4. ARBITRATION

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4.1 In 2016, Singapore courts continued to see a flow of arbitration cases seeking judicial assistance albeit by a significantly lesser number than those filed in 2015. These cases involve the enforcement of the arbitration agreement by way of stay of court, injunction, and setting-aside applications. Based on the decisions reported, Singapore courts had on six occasions been asked to stay their own court proceedings in favour of arbitration.[1] There were only four cases (down from 2015's staggering nine cases) which were brought to set aside arbitral awards. The decrease in number is quite telling of Singapore court's reputation of following a strict, narrow, and rather "high threshold" approach when requested to set aside what ought to be unimpeachable arbitral awards. There was also the occasional application for interim measures such as sealing orders.

Enforcement of arbitration agreements

Applicability of the dispute resolution mechanism in a bilateral investment treaty

4.2 The High Court had in *Government of the Lao People's Democratic Republic v Sanum Investments Ltd*[2] determined that the bilateral investment treaty ("BIT") between the People's Republic of China ("PRC") and the Lao People's Democratic Republic ("Laos") ("PRC–Laos BIT") does not extend to the Macao Special Administrative Region of China

1 See especially International Arbitration Act (Cap 143A, 2002 Rev Ed) s 6; Arbitration Act (Cap 10, 2002 Rev Ed) s 6; UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006) Art 8; Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 3 Art II(3).

2 [2015] 2 SLR 322; see also (2015) 16 SAL Ann Rev 100 at 100–102, paras 4.2–4.8.

("Macao") and, therefore, the arbitration agreement contained therein was not applicable to disputes arising from investments made by a Macanese investor in Laos.

4.3 Sanum Investments Limited ("Sanum") was a company incorporated in Macao. In 2007, it began investing in the gaming and hospitality industry in Laos through a joint venture with a Laotian company. Alleging that the Government of Laos ("Lao Government") deprived it of the benefits to be derived from its capital investment through the imposition of unfair and discriminatory taxes and, thus, had effectively "expropriated" Sanum's investments, Sanum then commenced arbitration against the Lao Government pursuant to the dispute resolution mechanism in the PRC–Laos BIT which was entered into in 1993.

4.4 The Lao Government challenged the jurisdiction of the tribunal on the basis of its submission that the PRC–Laos BIT does *not* extend to Macao. The tribunal decided on the challenge holding that the BIT extends to Macao and upheld its own jurisdiction. The Lao Government appealed against the tribunal's decision to the High Court under s 10 of the International Arbitration Act[3] ("IAA"), the amended version of Art 16 of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ("MAL"). In the course of the appeal, the Lao Government sought and obtained the admission of two diplomatic letters: a letter from the Laotian Ministry of Foreign Affairs to the PRC Embassy in Vientiane, Laos; and the reply from the PRC Embassy in Vientiane, Laos (collectively "the Two Letters"), both of which confirmed the intention of the PRC and Laos on the non-applicability of the PRC–Laos BIT to Macao. The High Court's decision was arrived at primarily based on the Two Letters, in that they are evidence of subsequent agreements allowed as evidence of intention of the contracting parties to treaties such as the PRC–Laos BIT, as contemplated in the Vienna Convention on the Law of Treaties 1969 ("VCLT").

4.5 In allowing the appeal and reinstating the tribunal's decision upholding jurisdiction, the Court of Appeal in *Sanum Investments Ltd v Government of the Lao People's Democratic Republic*[4] referred to Art 29 (regarding territorial scope of treaties) of the VCLT read together with Art 15 (regarding succession in respect of part of a territory) of the Vienna Convention on Succession of States in respect of Treaties 1978 ("VCST") and accepted the joint experts' view that these provisions reflect the principle in "customary international law" known as the

3 Cap 143A, 2002 Rev Ed.
4 [2016] 5 SLR 536.

"moving treaty frontier rule" ("MTF Rule"). In the court's view, the MTF Rule is "implicitly embedded" in Art 29 (which provides for the application of a treaty to the entire territory of a signatory state) to the extent that the MTF Rule suggests the automatic extension of a treaty to a new territory as and when it becomes a part of that signatory state. The Court of Appeal observed that both states had the opportunity after the initial ten-year term of the PRC–Laos BIT to review the applicability of the BIT but they did not do so. While the Court of Appeal accepts that the MTF Rule is a "presumptive rule" that can be displaced by proof of any intention to the contrary, it held that there is no evidence that the MTF Rule has been so displaced, ruling that the silence or inaction of Laos and the PRC in this connection cannot displace the presumptive position that the PRC–Laos BIT extends to Macao as from 1999.

