## Singapore Law Gazette – Arbitration in 2014: Looking Ahead to 2015

The SLW commentary looks at the following significant 2014 Singapore court cases involving arbitration that either dealt with novel points of law, or were otherwise noteworthy in that they differ from the equivalent English position:

1. *R1 v Lonstroff* [2014] SGHC 69 – power of the Singapore court to grant permanent anti-suit injunctions in aid of arbitration. See our detailed case analysis of the "**Power of the Singapore Court to grant permanent anti-suit injunction in aid of arbitration proceedings**". Our examination of the Singapore Court of Appeal decision is at Case Update: Court of Appeal grants permanent anti-suit injunction in R1 v Lonstroff.

### Case Update: Power of the Singapore Court to grant permanent anti-suit injunction in aid of arbitration proceedings

In a previous post, we discussed the UK Supreme Court decision of *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35. The UK Supreme Court held that the English courts have the power to issue anti-suit injunctions in support of arbitration agreements where proceedings have been brought in a court forum which is outside of the EU (Brussels/Lugano regime). This is the case even where the applicant for the anti-suit injunction has not commenced, and has no intention or wish to commence, any arbitration proceedings.

In that post, we had also noted that this issue had not been directly addressed by any Singapore case or legislative position. We had written that,

*"There does not appear to be any Singapore case or legislative provision which addresses this issue directly. Section 6 of the Singapore International Arbitration Act (Cap. 143A) ("**IAA**") provides that the Singapore courts have the power to stay its own proceedings where the applicant is a party to an arbitration agreement with the other party which had commence proceedings. The exercise of such a power is premised on the fact that an arbitration agreement exists between the two parties.*

*Furthermore, the Singapore courts have also held that they have an inherent power to stay their own proceedings in support of arbitration, for example, where the applicant is a third party to an arbitration agreement and in view of intended arbitration proceedings between the parties to the arbitration agreement.*

*However, those provisions/powers relate to the Singapore courts determining whether to stay their own proceedings. The first successful application to the Singapore High Court for an anti-suit injunction in support of arbitration was in WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka, [2002] SGHC 104. The Singapore High Court held that its powers under section 12(6) of the IAA (see now section 12A(6) of the IAA) turned on whether the arbitration clause in a settlement agreement between the parties was an arbitration agreement for the purposes of the IAA. In that case, however, the applicant had already commenced arbitration proceedings and was seeking to restrain the respondent's proceedings before the Sri Lankan court. It should be noted that section 12(6) of the IAA (now section 12A(6) of the IAA) makes explicit that the court's exercise of its powers was contingent "only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively".*

*Another point worth considering is whether the Model Law, and in particular the doctrine of minimal curial intervention in Article 5 of the Model Law, circumscribes the power of the (Singapore) courts to issue an anti-suit injunction except in accordance with the Model Law/IAA. As mentioned above, the UK Supreme Court considered that section 1(c) of the UK Arbitration Act 1996 was a deliberate departure from the prescriptive mandatory Article 5 of the Model (see paragraph [33]).*"

A recent Singapore High Court case gives some guidance but by no means resolves this issue. In *RI International Pte Ltd v Lonstroff AG*, [2014] SGHC 69 the Singapore High Court confirmed (albeit in *obiter*) that the Singapore courts have the power to grant a permanent anti-suit injunction in aid of international arbitration proceedings seated in Singapore. A tentative view was also expressed that such powers would extend to foreign arbitration proceedings as well.

## Background

The parties were business entities which had dealt with each other over a series of transactions involving the sale and purchase of rubber. The Plaintiff, R1 International Pte Ltd ("**R1**") was a Singapore company. The Defendant, Lonstroff AG ("**Lonstroff**") was a Swiss company.

The dispute between the parties concerned a certain order of rubber which Lonstroff claimed was defective. R1 refused to offset payment against the cost of delivery and Lonstroff commenced proceedings in the Commercial Court of Canton of Aargovia ("**Swiss Court**"). R1 then requested the Singapore Commodity Exchange ("**SICOM**") to set up an arbitration tribunal to hear the parties' dispute. However, SICOM refused to do so until the Swiss proceedings were suspended and both parties agreed to refer the dispute to it.

R1 then commenced proceedings in the Singapore courts to obtain an anti-suit injunction to prevent Lonstroff from continuing with proceedings in the Swiss Court. R1 alleged that Lonstroff was in breach of a SICOM arbitration agreement between the parties. On that basis, R1 obtained an interim anti-suit injunction. Lonstroff sought to discharge that injunction while R1 sought to make the anti-suit injunction permanent.

## The Threshold Issue

Lonstroff argued that there was in fact no arbitration agreement between the parties and it was therefore entitled to commence proceedings in the Swiss Court. The Singapore High Court agreed.

There were a total of 5 orders placed by Lonstroff to R1. In each of these orders, parties would negotiate commercial terms. Lonstroff would confirm their acceptance of R1's offer by telephone and this would in turn be confirmed by R1 by email. Subsequent to that, R1 would then send a pre-signed sales contract after each confirmation. However, Lonstroff would never sign it.

In those sales contracts, there was an arbitration clause which provided that,

*"Subject to the terms, conditions and rules (including the arbitration clauses and rules) of the International Rubber Association Contract for technically specified rubber in force at date of contract."*

12(C) of the Index to the International Rubber Association Contract ("**IRAC terms**") provides that any dispute arising out of the contract shall be settled at the designated centre of arbitration which, in respect of shipments to Europe would be London unless the parties agreed otherwise.

However, it was only in the second and subsequent order that the sales contract further provided for arbitration in Singapore. This was done through an additional clause right after the arbitration clause. The additional clause provided that, "*In the event of any arbitration, it will be conducted in Singapore*".

R1 sought to argue that there was a SICOM arbitration agreement between parties in the second order either by way of a trade custom or, alternatively, that the IRAC arbitration clause providing for arbitration in London had been incorporated into the contract by a previous course of dealing.

The Singapore High Court rejected both arguments. The High Court held that R1 had not sufficiently proved any alleged trade custom in the rubber trade that the majority of contracts concluded by international rubber traders were based on IRAC terms. Accordingly to the High Court, R1 had "*neither adduced evidence on the prevalence of IRAC terms in the rubber trade nor shown that the use of IRAC terms is of an incontrovertible nature*" (see paragraph [25]). Furthermore, the High Court considered that Lonstroff was "*not an international rubber trader but an end user of the product so it is believable that it may not be aware of the practice of international rubber traders even if one exists*" (see paragraph [24]).

The High Court also dismissed the course of dealing argument. Prior to the second order, there had only been a single dealing between parties. The High Court held that one prior transaction was "*insufficient to found a course of dealing between [the parties]*" (see paragraph [32]). The High Court also noted that there was "*no continuity in the transactions*" given that from the second order onwards, R1 modified the IRAC arbitration agreement to a SICOM arbitration agreement instead.

