fact that the award was affirmed by the French court and granted *exequatur*. The irony in that case was made even more stark when the Paris Court of Appeal reaffirmed the tribunal's award and rejected Pakistan's challenge on the same jurisdictional ground).

***Recourse against awards in domestic arbitration proceedings under the Arbitration Act: Appeal on question of law***

4.45 An award rendered in domestic arbitration proceedings under the Arbitration Act (Cap 10, 2002 Rev Ed) ("AA") may be appealed to the High Court on a "question of law" arising out of an award made in the proceedings, either with the agreement of all the parties to the proceedings or with leave of court.

***Question of law: Issue must be one which tribunal was asked to determine***

4.46 The question of whether the agreement of the parties to prefer an appeal under s 49 AA would include an agreement made prior to any dispute which has arisen, such as one made in the arbitration clause within a commercial contract, arose for consideration before Judith Prakash J in the case of *Lim Chin San Contractors Pte Ltd v LW Infrastructure Pte Ltd* ("LW") [2011] 4 SLR 455 ("*Lim Chin San*") where the arbitration clause in the construction contracts expressly stated that parties "may appeal to the High Court on any question of law arising out of an award made in an arbitration under this Arbitration Agreement". The court (adopting the view of Colman J in *Poseidon Schiffahrt GmbH v Nomadic Navigation Co Ltd (The Trade Nomad)* [1998] 1 Lloyd's Rep 57, interpreting similar provisions in the Arbitration Act 1979 (c 42) (UK) (repealed)) saw no policy reason to

accept an agreement to appeal given before the dispute was referred to arbitration. Related to the question of appeal by consent was whether such agreement had the effect of precluding the need to characterise the questions of law arising out of the award. To this the learned judge answered that, if there was any agreement between the parties to increase the scope of the court's jurisdiction in s 49 of the AA, the questions referred to the court must still truly constitute questions of law arising out of the arbitral award before a court is empowered to entertain them.

4.47 The fundamental basis for appeal is that there must be a "question of law" for determination. The distinction between a "question of law" and an "error of law" was earlier settled by the Court of Appeal in *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd* [2004] 2 SLR(R) 494 ("*Northern Elevator*"), in which it emphasised the regime of appeal in the AA permits only an appeal on a "question of law" and not an "error of law" (see also (2004) 5 SAL Ann Rev 47 at paras 3.29–3.35).

4.48 It was argued by LW, relying on the Court of Appeal's decision in *Northern Elevator*, that the question of law which is sought to be appealed against under s 49 AA must be "the precise issues which are pleaded before the arbitrator and nothing more, even if the question of law arises out of a finding which was a necessary step along the path to the arbitrator's ultimate conclusion on the pleaded issues". The learned judge however rejected this. She took the view that the Court of Appeal in *Northern Elevator* did not contemplate such a narrow scope for the application of s 49 AA holding that (*Lim Chin San* at [43]):

> There is nothing in Northern Elevator which obliges the court further to limit the meaning of 'question of law' to the precise issues which were pleaded before the arbitrator. In reaching a conclusion on a pleaded issue, an arbitrator may make several findings along the way, whether of fact or of law (as properly understood). If he makes a finding of law which is necessary to enable him to reach the ultimate conclusion on the precise issue which was pleaded, there seems to be no reason why that finding should not fall within the meaning of a 'question of law' in s 49(1).

4.49 Interestingly Choo Han Teck J in *Healthcare Supply Chain (Pte) Ltd v Roche Diagnostics Asia Pacific Pte Ltd* [2011] 3 SLR 476 seems to have taken a slightly different approach when faced with an appeal against a majority award interpreting the right of a party to terminate a distributorship agreement. The agreement between Roche and Healthcare was stated to be effective for a period of five years and thereafter renewable for such extended periods and upon such terms and conditions to be agreed. The agreement also provided for the right of each party to terminate the agreement by giving six months' written

notice to the other. Roche gave notice and terminated the agreement prior to the period of five years. Healthcare argued that a reading of the two provisions meant that each party could only exercise the right to terminate after five years had elapsed. The majority arbitrators held in favour of Roche. In the appeal, Healthcare argued that the majority had misinterpreted the provisions by erroneously adopting the "ordinary and plain meaning approach" instead of starting on the "purposive" or "contextual" approach as set out by the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 on the interpretation of contractual provisions.