4.6 With regard to the Two Letters, the Court of Appeal expressed the view that the question of their admissibility and weight must be considered within the framework of any other applicable principles of international law, such as the critical date doctrine which, in essence, requires the court to treat evidence which comes into being after a "critical date" and which is "self-serving and intended by the party putting it forward to *improve* its position in the arbitration, as being of little, if any, weight" [emphasis in original].[5] It rejected the Lao Government's submission that the Two Letters should be considered as confirming the legal position between the two state parties to the BIT reasoning that the Two Letters in fact contradicted its finding that "the evidence … does not establish that the MTF Rule had been displaced".[6] In its view, "giving effect to the [Two Letters] as a subsequent agreement in relation to the interpretation of the PRC–Laos BIT would amount to effecting a retroactive amendment of the BIT".[7] On that basis, it concluded that the default position is for the PRC's treaties to apply to Macao automatically upon Macao's reversion to the PRC in 1999.[8] The PRC–Laos BIT, therefore, applies to Macao and the tribunal appointed pursuant to the arbitration agreement contained therein has jurisdiction to hear disputes between Sanum as investor and Laos as the host-state.

4.7 In reaching its decision, the court conceded that its conclusion is "counter-intuitive" as the state parties, Laos and the PRC, have taken the view that the BIT does not extend to Macao. Indeed, the conclusion

5 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [104].

6 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [112].

7 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [116].

8 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [57].

reached generated wide differences of opinion. While some practitioners welcome the decision as being "correct to say that by selecting Singapore as seat, the [IAA] as well as the supervisory jurisdiction of the Singapore courts is engaged" and will bolster "confidence in Singapore as a serious and viable seat for investor–state arbitrations involving Southeast Asian states",[9] others accepted the court's decision more cautiously as being "explicable on the particular facts" of the case in that it involved a BIT which, by its nature, creates rights for third parties to the treaty.[10]

4.8 Chinese scholars in the main could not accept that a Singapore court could ignore and interfere with the PRC and Laos' common position on the extent of their treaty coverage.[11] The PRC Ministry of Foreign Affairs had expressed in no uncertain terms its disagreement with the court's conclusion, asserting that "the geographical scope of application of the PRC–Laos investment agreement is a question of fact

9 Herbert Smith Freehills Dispute Resolution, "Singapore's Court of Appeal Rules on the Interpretation of PRC–Laos Bilateral Investment Treaty and Reinstates Investor-state Arbitration Award on Jurisdiction against Laos" (7 October 2016) <http://hsfnotes.com/arbitration/2016/10/07/singapores-court-of-appeal-rules-on-the-interpretation-of-prc-laos-bilateral-investment-treaty-and-reinstates-investor-state-arbitration-award-on-jurisdiction-against-laos/> (accessed 11 May 2017).

10 Gary B Born, Jonathan W Lim & Dharshini Prasad, "Sanum v. Laos (Part II): The Singapore Court of Appeal Affirms Tribunal's Jurisdiction under the PRC–Laos BIT" (11 November 2016) <http://kluwerarbitrationblog.com/2016/11/11/sanum-v-laos-the-singapore-court-of-appeal-affirms-tribunals-jurisdiction-under-the-prc-laos-bit-part-ii/> (accessed 11 May 2017).

11 Song Jie, "《中老投资协定》在澳门的适用问题——评新加坡上诉法院有关'Sanum 公司诉老挝案'判决" (2017) 143 Journal of Zhejiang Gongshang University 58; Wang Shi Xi, "国际投资仲裁裁决的司法审查及投资条约解释的公正性——基于'Sanum 案'和'Yukos 案'判决的考察" (2017) 3 Law Science <https://www.iolaw.org.cn/showNews.aspx?id=57925> (accessed 17 May 2017); Jing Dian San Wen Bar, "新加坡法院关于中老投资协定适用于澳门特区的判决是一项错误判决" (12 October 2016) <http://www.sanwen8.com/p/c42degdo.html> (accessed 17 May 2017); Hai Shi Kuai Xin, "问题依然在：中外BIT 适不适用于港澳——新加坡上诉法庭'Sanum v. 老挝案'判决述评" (8 October 2016) <http://news.hsdhw.com/389302> (accessed 17 May 2017); Wei Xin Zhi, "新加坡法院关于中老投资协定适用于澳门特区的判决是一项错误判决" (16 October 2016) <http://www.wxzhi.com/archives/961/9n8yy53fdnzbqq4v/> (accessed 11 May 2017); Wang Sheng Chang & Jin Ning, "中老投资保护协定是否适用于澳门特区" <http://huizhonglaw.com/cn/%E6%B1%87%E4%BB%B2%E5%BE%8B%E5%B8%88-%E4%B8%93%E4%B8%9A%E8%AF%84%E8%AE%BA/%E4%B8%AD%E8%80%81%E6%8A%95%E8%B5%84%E4%BF%9D%E6%8A%A4%E5%8D%8F%E5%AE%9A%E6%98%AF%E5%90%A6%E9%80%82%E7%94%A8%E4%BA%8E%E6%BE%B3%E9%97%A8%E7%89%B9%E5%8C%BA%EF%BC%9F/> (accessed 11 May 2017).