Furthermore, even if there had been a previous course of dealing between the parties, the High Court held that the SICOM arbitration clause would not have been incorporated by reference. This is because the sales contract with the SICOM arbitration clause had only been sent *after* the rubber had been delivered. The High Court held at [34],

*"The SICOM arbitration agreement was not incorporated since the contract had been concluded and performed between both parties before Lonstroff was notified of the SICOM arbitration agreement. There was also no discussion pertaining to the incorporation of the SICOM arbitration agreement during negotiations between the parties. Hence, the SICOM arbitration agreement was not incorporated by reference."*

**Permanent anti-suit injunction in aid of arbitration proceedings**

The Honourable Justice Judith Prakash ("**Prakash J**") then proceeded to give her views on the power of the Singapore courts to grant permanent anti-suit injunction in aid of arbitration proceedings.

Prakash J held that the "*power to grant permanent anti-suit injunctions to assist arbitration [cannot] be derived from s[ection] 12A of the [International Arbitration Act]*". Section 12A of the International Arbitration Act (Cap. 143A) provides only for interim injunctions in aid of both domestic and foreign international arbitrations – it does not extend to permanent anti-suit injunctions (see paragraph [40]).

Instead, the power of the Singapore courts to grant permanent anti-suit injunctive relief in relation to arbitration proceedings is found in the Civil Law Act (Cap. 43, 199 Rev Ed) instead. In particular, section 4(1) of the Civil Law Act provides that,

***"Injunctions and receivers granted or appointed by interlocutory orders***

*(10) A Mandatory Order or an injunction may be granted or a receiver appointed by an interlocutory order of the court, either unconditionally or upon such terms and conditions as the court thinks just, in all cases in which*

*it appears to the court to be just or convenient that such order should be made."*

The High Court explained at [43] that this was "*the power that the court exercises when it grants a permanent anti-suit injunction in aid of local court proceedings*". Prakash J reasoned that,

*"There is no reason why this power cannot be exercised to make permanent anti-suit injunctions in aid of domestic international arbitration proceedings especially since under s 12A(2) read with s 12(1)(i) of the IAA and the holding in [Maldives Airports Co Ltd and another v GMR Male International Airport Pte Ltd [2013] 2 SLR 449], the courts can grant interim anti-suit injunctions in such situations."*

The High Court also rejected the argument that the court's power to grant such relief was limited or circumscribed by the International Arbitration Act. In this respect, the High Court adopted the holding in *AES Ust-Kamenogorsk* that "*clear words would be needed to abrogate the court's general jurisdiction to grant anti-suit injunctions*". In this respect, there was "*no clear language in the IAA which would cut down the breadth and scope of the court's powers under s 4(10) of the CLA*" (see paragraph [44]).

**Whether it would be appropriate to grant a permanent anti-suit injunction in aid of foreign arbitration proceedings**

The High Court held that the position under Singapore law with respect to international arbitrations seated in Singapore was clear. Where there was an arbitration clause providing for international arbitration in Singapore, the innocent party could seek a permanent anti-suit injunction under the court's general power to grant an injunction (see paragraph [48] to [50]).

In this respect, in *Maldives Airports Co Ltd and another v GMR Male International Airport Pte Ltd* [2013] 2 SLR 449, the Singapore Court of Appeal confirmed that the Singapore courts had the power to issue an interim anti-suit injunction in aid of foreign arbitration.

However, the same may not be applicable to the Singapore court's powers to grant permanent anti-suit injunctions in aid of foreign arbitration

proceedings. Prakash J considered that it would be "*logical and consistent*" that the Singapore courts' powers under the "*more wide-ranging law*" in CLA enabled it to issue a permanent anti-suit injunction in aid of foreign arbitration proceedings (See paragraph [54]). However, she also accepted that logic alone may not be a sufficient condition to form a definitive view as to whether the Singapore courts had such a power in the first place. The learned judge reasoned at paragraph [54] as follows,

*"Logic alone, however, may not be a sufficient basis to extend the court's powers beyond what is in the IAA to parties who have agreed to arbitrate abroad especially since the interim orders made should be sufficient to put matters on the right track. Any such extension of power would have the potential to affect more situations than simply those concerned with arbitration and therefore policy considerations would come into play. Since this point was not fully argued and, in the event, it is not necessary to decide it, I do not express a concluded opinion."*

The learned judge also adopted the views of an earlier Singapore High Court judgment in which the court had warned that "*Singapore should not be an international busybody; it is only when strong reasons are present that the courts would intervene with a permanent anti-suit injunction to support foreign international arbitration*" (see paragraph [55]).

**Conclusion and Takeaways**

Commercial parties should ensure that all terms have been agreed to before the performance and completion of a contract. Parties otherwise take the risk that certain terms (like the arbitration clause) are not incorporated into the agreement between parties or certain implied terms are not excluded as a result.

In this respect, arbitration clauses are a form of jurisdiction clauses. However, there are not the default jurisdictional ones – litigation before national courts is. A party who wishes to have the benefit of an arbitration clause should ensure that the clause is present, incorporated or agreed to by the counterparty.

Finally, the confirmation by the Singapore High Court of its power to grant permanent anti-suit injunctions in the context of an international arbitration seated in Singapore once again reinforces Singapore's pro-arbitration stance. Parties who have a binding arbitration clause will not be permitted to breach that arbitration agreement by commencing proceedings in a foreign (non-Singapore) court and must instead do so through arbitration instead.

2. *Silica Investors v Tomolugen Holdings* [2014] SGHC 101 – limited arbitrability of intra-corporate disputes. The Singapore court declined to follow what it deemed to be the broad approach to arbitrability by the English court in *Fulham Football Club (1987) Ltd v Richards and another* [2011] EWCA Civ 855; [2012] Ch 333. Our detailed case analysis of "**Arbitrability of intra-corporate disputes"** is shown below.

## Arbitrability of intra-corporate disputes

Arbitration is a consensual process. It is axiomatic that parties may only arbitrate those disputes that they have agreed to submit to arbitration. In some cases, after a dispute has arisen, parties to that dispute may agree to refer the dispute to arbitration. Alternatively, and more commonly, parties agree by virtue of arbitration clauses drafted into their contracts to submit any subsequent disputes that may arise to arbitration.

There are good reasons why parties should pay attention to how their arbitration clause are worded. Where a dispute does not fall within the scope of the arbitration clause, that dispute would fall outside the jurisdiction of the arbitral tribunal and any award rendered on that basis is liable to be set aside or refused recognition and enforcement: see Article 34(2)(a)(iii) of the UNCITRAL Model Law; Article V(1)(c) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("**New York Convention**").

Parties should also note that there are certain subject matters that are non-arbitrable: see Article 34(2)(b)(i) of the UNCITRAL Model Law; Article V(2)(a) of the New York Convention). These tend to involve issues of statutory

rights and remedies including marriage and divorce, criminal law, probate and estate (inheritance), patents and trademarks as well as insolvency (personal and corporate).