4.50 Choo J refused leave to appeal holding that Healthcare's questions posed in the appeal under s 49(6) AA were not questions of law, but were just questions as to the correct construction of the contract. Healthcare's complaint that the majority had misread the contract by using the wrong approach to contractual interpretation was not an error of law but an error in the application of the law and did not come within the scope of appeal under s 49.

### *Grant of leave: "Just and proper" discretion*

4.51 The power of the court to grant leave to appeal under s 49(5) AA is discretionary. The court may refuse leave even if the applicant succeeds in persuading the court that the decision passed all the three threshold tests if the court finds that the grant of leave is neither "just" nor "proper", that is, there is some good reason not to interfere with the arbitrator's decision (see *Halsbury's Laws of Singapore* vol 1(2) (LexisNexis, 2011 Reissue) at para 20.123). Tan Lee Meng J in *Prestige Marine Services Pte Ltd v Marubeni International Petroleum (S) Pte Ltd* [2012] 1 SLR 917 held that, apart from failing to show that there were questions of law where the tribunal had been "obviously wrong", Prestige Marine Services had also failed to satisfy the court that it was "just and proper in all the circumstances" to grant leave for appeal. The learned judge drew attention to this requirement and adopted the view reflected in the New Zealand case of *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] NZCA 131 where the court said that the parties' desire for finality would be a factor to be considered when deciding whether it is "just and proper" to grant leave to appeal. Tan J noted that the parties had in the arbitration agreement expressly stated to have their disputes "finally resolved by arbitration in Singapore", indicating that they did not contemplate becoming involved in litigation unnecessarily.

4.52 The word "finally" is often found in arbitration clauses to indicate the parties' desire to have finality in the dispute resolution process. The use of the term "finally resolved" (or its variations, *eg*, "final

decision", "final and binding award") has not of itself been considered as sufficient to exclude any right of appeal or review. The final and binding nature of the arbitral process is one of the necessary features of arbitration. An award made in arbitration has been given statutory "final and binding" force as between the parties (see s 44 AA). As such the mere use of the term "finally" or "final" in the arbitration agreement adds nothing to assist the court in considering the exercise of the power given in s 49. The words of s 45(5)(ii)(*d*) AA that "despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question" taken in its plain meaning should mean that, notwithstanding the parties' agreement to resolve their disputes through final and binding arbitration, there are nevertheless "just and proper" reasons for the court to determine the question of law that was earlier wrongly decided by the tribunal. Such circumstances could include situations where the wrong decision of the tribunal has resulted in unjust enrichment or double exposure to claims or prejudice to third-parties, against which the desire for finality would not be a sufficient answer.

***Substantive appeal: Power of court to revisit decision made during grant of leave to appeal***

4.53 The Court of Appeal too had another occasion in late 2011 to deal with a similar issue when in *Motor Image Enterprises Pte Ltd v SCDA Architects Pte Ltd* [2012] 1 SLR 258 ("*Motor Image*") it reaffirmed its view that leave to appeal under s 49(5) of the AA shall be given only if the court is satisfied that the question is one which the arbitral tribunal was asked to determine: *Motor Image* at [36]. V K Rajah JA found the occasion to clarify the statutory regime of s 49 AA, addressing issues of whether a judge, after granting leave to appeal on the basis that there was a question of law which the arbitrator was asked to decide, could re-visit the same question and come to a different conclusion when hearing the substantive appeal.