concerning acts of state, which is up to the contracting parties to decide".[12]

4.9 The decision of the court raises some other issues concerning the Singapore courts' role in investor–state arbitrations arising out of BITs. The present authors had earlier observed[13] that in seeking the court's supervisory jurisdiction under s 10 of the IAA, no consideration was in fact given as to whether a Singapore court could be seized with such jurisdiction given that the IAA is a legislation based on and intended to give effect to the MAL, whose scope includes contracts or "relationships of a commercial nature". While the term "investment" appears in the footnote to Art 1 of the MAL, the term is proscribed by the term "relationships of a commercial nature", *viz*, that whatever the nature of the transaction, the relationship between the parties to the dispute must necessarily be of a commercial nature, for instance, a sale of a car by a father to his son at a discounted price which, while a valid sale transaction, is not a "relationship of a commercial nature". Similarly, while an investor who has contracted to build a highway for the host-state on a build–operate–transfer scheme will be considered "in a relationship of a commercial nature" with the host-state, for an investor who has no direct contractual relationship with the host-state, save for the fact that it has made investments in the host-state, making claims for breach under a BIT is not making any claim arising out of a "relationship of a commercial nature". As the issue was not raised by Sanum at the High Court and before the Court of Appeal, the court had assumed that the fact that the place of arbitration was Singapore, the IAA automatically applied and, accordingly, the court could assume jurisdiction. While some may see the court's decision as another manifestation of the Singapore court's strong support for arbitration, it should be borne in mind that BITs are entered into by state parties and not by investors. As such, the court's readiness to declare that the choice of Singapore seat subject the parties (both the investor and state parties) to the court's supervisory jurisdiction, coupled with the court's readiness to displace state parties' joint expressed intentions, could well work against Singapore's intention to poise itself as a place of choice for investor-state arbitration.

12 Ministry of Foreign Affairs of the People's Republic of China, "Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on 21 October, 2016" <http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1407743.shtml> (accessed 11 May 2017).

13 See (2015) 16 SAL Ann Rev 100 at 102, paras 4.6–4.8.

Stay of court proceedings

The court's inherent case management power

4.10 The judgment of the Court of Appeal in *Tomolugen Holdings Ltd v Silica Investors Ltd*[14] ("*Tomolugen Holdings*") figured prominently in a number of applications for stay of court proceedings under s 6 of the Arbitration Act[15] ("AA") or s 6 of the IAA, applications for injunction in favour of arbitration, as well as issues of subject-matter arbitrability.

4.11 In *Maybank Kim Eng Securities Pte Ltd v Lim Keng Yong*[16] ("*Maybank Securities*"), a stay applicant relied on the court's inherent case management power for the court to grant her stay application for all claims pending in court. Five months later, the court was again requested to exercise its inherent case management power in the case of *BDC v BDD*.[17] Both cases relied on *Tomolugen Holdings* for support.

4.12 In *Maybank Securities*, Wendy Lim Keng Yong ("Ms Lim") maintained an account for contracts for difference ("CFDs") with Maybank Kim Eng Securities Pte Ltd ("Maybank"), a securities brokerage firm in Singapore. The CFDs were governed by Maybank's General Terms and Conditions and the CFDs' Terms and Conditions, which contained an arbitration agreement pursuant to which any dispute that might arise between Maybank and Ms Lim would be referred to arbitration under the AA. Her husband, William Lye Hoi Fong ("Mr Lye"), entered into a remisier agreement with Maybank, for him to act as remisier or trading representative of Ms Lim in respect of the CFD account. The agreement included an indemnity form that contained a non-exclusive jurisdiction of the courts of Singapore. Ms Lim entered into a series of CFD transactions for stocks sometime in mid-2015 ("CFD transactions"). The value of the shares then fell sharply around 2015 and Maybank proceeded to close the CFD transactions resulting in substantial losses for the CFD account. Maybank commenced suit against both Ms Lim and Mr Lye for the same amount and the same losses arising from the CFDs, to which the spouses filed a stay application before the assistant registrar ("asst registrar"). The asst registrar found in favour of arbitration and granted the stay application. Maybank appealed the asst registrar's decision in relation to the action against Mr Lye only. It argued that Mr Lye's liability arose from the indemnity form, which was separate from Maybank's claims against

14 [2016] 1 SLR 373; see also (2015) 16 SAL Ann Rev 100 at 107–109, paras 4.24–4.29.
15 Cap 143A, 2002 Rev Ed.
16 [2016] 3 SLR 431.
17 [2016] SGHC 202.