The learned author Gary Born expresses it as follows (see *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2009) at page 768):

*"... the types of claims that are non-arbitrable differ from nation to nation. Among other things, classic examples of non-arbitrable subjects include certain disputes concerning consumer claims; criminal offences; labour or employment grievances; intellectual property; and domestic relations. The types of disputes which are non-arbitrable nonetheless almost always arise from a common set of considerations. The non-arbitrability doctrine rests on the notion that some matters so pervasively involve public rights, or interests of third parties, which are the subjects of uniquely governmental authority, that agreements to resolve such disputes by 'private' arbitration should not be given effect."*

The Singapore High Court in *Silica Investors Limited v Tomolugen Holdings Limited* [2014] SGHC 101 recently examined the issue of the arbitrability of intra-corporate disputes. The issue before the court was whether a minority oppression claim under s 216 of the Companies Act (Cap. 50, 2006 Rev Ed) could be arbitrated.

**Background**

The Plaintiff, Silica Investors Limited, was the registered shareholder of 3,750,000 shares (representing about 4.2% of all the shares) in the 8th defendant, Auzminerals Resource Group Limited ("**AMRG**"). The majority and controlling shareholders of AMRG were the 1st Defendant, Tomolugen Holdings Limited ("**THL**") which held 49,603,397 shares (representing about 55% of all the shares) in AMRG. THL was also the sole shareholder of the 2nd Defendant, Lionsgate Holdings Pte Ltd (formerly known as Tomolugen Pte Ltd), which held 8,135,001 shares (representing about 9% of all the shares) in AMRG.

The Plaintiff had purchased its shares from the 2nd Defendant pursuant to a Share Sale Agreement dated 23 June 2010 (the "**Share Sale Agreement**") and a Supplemental Agreement dated 5 July 2010 (the "**Supplemental Agreement**") entered into between the Plaintiff and the 2nd Defendant.

Clause 12.3 of the Share Sale Agreement provided for disputes between the Plaintiff and the 2nd Defendant to be referred to SIAC arbitration.

***12.3 Dispute Resolution***

*Without prejudice to any right of the Parties to apply to any competent court for injunctive relief, any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC") for the time being in force, which rules are deemed to be incorporated by reference in this clause. The tribunal shall consist of one arbitrator to be appointed by the chairman of the SIAC. The language of the arbitration shall be English.*

The Plaintiff commenced a suit in the Singapore courts pursuant to s 216 of the Companies Act alleging minority oppression by several of the defendants. The Plaintiff's four main allegations (see paragraph [6]) were that.

1. The issuance of shares to THL by AMRG as payment for an alleged debt had the effect of diluting the Plaintiff's shareholding by over 50%.
2. The Plaintiff was wrongfully excluded from participating in the management of AMRG.
3. The board of directors of AMRG were under the control and/or influence of several of the defendants and executed corporate guarantees to further those defendants' interest at the expense of AMRG.
4. Several of the defendants had misused AMRG's resources for their own benefit and had concealed information from AMRG.

One of the reliefs sought by the Plaintiff as a minority shareholder was the winding up/liquidation of AMRG pursuant to Section 216(2)(f) of the Companies Act.

**Threshold Question – Did the Plaintiff's claims fall within the arbitration clause**

The 2nd Defendant applied for a stay of the court proceedings on the basis of the arbitration clause and pursuant to section 6 of the International Arbitration Act (Cap. 143A) ("**IAA**").

Subsequently, several of the defendants (who were not party to the Share Purchase Agreement) also sought a stay of the proceedings against them on the basis of the inherent jurisdiction of the court.

The Singapore High Court held that the Plaintiff's minority oppression claims fell within the arbitration clause (see paragraph [15] to [59]). A few legal points are worth noting here.

First, the court's analytical framework for a stay is to determine (a) the proper characterisation of the Plaintiff's claim; (b) the scope of the arbitration clause and (c) whether the Palintiff's claim falls within the scope of the arbitration clause (see paragraph [14]).

Second, to properly characterise a plaintiff's claim,

*"...the Court is entitled to ascertain the essential dispute between the parties. However, it should not be a mere issue which falls to be decided in the course of the proceedings. To identify the matter in the proceedings, the Court may consider the pleadings and the underlying basis of the claim. The Court is guided by, but not limited to, the way in which the claim has been framed in the pleadings"* (see paragraph [18]).

Third, the High Court recognised that there was a "*controversy*" as to whether separate claims arising from the same facts ought to be considered as one matter or separate distinct matters(see paragraph [43]). However, the High Court declined to provide its view on this issue. The relevance of the term "*matter*" stems from section 6 of the IAA, which provides:

***Enforcement of international arbitration agreement***

6. *—(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.*

Fourth, the Singapore High Court reaffirmed the Singapore courts' position that arbitration clauses ought to be read broadly (see paragraph [47] to [50]). In this case, the High Court considered that given the wide wording of the clause there was no indication that parties intended to exclude statutory claims from arbitration.

**Is a Section 216 Companies Act claim arbitrable?**

Pursuant to Section 6 of the IAA, a Singapore court shall stay its proceedings in favour of arbitration if the dispute before it falls within an arbitration clause. However, if the subject matter of the dispute cannot be arbitrated, then the Singapore court cannot stay its proceedings (see paragraph [60]).

After an exhaustive review of case law from England and Wales, Australia and Canada, the Singapore High Court held that save in certain circumstances, a minority oppression claim is not arbitrable. The key points from the High Court's decision are as follows.

First, it was not possible to set down a bright line rule as to whether a minority oppression claim could be arbitrated – it would depend heavily on the factual matrix of the dispute, the plaintiff's claim and the remedies sought. As a general principle, "*just because a statutory claim may be redressed or remedied by an order that is only available to the courts, that does not mean the claim is automatically rendered non-arbitrable*" (see paragraph [113]).

Second, a minority oppression claim would only be arbitrable where "*all relevant parties (including third parties whose interest might be affected)*

*are parties to the arbitration and…the remedy or relief sought is one that only affects the parties to the arbitration*" (see paragraph [142]).

In this respect, the Singapore High Court considered section 12(5) of the IAA, which provides that an arbitral tribunal "may award *any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court*". It held that the section,

*"…clearly cannot be construed as conferring upon arbitral tribunals the power to grant all statute-based remedies or reliefs available to the High Court. It has a more limited purpose…and an arbitral tribunal clearly cannot exercise the coercive powers of the courts or make awards in rem or bind third parties who are not parties to the arbitration agreement"* (see paragraph [111]).

Third, most other minority oppression claims will have the following characteristics and will thus not be arbitrable (see paragraph [142]).