4.54 The parties in *Motor Image* had entered into an architectural contract, in which Motor Image engaged SCDA to provide architectural services for retrofitting and alteration works at its premises. The project was subsequently abandoned. Dispute arose between the parties as to payment issues and the respondent commenced an arbitration against the appellant, in which the appellant also raised a counterclaim against the respondent. The arbitrator issued its award in favour of SCDA and dismissed Motor Image's counterclaim. Dissatisfied with the arbitrator's award, Motor Image appealed to the High Court, which initially granted leave to appeal but dismissed the appeal (*Motor Image Enterprises Pte Ltd v SCDA Architects Pte Ltd* [2011] 1 SLR 497) following the hearing on the substantive appeal.

4.55 At the hearing for grant of leave before the High Court, the question of law that was framed by *Motor Image* was ruled by the judge as not being based on the facts as found by the arbitrator and the judge re-framed the question in a manner she believed was based on the facts found by the arbitrator. SCDA's appeal to the judge in her grant of leave was rejected. However, when the judge heard the substantive appeal she found that the question that was framed and upon which leave had earlier been granted, was not based on any finding of fact by the arbitrator. The appeal was accordingly dismissed.

4.56 Motor Image appealed to the Court of Appeal arguing that having granted leave, it had "an irrevocable right of appeal" and that such right cannot be taken away. While agreeing with Motor Image that indeed if leave was granted, a right of appeal cannot be revoked, the Court of Appeal, however, took the view that, if the leave to appeal had been granted on a mistaken belief that a question of law was based on facts found by the arbitrator, then the judge would not have jurisdiction to grant leave to appeal on such a question on the basis that it was an appealable question. It follows that no such right of appeal could have been properly vested in Motor Image due to the judge's error. The Court of Appeal accordingly held that a judge, on hearing the substantive appeal, could review and overturn the earlier finding when granting leave and that the question of law did not in fact arise out of the award. In doing so, the Court of Appeal indicated that the High Court has the power to revisit its own decision made in granting leave.

**Termination of arbitral proceedings**

4.57 Arbitration proceedings once commenced are terminated by the final award (including a consent award) or by an order of the arbitral tribunal. Termination orders are made by the tribunal if the parties agree on the termination of the proceedings or the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible. Such an order may also be made if the claimant withdraws its claim, unless the respondent objects to it and the arbitral tribunal recognises a legitimate interest on its part in obtaining a final settlement of the dispute (see Art 32 Model Law). There is no provision in the IAA or the AA empowering the court to order the termination of an arbitration or to prevent the arbitral proceedings from continuing (see Art 5 Model Law; *Mitsui Engineering and Shipbuilding Co Ltd v Easton Graham Rush* [2004] 2 SLR(R) 14).

4.58 An attempt to terminate arbitral proceedings by way of a court declaration to that effect was made in *Doshion v Sembawang Engineering and Constructors Pte Ltd* [2011] 3 SLR 118. In this case, there were disputes between Doshion Limited an Indian company which was a

sub-contractor to Sembawang Engineers and Constructors Pte Ltd under two sub-contracts which were referred to arbitration. However, it was alleged by Doshion that an oral "drop hands" settlement was agreed between the solicitors and Doshion therefore asked that the arbitration be terminated and prayed for an injunction preventing the arbitration from continuing. Sembawang denied the settlement and refused to terminate the arbitration preferring to refer the existence of the dispute to the tribunal. Choo Han Teck J had to consider Doshion's application to the court for a declaration that there was a settlement. Choo J, while agreeing that a settlement agreement would be a separate agreement independent of the original contract, held that the tribunal was not *functus* and the dispute over the existence of the settlement agreement would fall within the meaning of a dispute "arising out of the relationship into which [the parties] had entered". Doshion's application was accordingly dismissed. Doshion's attempt rightly failed at the threshold. The court could not have acceded to any of its application as Art 32 of the Model Law specifically empowers the tribunal to decide on all such matters relating to termination and if a settlement had indeed been reached, the tribunal was empowered to make an award in terms recording the settlement under Art 30 of the Model Law.