Ms Lim made pursuant to the CFD Terms and Conditions. There was, thus, no basis for Mr Lye's stay application to be granted.

4.13 One of the issues on appeal was whether the court could exercise its inherent case management power and stay court proceedings against Mr Lye pending resolution of a related arbitration governed by the AA. Ms Lim and Mr Lye, who argued for the affirmative, relied on the court's pronouncements in the IAA-governed *Tomolugen Holdings*. Steven Chong J found no reason why there ought to be a difference of treatment of the applicability of the principles in *Tomolugen Holdings* for arbitration agreements governed by the AA or the IAA. The only difference worth noting is the court's power to exercise discretion under the AA, a power not available under the IAA. His Honour also noted, however, that the court's power to exercise discretion under s 6 of the AA is not unfettered and ought to be limited with the proviso that a party who wishes to proceed to court must "show sufficient reason why the matter should *not* be referred to arbitration". The fact that in certain cases, some of the claims fall within the scope of an arbitration agreement and some do not is not a "sufficient reason" for the court to exercise its discretion and not grant the stay application in favour of arbitration. In the case of Ms Lim and Mr Lye, the court was compelled to exercise its case management power and grant the stay application on the ground that the claims against Ms Lim and Mr Lye "overlap[ped]" and were "practically identical".

4.14 In *BDC v BDD*, the plaintiff engaged the first defendant to carry out a survey of a conservation shophouse and produce drawings of the building structure thereof, and the second defendant to act as architect for additional and alteration works. The plaintiff's contract with the second defendant contained an arbitration clause governed by the AA. The plaintiff passed drawings to the second defendant for the latter to use in preparing the architectural design drawings. It was only when a contractor was engaged for additional and alteration works that an error was discovered, that is, the design drawings turned out to be based on the wrong dimensions. By such time, substantial delay had been incurred. The plaintiff then commenced suit against the first and second defendants for losses resulting from the delay. The second defendant applied for stay of court proceedings which the asst registrar had granted. The plaintiff appealed. Lee Seiu Kin J affirmed the decision and exercised the court's inherent case management power, and ordered a stay as that would be the "most expedient" and "cost-effective" under the circumstances to avoid possible inconsistent findings between the court and the arbitral tribunal.

4.15 These cases demonstrate that Singapore courts are prepared to depart from the "rare and compelling" threshold laid down by English courts in deciding whether to exercise the court's inherent case

management power to stay court proceedings[18] to one that considers the most "efficient", "fair", "expedient, cost-effective" and "practical" under the circumstances.

Injunction in winding-up proceedings

Prima facie *existence of a dispute*

4.16 The grant of a winding-up order by a court is an exercise of its specific statutory duty as opposed to its adjudicatory jurisdiction in resolving matters in disputes arising out of a commercial contract. While winding-up and insolvency proceedings are not actions for which stay is contemplated under s 6 of the AA or s 6 of the IAA, in some cases where a company has a genuine cross-claim against the other, the winding-up process may be ordered to be stayed or an injunction ordered against the insolvency process pending resolution of the cross-claims.[19]

4.17 In *BDG v BDH*,[20] the defendant had supplied drilling units for fossil fuels to the plaintiff and for which it made statutory demands for certain unpaid invoices. The plaintiff sought an injunction to restrain the defendant from commencing winding-up proceedings. The contracts contained multi-tiered dispute resolution clauses where in the event of a dispute, discussions or negotiations were to be made first between representatives of each party before elevating the discussions to top management. Failing resolution of the dispute at these levels, any of the parties could then proceed to arbitration. The defendant said no agreement was reached with the plaintiff following discussions and that although subsequent payments were made, they were accepted by the defendant as part payments and not as part of any settlement reached.