*"…there are other shareholders who are not parties to the arbitration, or the arbitral award will directly affect third parties or the general public, or some claims fall within the scope of the arbitration clause and some do not, or there are overtones of insolvency, or the remedy or relief that is sought is one that an arbitral tribunal is unable to make."*

Fourth, the Singapore High Court declined to follow what it termed the broad approach of *Fulham Football Club (1987) Ltd v Richards and another* [2011] EWCA Civ 855;[2012] Ch 333 in which the courts would

*"…allow all minority oppression claims to go for arbitration; if the arbitral tribunal is of the view that a winding up or buy-out order is appropriate, then the parties can go to Court to obtain the necessary orders, but if not, the award takes effect in the normal way; in the former case, the Court adopts the findings and remedies proposed by the arbitrator and merely proceeds to enforce the same by making the appropriate orders, eg, a winding up or buy-out order or cancel or vary a resolution"*

In this respect, the Singapore High Court noted the unique facts of the *Fulham* case. The relief sought in that case was very limited. The applicant did

not seek any winding up remedy and there was very little risk that such relief would be sought (see paragraph [67]).

**Procedural Solution?**

The Singapore High Court highlighted a "*useful procedural rule*" of the New South Wales Supreme Court Rules 1970 (the "**Rules**"). Part 72 of the Rules essentially permitted the concurrent hearing of a minority oppression claim in both the New South Wales court as well as in arbitration in a single forum (see paragraph [135]).

In *ACD Tridon Inc v Tridon Australia Pty Ltd and others* [2002] NSWSC 896, the New South Wales Supreme Court had recognised the problems raised by its holding that certain matters in the plaintiff's claim were to be dealt with in arbitration and all other matters were to be dealt with by the court. In particular, the learned judge identified "*strains on the legal resources of the parties, and a degree of duplication of the process of information-gathering, evidence and factual determination*".

Accordingly, what the New South Wales Supreme Court did was to refer all the matters that were to be heard by the court to the appointed arbitrator instead. That arbitrator would be, pursuant to Part 72 of the Rules, a referee of the court. Hence, the hearings before the court and the arbitrator would for all intents and purposes be one concurrent hearing.

The Singapore High Court declined to make such an order pursuant to the inherent jurisdiction on the court given the absence of an equivalent statutory power conferred on the Singapore courts to do so. Furthermore, the Singapore High Court considered that "*in the absence of a contractual agreement to refer matters to adjudication by a tribunal other than a Court, the Plaintiff is entitled to avail itself of the Court's processes*" (see paragraph [137] to [138]).

**Conclusion**

*Silicia v Tomolugen* very helpfully provides guidance on the Singapore courts' approach on how it will deal with the issue of the arbitrability of intra-corporate disputes, and more broadly when a plaintiff's claim involves statutory claims and reliefs that can only be granted by the Singapore courts.

It also serves as a useful reminder to commercial parties that there are real limits to arbitrating shareholder disputes.

If commercial parties would like to have a greater degree of certainty that their shareholder disputes are resolved in arbitration rather than in court, one possible approach would be to ensure that all shareholders are party to an arbitration agreement e.g. by including an arbitration clause as part of a shareholders' agreement. Another possible approach might be to embed an arbitration agreement into the articles of association of the company. Given that the articles of association of a company operate as a contract between members (shareholders) of a company, that article should operate as an arbitration agreement between shareholder parties. Parties should however take local law advice as different jurisdictions have taken different approaches as to whether an arbitration agreement in a company's articles of association will be upheld: see Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (2007:Sweet & Maxwell) at pp 4 to 6.

An issue that does not appear to have been explicitly addressed by the High Court is as follows. In minority oppression claims, we are given to understand that as a matter of practice, the courts do not lightly order the liquidation of a company where it is a going concern and one faction is able to buyout the other faction. In these circumstances, where the court is unlikely to order a winding up of the company, should the Singapore courts then adopt a *Fulham* case approach and permit the minority oppression claim to be arbitrated, or should the possibility of a winding up remedy (as set out in the plaintiff's pleadings) be a sufficient reason to not stay the court proceedings?

This case is not likely to be the final word on the issue in Singapore. We will update readers should the matter be appealed to the Singapore Court of Appeal.

3. *FirstLink v GT Payment* [2014] SGHCR 12 – Seat of Arbitration and Implied Choice of Governing Law of Arbitration Agreement. The Singapore High Court disagreed with the English position and held that where parties had expressly provided for the governing law of the underlying agreement (eg

England and Wales), but had chosen a different seat for the arbitration (eg Singapore), the Singapore courts would not infer or assume that parties intended for the law of the underlying contract to take precedence over that of the law of the seat of the arbitration. See our detailed case analysis of "**Seat of Arbitration and Implied Choice of Governing Law of Arbitration Agreement".**

## Case Update: Seat of Arbitration and Implied Choice of Governing Law of Arbitration Agreement

[*Update: the paragraphs on the Singapore High Court's analysis of the arbitration clause and its implications has been updated to more closely reflect the language at paragraph [17] of the Singapore High Court's decision.]*

A party may rely on a valid and enforceable arbitration clause to obtain a stay of court proceedings commenced by the counterparty to the arbitration agreement. The applicant party may even obtain an anti-suit injunction to prevent a party to the arbitration agreement from commencing court proceedings.

On the other hand, if an arbitration clause is defective, then a party may resist the stay application on the basis that the arbitration agreement is unenforceable or that the dispute between the parties does not fall within the scope of the arbitration agreement. These issues of enforceability and scope of the arbitration agreement are determined by the governing law of the arbitration agreement. What happens then when parties do not expressly provide for the governing law of the arbitration agreement? The legal analysis can get complicated.

The Singapore High Court case of *FirstLink Investments Corp Ltd v GT Payment Pte Ltd and others*, [2014] SGHCR 12 had to deal with these two issues concurrently. The Plaintiff, FirstLink Investments Corp Ltd, had commenced Singapore court proceedings against the three defendants. The 1st Defendant applied for a stay of those proceedings on the basis of a Stockholm Chamber of Commerce ("**SCC**") arbitration clause between the Plaintiff and

itself. The Plaintiff then resisted the stay on the basis that the arbitration clause was null, void, inoperative or otherwise incapable of being performed.

The arbitration clause read,

*"Any claim will be adjudicated by Arbitration Institute of the Stockholm Chamber of Commerce. You and GTPayment agree to submit to the jurisdiction of the Arbitration Institute of the Stockholm Chamber of Commerce. Both parties expressly agree not to bring the disputes to any other court jurisdictions, except as agreed here to the Arbitration Institute of the Stockholm Chamber of Commerce[.]"*

Further complicating matters, the governing law of the underlying agreement referred to the rules of the SCC rather than the laws of a state.

*"16. General.*

*This Agreement is governed by and interpreted under the laws of Arbitration Institute of the Stockholm Chamber of Commerce as such laws are applied to agreements entered into and to be performed entirely within Stockholm."*

The Singapore High Court held that the arbitration agreement was a valid and enforceable agreement that was governed by Swedish law.

**Threshold question – applicable standard for determining validity of an arbitration agreement**

The learned Assistant Registrar Shaun Leong ("**Leong AR**") cited his earlier decision in *The "Titan Unity"* [2013] SGHCR 28 for the proposition that,

*"…an applicant for a stay of court proceedings pursuant to section 6(1) of the IAA must satisfy on a prima facie basis the pre-condition of showing the existence of an arbitration agreement, without which the court would have no jurisdiction to grant a stay. Where this jurisdiction is invoked, the court must grant a stay unless the agreement is shown to be "null and void, inoperative or incapable of being performed"…"* (see paragraph [6])

In other words, "*it would be sufficient for the purposes of a stay application that the court be satisfied of the agreement's validity on a prima facie basis without having to descend to a full review*" (see paragraph [7]).