4.18 Aedit Abdullah JC granted the injunction sought. In doing so, the court considered whether a dispute existed and the relevant standard to be applied. The existence of a genuine or *bona fide* dispute normally requires showing that a triable case has been made out. Applying this requires an inquiry and assessment of a higher threshold than that of making a *prima facie* case that a dispute exists. The rationale for requiring a *bona fide* dispute is to prevent an insolvent debtor from staving off such proceedings on flimsy or unsubstantiated grounds. The learned judge, however, noted that a different standard can be justified where an arbitration agreement exists between the parties; the parties

18 See *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173.
19 See *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268.
20 [2016] 5 SLR 977.

ought to be first held to their agreed dispute resolution process, and that the merits of the parties' dispute should be a matter for the arbitral tribunal to determine. In his view, so long as a *prima facie* case is made out on the existence of an agreement to arbitrate and the existence of the dispute, the parties should proceed to arbitrate. Although this case is an injunction restraining winding-up proceedings and not an application for stay of a pending court action, Abdullah JC noted that to apply "any stricter standard would lead to incongruities with the standard applicable [to] stays in favour of arbitration."[21]

Stay order with conditions

4.19 A court granting a stay may impose conditions under s 6 of the IAA. Conditions to be imposed should normally be consonant with the object of referring parties to perform their obligation to arbitrate.

4.20 The question of whether the conditions imposed should be "judicious", "reasonable", and "required by the ties of justice" was discussed in the case of *BAF v BAG*.[22] There, the plaintiff company was engaged in the business of mining and commodities trading. The first defendant was an Indonesian national who was the founder of the PTP Group in Indonesia. The second defendant was an Indonesian company carrying the business of coal mining and trading within the PTP Group. The plaintiff and the first defendant agreed to enter into a joint venture to develop and use the second defendant's mining concession in Indonesia by the terms set out in the "Master Agreement" that contained an arbitration clause. The second defendant expressly acknowledged that it was bound by the terms of the Master Agreement as if it was a party to it. The third defendant was a British Virgin Island company into whose bank account funds intended for the requirements of the joint venture company were transferred by the plaintiff pursuant to the Master Agreement. The third defendant was not a party to the Master Agreement. The plaintiff commenced suit against the three defendants raising allegations of fraudulent misrepresentation, breach of trust, and unjust enrichment. An arbitration was commenced by the first and second defendants against the plaintiff. The third defendant agreed to be joined and be bound by the findings in the arbitration and applied for stay of the court proceedings pursuant to the court's inherent case management power. The plaintiff did not object to the stay but asked that the stay be granted on condition that interrogatories be ordered to be answered by the first defendant, in particular about the application of its funds. Chua Lee Ming JC granted the stay and imposed the condition that interrogatories be answered to enable the plaintiff to follow and

21 *BDG v BDH* [2016] 5 SLR 977 at [28].
22 [2016] SGHC 251.

trace the whereabouts of the funds. In doing so, the court noted that the conditions to be imposed under s 6 of the IAA should be made "judiciously" and "reasonably", or as "required by the ties of justice".[23]

Scope of an arbitration agreement

4.21 Who is a proper party to an arbitration agreement? How are third party assignees or endorsees to a bill of exchange treated under an arbitration agreement found in the underlying contract? These were some of the questions confronting the High Court in the case of *Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pte Ltd*.[24]

4.22 Rals International Pte Ltd ("Rals"), the buyer, entered into a supply agreement with Oltremare SRL ("Oltremare"), the seller, for the purchase of machines to process cashew nuts. The supply agreement contained an arbitration clause and other provisions for Rals to draw promissory notes in favour of Oltremare and for the latter to negotiate the notes to its bank in Italy, Cassa di Risparmio di Parma e Piacenza SpA ("Cariparma") without recourse. Oltremare assigned its contractual right to receive payment for the machines from Rals to Cariparma by way of a discount agreement. The notes fell due for payment and were dishonoured by Rals upon presentation. Cariparma commenced suit against Rals to recover the value of the dishonoured notes. Rals applied for a stay under s 6 of the IAA, which the asst registrar granted. Vinodh Coomaraswamy J, however, lifted the stay taking the view that while Cariparma could be a party "claiming through or under" Oltremare, making it a proper party to the arbitration agreement within the extended meaning of the term in s 6(5)(*a*) of the IAA, Cariparma's claim, however, was *not* within the scope of the arbitration agreement contained in the supply agreement between Rals and Oltremare, having been confined to its right as "holder of the notes".

4.23 The Court of Appeal in its decision in *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA*[25] ("*Rals International*") dismissed the appeal, holding that while Cariparma was a party "claiming through or under" Oltremare, its disputes arising from the promissory notes were *not* within the scope of the arbitration agreement set out in the supply agreement. The court did so after examining closely the nature of promissory notes and the characteristics unique to such notes, that is, their legal title being transferable by delivery or endorsement, a transferee of the notes would be entitled to sue in his own name, and a holder in due course takes the notes "free from any

23 *BAF v BAG* [2016] SGHC 251 at [42].
24 [2016] 1 SLR 79; see also (2015) 16 SAL Ann Rev 100 at 106, paras 4.21–4.23.
25 [2016] 5 SLR 455.

defect of title of prior parties".[26] These characteristics clearly show that each note is a contract *independent* of any underlying contract. This decision cast some doubt over the decision of Belinda Ang Saw Ean J in *Piallo GmbH v Yafriro International Pte Ltd*[27] ("*Piallo*") where a dispute over a dishonoured cheque made pursuant to the underlying contract was held to be within the scope of the arbitration agreement in that contract – a question similar to that in *Rals International*. Nevertheless, it could still be argued that the decision could be reconciled on the facts, *viz*, in *Piallo*, the holder of the dishonoured cheque was an original party to the underlying contract and was, thus, a party to the arbitration agreement. Conversely, in *Rals International*, the bank holder of the notes, Cariparma, was a mere endorsee, and could not have been adequately foreseen to be made a party to the arbitration agreement at the time the supply agreement was entered into.

Arbitration upon the election of one party

4.24 In the main, arbitration agreements would normally confer on each party the right and commit each to refer disputes arising out of the underlying contract to arbitration. There are, however, situations where the arbitration agreements may be crafted to confer the right to elect to arbitrate only upon one party or which gives a party or any party, an option to arbitrate or to litigate. Such agreements often give rise to arguments over whether the nature of an arbitration agreement requires it to confer a mutual right to arbitrate or whether such an agreement that gives a unilateral right to one party to elect to arbitrate is sufficient to constitute a valid arbitration agreement. Coomaraswamy J, in *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd*,[28] eschewed the use of "unilateral right" and "mutual right", preferring instead the terms "asymmetrical" and "symmetrical". His Honour was confronted with an application for a stay of proceedings made under s 6 of the IAA, where the applicant relied on a dispute resolution agreement that stated, "at the election of Dyna-Jet, the dispute may be referred to and personally settled by means of arbitration proceedings … in Singapore". The learned judge took the view that an agreement to arbitrate may be unconditional or conditional. While upholding the dispute resolution clause as a valid arbitration agreement as it expressed a "mutual intent to arbitrate", the court concluded that Dyna-Jet's election to commence suit (and thereby opting not to arbitrate) rendered the arbitration agreement "incapable of being performed". The stay application was, thus, refused.

26 *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455 at [28].

27 [2014] 1 SLR 1028; see also (2013) 14 SAL Ann Rev 72 at 72–74, paras 4.1–4.7.

28 [2017] 3 SLR 267.

This decision is consistent with the view and approach of Lee J in *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka*.[29]

Challenge of arbitral jurisdiction

4.25 Challenges of arbitral jurisdiction may be made on many grounds. Where the very existence of the contract containing the arbitration agreement is challenged as being invalid or not concluded, the doctrine of separability and principle of *kompetenz–kompetenz* may be availed to permit the tribunal to decide if the arbitration agreement stands or falls. The tribunal may rule on its own jurisdiction either as a preliminary question or defer the same to be dealt with together with the merits of the case. In most cases, an arbitration agreement would normally be asserted to have been entered into at the same time or following the conclusion of the underlying commercial contract. In a rather unusual situation in *BCY v BCZ*,[30] the plaintiff, a foreign bank, and the defendant entered into negotiations for the sale of shares by the bank to the defendant. Various drafts of the sale and purchase agreement ("SPA") were exchanged. By the second draft of the SPA, the parties had included an arbitration clause with a reference to Singapore as the seat of arbitration and choice of New York law as the governing law. Subsequent drafts (seven in all) made no substantive changes to the arbitration clause. By the sixth and seventh drafts, each party indicated that they were prepared to sign the SPA, describing them as "final" and "final and agreed". However, in the seventh draft forwarded to the plaintiff, substantial changes relating to the definitions of key terms, such as "sale consideration" and "dividend payment", were made. Subsequently, the plaintiff decided that "due to recent changes in business climate", it would not be proceeding with the sale of the shares. The defendant commenced International Chamber of Commerce arbitration in accordance with the arbitration clause in the draft SPA, asserting that notwithstanding the fact that the SPA was not signed, the arbitration agreement came into existence. Not unexpectedly, the plaintiff challenged the tribunal's jurisdiction. The arbitrator found for the defendant and declared that a valid arbitration agreement was concluded between the parties on the basis that "mutual assent" could be inferred from the exchange of drafts between the parties and from the plaintiff's statement that it was ready to sign the sixth draft, which contained an arbitration clause. Aggrieved, the plaintiff filed an application in court under s 10(3) of the IAA for a declaration that the arbitrator had no jurisdiction.