Leong AR rejected the Plaintiff's reliance on English cases for the converse position requiring a more extensive review. He cited *Titan Unity* for the reasons why it was not appropriate to follow English cases authorities on this issue and drew a distinction between the UK Arbitration Act 1996, which was not based on the UNCITRAL Model Law, and the Singapore International Arbitration Act (Cap. 143A) which was. Furthermore, Commonwealth case law (from Model Law jurisdictions) on the issue far outweighed the English position.

Parenthetically, the English position can be seen in the case of *Joint Stock Company "Aeroflot Russian Airlines" v Berezovsky & Ors* [2012] EWHC 1610 (Ch)

**Determination of governing law of arbitration agreement – departure from English position**

The Singapore High Court adopted the English Court of Appeal's three-stage inquiry in *SulAmérica Cia Nacional De Seguros S.A. and others v Enesa Engenharia S.A.* [2012] 1 Lloyd's Rep 671 to determine the governing law of the arbitration agreement, namely – (i) the express choice of the parties; (ii) the implied choice in the absence of an express choice; and (iii) where the parties had not made any choice, the law in which the arbitration agreement had its closest and most real connection with.

The Singapore High Court considered that with regard to stage two of the inquiry (implied choice), the English courts had created a rebuttable presumption that the express substantive governing law (the governing law of the underlying agreement) was the parties' implied choice of the governing law of the arbitration agreement. However, where no substantive law was chosen, the choice of the seat of the arbitration would be "*overwhelmingly significant*" and that would likely be the governing law of the arbitration agreement. The learned AR considered this to be the effect of the trio of English cases – *SulAmérica*, *Asranovia Ltd & Ors v Cruz City 1 Mauritius*

*Holdings* [2012] EWHC 3702 (Comm), and *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Company Ltd* [2013] EWHC 4071 (Comm).

The Singapore High Court disagreed with the English position to the following extent: where parties had expressly provided for the governing law of the underlying agreement (e.g. England and Wales) but had chosen a different seat for the arbitration (e.g. Singapore), the Singapore courts would not infer or assume that parties intended for the law of the underlying contract to take precedence over that of the law of the seat of the arbitration (see paragraph [13]). The Singapore High Court reasoned that,

*"...this court takes the view that it cannot always be assumed that commercial parties want the same system of law to govern their relationship of performing the substantive obligations under the contract, and the quite separate (and often unhappy) relationship of resolving disputes when the more commercially sensible viewpoint would be that the latter relationship often only comes into play when the former relationship has already broken down irretrievably. There can therefore be no natural inference that commercial parties would want the same system of law to govern these two distinct relationships. The natural inference would instead be to the contrary. When commercial relationships break down and parties descend into the realm of dispute resolution, parties' desire for neutrality comes to the fore; the law governing the performance of substantive contractual obligations prior to the breakdown of the relationship takes a backseat at this moment (it would take the main role subsequently when the time comes to determine the merits of the dispute), and primacy is accorded to the neutral law selected by parties to govern the proceedings of dispute resolution. ..."*

Furthermore, given the importance of the choice of the seat in an arbitration, the Singapore High Court agreed with the English Court of Appeal's decision in *C v D* [2007] EWCA Civ 1282 that it would be "*rare*" for the governing law of the arbitration to be different from that of the law of the seat (see paragraph [14]).

Finally, the Singapore High Court reasoned that parties would conceivably demand that the law of the seat of the arbitration be the governing law of the arbitration agreement in order to achieve consistency between the *lex arbitri*

(the law of the seat governing the arbitration's procedures) and the governing law of the arbitration agreement (determining the validity of the arbitration agreement). This was because "*commercial parties would not…select a place to be the seat if they do not at least have the notional confidence that the supervisory court would recognise and give effect to the arbitration agreement in the first place*" (see paragraph [15]).

**Arbitration Agreement was valid**

The Plaintiff had sought to argue that the arbitration agreement was non-enforceable because the substantive law of the underlying agreement applied to the arbitration agreement and it "*would make no sense*" for a system of rules (SCC) applying to the conduct of an arbitration to govern the substantive obligations of the parties (see paragraph [10]). The Singapore High Court disagreed on the basis that the choice of SCC arbitration, *in this case*, entailed that parties had chosen Swedish law to govern the arbitration agreement.

On the basis that parties chose SCC (Swedish Chamber of Commerce) arbitration, the Singapore court held that the seat of arbitration was Sweden and that the governing law of the arbitration agreement was Swedish law. Leong AR reasoned at paragraph [17] that:

1. "*[I]n the absence of any express clause prescribing a difference place in which the arbitration proceedings will be conducted",* the choice of SCC arbitration meant that the place of arbitration was Sweden.
2. This choice "*evinces an objective intention [on the part of the parties to the arbitration clause] to elect the lex arbitri of Sweden as the curial law applicable to the arbitration*".
3. This is because section 46 of the Swedish Arbitration Act 1994 provides that the Act shall apply to arbitration proceedings which take place in Sweden.
4. And "*in the absence of factors pointing to the contrary, it follow[ed] naturally that parties have selected Sweden as the seat of the arbitration*". This was especially so given that the Act also provided that in the absence of parties' agreement on a proper law, an arbitration agreement shall be governed by the law of the country in which the proceedings shall take place.

5. There was no indication in the underlying agreement that parties intended to have any non-Swedish law governing the arbitration agreement.

The Singapore High Court therefore held that the arbitration agreement was valid because there was no submission that the arbitration agreement was invalid under the laws of Sweden.

In the abstract, the High Court's reasoning as to the proper governing law of the arbitration agreement raises certain issues. First, there is a distinction between the juridical seat (place) of an arbitration and the *venue* where the hearings of the arbitration takes "*place*" (Leong AR discusses the case of *Braes of Doune Wind Farm v Alfred McAlpine* [2008] EWHC 426 (TCC), which provides an excellent example of this distinction.) It is not entirely clear how the Swedish Arbitration Act 1996 draws a distinction between them, especially given translational issues. Second, there is no real reason to infer that the arbitration is to take place in Sweden notwithstanding that the arbitration clause provides for SCC arbitration. For example, ICC arbitrations are seated (legally and physically) variously in Paris, London, Zurich, Hong Kong and Singapore.

However, an argument could be raised that the substantive governing law clause provides some mooring for the High Court's reasoning. Insofar as it provided that "*This Agreement [was to be] entered into and to be performed entirely within Stockholm*", it could be argued that this too applied to any arbitration conducted under the auspices of the SCC pursuant to the arbitration clause (see also the reasoning of the English High Court in *Arsanovia* at [22] on substantive governing law clause and express choice of governing law of the arbitration agreement).

**Can an agreement or even an arbitration agreement be governed by a system of rules rather than substantive law?**

For the sake of argument, the Singapore High Court considered that even if the arbitration agreement was governed by the substantive governing law clause (SCC rules), that would not necessarily prove fatal to the validity of the arbitration agreement. The Singapore High Court was willing to be forgiving on the basis that laypersons (and even lawyers) could not be expected to be

"*avid students of jurisprudence with an acute philosophical understanding of what "law" is*". As such,

"*...in so far as parties' intentions are to be given effect to, the reference to "law" need not necessarily be read as "law" in the conventional Hartian, Dworkinian or Razian sense. At least in the realm of international arbitration, it is not entirely inconceivable that a dispute over the validity of an arbitration agreement may be resolved by rules of law as opposed to national laws*"(see paragraph [18])

In this respect, the High Court pointed out that there are non-national systems of law which arbitrators are entitled to turn to in order to determine a substantive dispute e.g. *lex mercatoria or transnational principles of national law*. This applied with even greater force to a court's determination of the validity of an arbitration agreement.

The Singapore High Court also noted the SCC had its own body of jurisprudence such that "*there does appear to be a clear system of rules and consistent application principles of the SCC which would guide arbitrants in determining the validity of an arbitration agreement*" (see paragraph [20] and [21]). This, the High Court held, "*may persuade a court to find that, at least on the prima facie threshold, such an arbitration agreement would be valid, but only for the specific purpose of staying court proceedings, which does not preclude a full jurisdictional challenge before the arbitral tribunal, or a complete review of the question by the enforcement court*" (see paragraph [21]).

However, the High Court declined to provide a definitive view. Instead, Leong AR was content to consider that it was theoretically possible for "*a substantive body of international law instead of a national law*" to govern international arbitration agreements (see paragraph [20]).

**Conclusion and Take-aways**

Leong AR's introductory paragraph about so-called "*midnight clauses*" is worth iterating,

*"It is not uncommon that commercial parties omit to include in their contracts an express choice of law governing their international arbitration agreements. These "midnight clauses" may be included in the main contract very late in the day along with other standard terms just before the contract is signed, understandably so as most parties would be enthusiastic about concluding the negotiations on the contractual obligations, while failing to direct their minds to a possible breakdown of the commercial relationship and the attendant specifics of the dispute resolution process. …"*

This case is a good example of how an arbitration clause:

1. is a separate agreement from the underlying contract and can be governed by a law that is different from the governing law of the underlying contract; and
2. can be affected by a badly drafted governing law clause.

The arbitration and governing law clauses in *FirstLink* certainly could have been better drafted. However, we would not go so far to characterize the arbitration clause as an example of a pathological arbitration clause. Pathological or defective arbitration clauses generally involve uncertainty as to whether parties intended to have their disputes referred to arbitration and usually make references to non-existent or wrongly named arbitration institutes and rules.

Commercial parties would be well advised to remember that an arbitration clause is a jurisdiction clause, albeit one that is much more flexible and responsive to parties' choice and autonomy than simply picking the court of a particular jurisdiction. Nonetheless, parties should be conscious that such arbitration clauses can be tricky and might give rise to unintended consequences if parties pay insufficient attention to drafting them and ancillary provisions like the substantive governing law clause.

**4.** *PT Central Investindo v Franciscus Wongso* [2014] SGHC 190 – the Singapore court will determine a challenge to arbitrator for bias even when the final award has been rendered. See our examination of the case **"Challenge to Arbitrator for Apparent Bias – What happens if the final award is rendered before the court determines challenge?"**

## Challenge to Arbitrator for Apparent Bias – What happens if the final award is rendered before the court determines challenge?

The recent Singapore High Court decision of *PT Central Investindo v Franciscus Wongso and others and another matter*, [2014] SGHC 190 involved a rare challenge to an arbitrator for apparent bias. The case also addressed a novel legal issue: what would happen when a party seeks to disqualify and remove a sole arbitrator, but that sole arbitrator then renders her/his final award before the courts determine the removal application?

### Background Facts

Franciscus Wongso and Chan Shih Mei were the claimants to an SIAC arbitration against PT Central Investindo ("**PTCI**") and Soekotjo Gunawan. The claim concerned certain success fees arising out of an Arranger Agreement. The arbitrator was appointed on 23 July 2009 and the substantive hearing took place from 12 April 2011 to 14 April 2011 (both dates inclusive). However, on 30 November 2012, the sole arbitrator wrote to the parties to apologise for the delay in rendering his award, and given the lapse of time, then invited the parties to update him on whether the claimants to the arbitration wished to adduce any further evidence in support of their claim on the fees and for counsel to address him on the appropriate and applicable interest rates.

PTCI protested against what it viewed as the claimants to the arbitration attempting to reopen matters after the hearing had closed on 14 April 2011. The arbitrator clarified that he was simply requesting for an update on matters in the interim and pointedly noted that the issue of further evidence on the fees had arisen because of PTCI's default in complying with the Tribunal's directions on document production.

Between January 2013 and 1 April 2013, the parties exchange further submissions on events that had transpired in the interim including Indonesian court proceedings between the parties that had been resolved in favour of the claimants to the arbitration. The claimants to the arbitration sought for PTCI to pay their costs arising out of the failed Indonesian court proceedings.

However, on 1 April 2013, after PCTI had filed its supplemental submissions on the same day, the claimants to the arbitration wrote to the Tribunal to give notices of a "fresh" claim to the arbitration. Counsel for the claimants to the arbitration requested that the Tribunal order PTCI to confirm whether it had done certain acts which the claimants alleged were a "fundamental breach" of the Arranger Agreement.

On the same day, the arbitrator wrote to PTCI's counsel asking PTCI to "*confirm or clarify*" by 3 April 2013 the claimants' factual assertions on the abovementioned acts and to respond to the allegation that such acts would constitute a fundamental breach of the Arranger Agreement.

When PTCI did not respond by the original deadline, the Tribunal then wrote to PTCI's counsel's assistant to extend the deadline to 8 April 2013 with a caution that failure to do so might invite the Tribunal to draw an adverse inference against PTCI. In that same email of 5 April 2013, the Tribunal also wrote to the claimants' counsel to address him on his powers to hear the so-called "fresh" claim.

The 1st and 5th April 2013 emails from the Tribunal (the "**April Directions**") formed the heart of PTCI's challenge to the arbitrator. On 12 April 2013, PTCI's counsel wrote to the Tribunal to invite him to withdraw as arbitrator. On 15 April 2013, PTCI filed a formal Notice of Challenge with the SIAC on 15 April 2013. The claimants to the arbitration then decided to withdraw their "fresh" claim but reserved their rights to raise the issue in a separate arbitration.

PTCI's application was dismissed by the SIAC on 9 May 2013. On 6 June 2013, PTCI then filed an application in the Singapore courts against the SIAC's dismissal of its challenge. However, before the hearing of PTCI's application for removal was fully heard, the tribunal rendered his final award on 4 October 2013. PTCI then filed a further application to set aside the award.