29 [2002] 1 SLR(R) 1088.
30 [2017] 3 SLR 357.

4.26 Chong J had, on a *prima facie* approach, come to the view that there was *no* "objective manifestation of any mutual intention" to be bound by an arbitration agreement *prior* to the conclusion of the SPA based on the attendant circumstances surrounding the parties at the time of exchange of drafts. The mere exchange of draft agreements containing an arbitration clause and agreeing to the words used therein with no further edits or a party's willingness to sign a certain version of the draft contract did *not* indicate, if at all, an intention by the parties to conclude an arbitration agreement prior to and independent of the conclusion of the SPA. The tribunal, therefore, did not have jurisdiction to hear the defendant's claims allegedly arising from a contract that was not concluded.

4.27 In coming to his decision, his Honour considered the proper law governing the formation of the arbitration agreement, the scope of the doctrine of separability in determining the validity of an agreement to arbitrate, and the survivability of a "free-standing" arbitration agreement.

Determining the law of an arbitration agreement

4.28 The general accepted approach is that the governing law of an arbitration agreement is to be determined in accordance with a three-step test: the parties' express choice; the implied choice of the parties as gleaned from their intentions at the time of contracting; or the system of law with which the arbitration agreement had the closest and most real connection.

4.29 Since the arbitration clause in the draft SPA did not contain a choice of law of the arbitration agreement, the court had to determine "the implied choice of law" as the contest between the law of New York being the governing law of the SPA and the law of Singapore being the law of the seat of arbitration. Chong J had little hesitation holding that the implied choice of law for the arbitration agreement was likely to be the same as the expressly chosen law of the substantive contract and rejected the plaintiff's contention that Singapore law as law of the seat should displace the choice of substantive law as the implied choice. The learned judge rejected the curious submission by the plaintiff's counsel that the decision of the asst registrar in *FirstLink Investments Corp Ltd v GT Payment Pte Ltd*,[31] which held that the implied choice should be the law of the seat, is ever representative of Singapore law. Indeed, there have been several Singapore High Court decisions that unreservedly stated that the implied choice of law of the arbitration agreement is the

31 [2014] SGHCR 12.

expressly chosen law of the substantive contract.[32] Quite rightly, the choice of a seat of arbitration would not be sufficient to negate the presumption that the parties intended the governing law of the main contract to govern the arbitration agreement.

Separability doctrine – Its purpose

4.30 The plaintiff in *BCY v BCZ* had argued that the doctrine of separability supported its argument that the arbitration agreement could have been concluded prior to the SPA. Whether the SPA was concluded or not could, therefore, not affect the validity of the arbitration agreement. In his decision, his Honour observed that "[s]eparability serves the narrow though vital purpose of ensuring that any challenge that the main contract is invalid does not, in itself, affect the validity of the arbitration agreement".[33] The doctrine is only relevant where an arbitration agreement forms part of a main contract and cannot, without more, be used to sustain an arbitration agreement independent of the underlying contract. The plaintiff's argument that the arbitration agreement was entered into prior to and independent of the SPA would not require the invocation of the separability doctrine. Its existence is to be determined according to the law applicable to its formation and validity.

4.31 An insightful observation made by the learned judge is that an agreement as to the wording of the arbitration clause is not necessarily an agreement that parties intended to be bound by the arbitration agreement as an independent contract. The mere exchange of written draft agreements containing an arbitration clause does not indicate that a binding arbitration clause was formed prior to the execution of that agreement.

Interlocutory orders

Confidentiality – The court's power to grant sealing orders under the IAA

4.32 A party to "proceedings under the IAA" has the right to an order for such proceedings to be heard "otherwise than in open court" pursuant to s 22 of the IAA, indicating a strong public policy in Singapore in favour of confidentiality in proceedings made or pursued under the IAA and in international arbitration. If an application is made

32 See *Piallo GmbH v Yafriro International Pte Ltd* [2014] 1 SLR 1028, *Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pte Ltd* [2016] 1 SLR 79.