**No justifiable doubts as to Arbitrator's impartiality**

Having set out and reviewed the correspondence and exchanges between parties' counsel and the Tribunal following the 1 April 2013 notice of a "fresh"

claim, the High Court held that they did not qualify as grounds for challenge falling within Article 12(2) of the Model Law. Article 12(2) provides that,

***"Article 12. Grounds for challenge***

…

*(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made."*

The High Court considered that the correspondence and exchanges "*fell far short of trigger [Article] 12(2)'s operation…[and were] even further removed from demonstrating justifiable doubts as to the Arbitrator's impartiality*" (see paragraph [13]).

The test in Article 12(2) of the Model Law was an objective one and the court must find circumstances that exist which give rise to justifiable doubts. In this respect, unjustified or unreasonable doubt is not sufficient. However, once the court has found justifiable doubts, the applicant need not prove actual bias (see paragraph [14]).

The Singapore courts consider there to be three types of bias,

*"15 Bias can manifest in three forms: actual bias, imputed bias or apparent bias. Actual bias will obviously disqualify a person from sitting in judgment. The second form of bias is imputed bias which arises where a judge or arbitrator may be said to be acting in his own cause (nemo judex in sua causa) and this happens if he has, for instance, a pecuniary or proprietary interest in the case. In such a case, disqualification is certain without the need to investigate whether there is likelihood or even suspicion of bias. The third form of bias is apparent bias. The allegation against the Arbitrator was that he had been affected by apparent bias.*

The test to be applied for determining apparent bias is the "*reasonable suspicion test*" i.e. whether "*a reasonable and fair-minded person with knowledge of all the relevant facts would entertain a reasonable suspicion that the circumstances leading to the April [D]irections and the April [D]irections themselves might result in the arbitral proceedings against PTCI being affected by apparent bias if the Arbitrator was not removed*" (see paragraph [18]).

**Utility argument dismissed**

As a preliminary point, the claimants to the arbitration argued that "*there was no utility in continuing with the challenge because the Arbitrator had become functus officio upon issuance of his final and binding award*" (see paragraph [47]). Given that the final award had been rendered, PTCI should challenge the award on one of the limited grounds of the Model Law (which is incorporated by the Singapore International Arbitration Act (Cap. 143A) (the "**IAA**")).

The High Court considered that the court's determination of challenge application still had "*legal, procedural and practical utility*" for the following reasons.

- "*the hearing of the challenge can continue as the intention is to disqualify for past breach and to, prospectively, ensure impartiality in the making of the award that was rendered pending the conclusion of [the challenge application]*" (see paragraph [50]).
- A decision was likely to have an effect on any subsequent setting aside application brought under s 24(b) of IAA and Art 34(2)(a)(ii), Art 34(2)(a)(iv) and Art 34(2)(b)(ii). The High Court noted that "*the requirement of impartiality or independence constitutes one of the two pillars of natural justice and any breach thereof may lead to a setting aside of the award under s 24(b) of the IAA*" (see paragraph [51]).
- The lack of impartiality and independence in an arbitral process may also give rise to public policy concerns, a violation of which is a ground to setting aside an award under Article 34(2)(b)(ii) of the Model Law. Furthermore, the High Court held that "*an arbitrator's impartiality and independence is mandatory under the Model Law and this is implicit in Art 12(2) of the Model Law… Hence, any finding made as to*

*an arbitrator's impartiality or independence would have a bearing on a setting aside application brought under Art 34(2)(a)(iv) of the Model Law with respect to the point that the arbitration was not conducted "in accordance with the Law" or "not in accordance with the agreement of the parties".*" (Paragraph [52])

- The Singapore court's decision on the challenge is not appealable whether the challenge is allowed or dismissed. In the event that the challenge is dismissed, a setting aside application that is based on the same grounds raised in the challenge will, at the very least, give rise to objections like issue estoppel and abuse of process (Paragraph [53]). Conversely, if the application were successful, then the applicant seeking to set aside the award merely needs to "*furnish proof of the court order to support his setting aside application*" (see paragraph [56]).
- The fact that the tribunal is *functus officio* is only with respect to the concluded arbitration – the arbitration agreement is not terminated. If the "fresh" claim were raised in separate proceedings, and if the challenge to the arbitrator were upheld, then the arbitrator would effectively be barred from sitting in future arbitrations between the parties. The High Court noted that it was not inconceivable that a court might remit an issue to the tribunal for reconsideration. If the challenge were dismissed then the issue would fall to be determined by that same arbitrator (see paragraph [58]).

The High Court therefore stressed at paragraph [59] that the stage at which the arbitration was at should not influence the court's determination of whether "*circumstances exist that give rise to justifiable doubts as to [the arbitrator's] impartiality or independence*".

**No apparent bias detected**

PTCI made a number of allegations and the High Court was invited to determine the challenge on their cumulative effect (see paragraph [61]):

*"(a) There had been a delay in rendering the award up to the time the Arbitrator issued the 1 April direction.*

*(b) The Arbitrator had initially given a short timeline of two weeks to PTCI for it to file a response to the CSS filed by the first two defendants on 29*

*January 2013. It was only after PTCI drew the Arbitrator's attention to the fact that the first two defendants took two months to file the CSS that the Arbitrator extended a similar timeline to them.*

*(c) The Arbitrator had given an unreasonable timeline of one day to PTCI to respond to the "fresh" claim that the first two defendants sought to admit on 1 April 2013. The direction was issued without giving PTCI a reasonable opportunity to be heard and formed part of the core of PTCI's challenge.*

*(d) The Arbitrator had threatened to draw adverse inferences on the facts asserted by the first two defendants in the "fresh" claim by way of the 5 April direction."*

The High Court rejected those allegations as capable of sustaining a challenge. Any undue delay in rendering an award fell within Article 14 of the Model Law (termination of appointment for failure to conduct proceedings properly or with reasonable dispatch) rather than a removal under Article 13 (read with Article 12(2)). Furthermore, the undue delay affected both parties and not just PTCI.

In any event, these matters "*related to and fell within the realm of the case management powers of the tribunal and as such [were] within the discretion of the Arbitrator to make*" (see paragraph [69]). In this respect, the High Court noted that PTCI was "*unable to show that the April [D]irections had not been case management issues*" and that the directions "*were fair and objective…and did not manifest any objective lack of impartiality in the conduct of the arbitral proceedings*" (see paragraph [70] and [71]).

The High Court further held the following:

1. On the issue of the "fresh" claim and the 1 April direction to PTCI to "*confirm or clarify*" the same, this direction was "*precisely intended to allow for PTCI to respond*" contrary to PTCI's complaint that they had not been given a reasonabe opportunity to respond (see paragraph [73]).
2. An arbitrator was entitled to draw adverse inferences, this was part of an arbitrator's case management powers when the arbitrator's case management directions were ignored by a party (see paragraph [76]).

3. The timelines given by the arbitrator were reasonable and would appear reasonable to "*an informed individual who takes into account all relevant facts before arriving at a conclusion*" (see paragraph [80]).

**No Breach of Natural Justice – complaints those of errors of law and/or fact**

PTCI had also sought to set aside the award for breach of natural justice by alleging apparent bias on the part of the Tribunal. In addition to the arguments above, PTCI sought to argue that the award showed that the Tribunal had "*conducted the Arbitration with a closed mind and in a biased manner*" (see paragraph [91]). Hence, the Tribunal had ignored PTCI's evidence and accordingly the award "*was wholly at odds with the established evidence*" (see paragraph [92]).

The High Court considered PTCI's argument "*baseless*" (see paragraph [93]). On the learned judge's review of the award, she considered that the award had set out the documentary evidence as well as the Tribunal's treatment and evaluation of PTCI's evidence and arguments – on that basis, the Tribunal had simply made a finding which happened to be adverse to PTCI (see paragraph [93] to [95]). Furthermore, the breaches of natural justice complained of were in actuality complaints of errors of fact and/or law purportedly made by the Tribunal. However, it was "*trite law that under the IAA, an error of law or erroneous finding of fact made in an arbitral award is not capable of establishing a ground for the award to be set aside*", see paragraph [101].

The Singapore High Court stressed that an adverse award could not in and of itself show bias on the part of the Tribunal:

*"95 I agreed with [counsel for the claimants to the arbitration] that an adverse award, in and of itself, could not show bias unless there was some evidence of improper conduct. The reality was that the issue of when the Preliminary Agreement had been concluded was decided in a way not to the satisfaction of PTCI. That could not be evidence of bias. It bears repeating that the substantive merits or the arbitral award are outside the remit of this court.*

PTCI also complained about the adverse costs order made against it and that it had to bear the costs of the entire arbitration notwithstanding that the

claimants to the arbitration had failed to establish jurisdiction against the second respondent to the arbitration. However, the Singapore High Court pointed to the fact that the sole arbitrator had addressed his mind to the issue and set out an explanation for the same in the final award (see paragraph [97]).

Finally, the Singapore High Court found that PTCI's attempt to raise the Tribunal's issuance of a power of attorney to effect registration of the final award with the Indonesia courts as an example of apparent bias was "*a desperate point made in an unmeritorious attempt to find fault with the Arbitrator*" (see paragraph [99]).

**Effect of Disqualification on Rendered Final Award**

Another interesting point of law arose that out of this case was whether disqualification of the arbitrator by removal would have the consequential effect of annulling or setting aside the final award which had been rendered (see paragraph [105]).

Strictly, this issue did not arise for determination because the application for removal failed. Nevertheless, the High Court having reviewed the *travaux preparatoires* to the Model Law considered that the removal of an arbitrator for apparent bias or partiality as a ground for setting aside an award is subsumed under Article 34(2) of the Model Law (see paragraph [128] and [134]).

In arriving at this view, the High Court rejected two other possible alternative arguments.

*"(a) The first is that the removal of an arbitrator would necessarily render the award to be of no effect, and therefore it was unnecessary to expressly provide for it as a ground to set aside the award under Art 34.*

*(b) The second is that the drafters did not quite anticipate the present scenario where an award would be rendered before the court's decision on the challenge. Given the fifteen-day and thirty-day timelines contained in Art 13(2) and Art 13(3) respectively, challenges against the arbitrator would in all likelihood be during the early stages of arbitral proceedings, and that*

*there is a lacuna in the Model Law as result of the failure to contemplate the occurrence of a situation such as that in the present case."*

The first argument was rejected on the basis of minimal curial intervention pursuant to Article 5 of the Model Law. The High Court considered that "*[w]ith [Article] 13(3) being silent on the issue of setting aside an award following a successful removal of the challenged arbitrator, and having regard to the terms of Art 5, it would appear that the supervising court has no consequential powers to annul the award and that a separate application to set aside the award based on Art 34 grounds must be filed.*"

In this respect, the High Court stressed that the effect of the Singapore Court of Appeal cases of *Astro v Lippo* and *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd*, [2013] 1 SLR 125 was to confine the powers of the court over an arbitration and its award to the IAA and that the Singapore courts had no general, residue or supervisory powers outside of the IAA.

The High Court rejected the second argument that there was a lacuna in the Model Law.. The *travaux preparatoires* showed that the drafters did contemplate a situation where a challenge to an arbitrator took so long that a decision was only rendered after the final award had itself been rendered (see paragraph [122]).

Separately, the High Court also addressed the mismatch in terms of the standard of proof required to to remove an arbitrator for apparent bias as compared to the grounds for setting aside an award under Article 34(2) of the Model Law (see Gary Born, *International Commercial Arbitration vol 2* at pp 1823–1824 and vol 3 at p 3279, quoted at paragraph [137] and [138]). The High Court considered that in principle, the setting aside application on the basis of a removal of an arbitrator would be subject to the more stringent requirements of Article 34(2). However, in practice and evidentially there need not be a dichotomy between the two. This was because,

*"136 …The proof that the applicant has to furnish is the court order to remove the arbitrator. The setting aside application can be said to depend on the removal order, and the opposing party will not be allowed to go behind the decision which is non-appealable.*

...

*145 ...the requirement of prejudice may not be a problem in application. For instance, within the framework of Art 34(2)(a)(iv), a party applying to set aside for procedural irregularity need not establish that the procedural irregularity had materially affected the award. As stated, a court order to remove the arbitrator is a serious matter. It signifies that the breach of procedure was not technical or immaterial. From this perspective, an inference of bias can be drawn from the court order and hence the existence of prejudice in relation to any award made".*

**Conclusion**

This decision reaffirms the Singapore courts' pro-arbitration and pro-enforcement approach. The Singapore courts have repeatedly stressed that errors of fact and/or law are not grounds to set aside an arbitration award. Parties have also struggled to set aside awards for breaches of public policy in Singapore. It is not surprising that disgruntled parties to an arbitration seek to set aside adverse arbitration awards by trying to argue that there has been a breach of natural justice.

However, *PT Central Investindo* as well as the recent cases of *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd*, [2013] SGHC 186 ("**TMM**"), and *BLB and another v BLC and others*, [2013] SGHC 196 ("**BLB**") show that the Singapore courts are cautious of parties' use of natural justice to "*dress up and massage their unhappiness with the substantive outcome into an established ground for challenging an award*" (see *TMM* at [2]).

Our article also considers likely trends in 2015 regarding the practice of international arbitration which are worth watching out for:

1. The growth of the Singapore International Commercial Court (SICC).
2. The regulation of external or alternative funding of international arbitration in Singapore.

3. Passing of the Myanmar (International) Arbitration Bill. See our Singapore Law Gazette article ***Myanmar Draft Arbitration Bill to Further Bolster Foreign Investor Confidence*** for further background.

This follows our Singapore Law Gazette article **Arbitration in Singapore 2013: A Year in Review** published last year which looks back at significant Singapore Court decisions of 2013 involving arbitration.