33 *BCY v BCZ* [2017] 3 SLR 357 at [61].

and an order granted under s 22, the applicant can then seek the court to "give directions as to whether any and, if so, what information relating to the proceedings may be published".[34]

4.33 In *BBW v BBX*,[35] the plaintiff commenced suit requesting for a declaration of the existence of a valid indemnity agreement between him and a deceased party, and the enforcement of that indemnity agreement against the first defendant who was the personal representative of the deceased's estate. The plaintiff claimed that the deceased had agreed to indemnify him against all liability, loss, or damage incurred in connection with a Singapore International Arbitration Centre ("SIAC") arbitration pursuant to the indemnity agreement. The plaintiff applied for an order that all court documents and records be sealed and access by third parties be withheld, and for another order that the proceedings be held *in camera*. Lee J examined the plaintiff's applications by determining off-hand whether the applications under ss 22 and 23 were to be considered "proceedings under [the IAA]". He came to the view that while such applications were made under the IAA, the "proceeding" subject to ss 22 and 23 applications must relate to an application under *another* specific provision of the IAA, such as but not limited to applications for stay of proceedings (s 6(1)), jurisdiction of the arbitrator (s 10(3)), and interim measures (s 12A). A proceeding based on some other cause of action, therefore, does not qualify as "proceedings under the IAA". The Parliament would have made it expressly so if ss 22 and 23 were intended to cover proceedings based on some other cause of action outside the provisions of the IAA. The action commenced by the plaintiff was a claim based on an indemnity agreement, a contract, and clearly *not* a "proceeding under the IAA". As such, the plaintiff's applications for sealing order and *in camera* hearing could *not* be granted under ss 22 and 23 of the IAA.

4.34 Notwithstanding the non-applicability of ss 22 and 23, Lee J granted the sealing order application pursuant to the court's inherent case management power. As to the *in camera* hearing application, he granted the same pursuant to s 8(1) of the Supreme Court of Judicature Act,[36] rendering it unnecessary to invoke the court's inherent case management power. In deciding whether to grant the sealing order, Lee J saw it necessary to weigh the principle of open justice against the need to preserve confidentiality in arbitration. The principle of open justice in this case did *not* outweigh the need to preserve the confidentiality of the arbitration, one of the foundational tenets in

34 See s 23(2) of the International Arbitration Act (Cap 143A, 2002 Rev Ed).
35 [2016] 5 SLR 755.
36 Cap 322, 2007 Rev Ed.

arbitration, and to grant the application was but appropriate under the circumstances.

Setting aside an award under the AA

An arbitrator's correcting his decision on costs is not permissible

4.35 A tribunal's duty to issue an award with finality cannot be downplayed. To amend an award in the guise of a "correction" or "interpretation" that is not sought by any of the parties is *not* available to a tribunal, who after the issuance of an award, is *functus officio* in so far as the issues raised and determined in that award are concerned. The court in *ASG v ASH*[37] had to grapple with the issue of whether a costs award may be amended by an arbitrator beyond the ambit of "correction" or "interpretation". The parties to a construction contract engaged in an *ad hoc* domestic arbitration under the AA, and had agreed for the tribunal to make an award *save as to costs* and for the parties to address the issue on costs separately following the making of the award. In its award, however, the arbitrator in dismissing the plaintiff's claims also made orders apportioning the costs between the parties ("main award"). Upon being informed or reminded of the parties' agreement on costs, the arbitrator, against the plaintiff's objections, agreed with the defendant and issued a correction to the award, which included a statement to the effect of withdrawing his earlier award on costs ("correction award"). The arbitrator then issued directions for service of written submissions on costs, which the parties complied with. A subsequent award on costs substantially similar in content as the order on costs in the main award was made thereafter ("costs award").

4.36 The plaintiff applied to set aside the main award pursuant to s 48(1)(*a*)(vii) of the AA for breach of natural justice on the ground that the tribunal failed to consider the plaintiff's evidence and submissions on a central aspect of its case, that the award failed to deal with a dispute contemplated within the terms of submission to arbitration, and that it was unable to present its case. It also applied to set aside the part in the correction award that dealt with costs and the entirety of the costs award averring that the tribunal had been rendered *functus officio* upon rendering an order on costs in the main award. Coomaraswamy J dismissed the setting-aside application of the main award but ordered that the correction award (in so far as it related to the costs order) and the costs award be set aside. His Honour held that the failure by the arbitrator to deal with a point pleaded by a party because it thought it

37 [2016] 5 SLR 54.

unnecessary to do so did not necessarily mean the arbitrator "did not apply its mind to the dispute". It simply meant the arbitrator did not see any merit on that point and, therefore, it could not be made a basis for breach of natural justice.

4.37 In setting aside the correction award and the costs award, the court referred to s 44 of the AA which states "an award … shall be final and binding" on the parties precluding the tribunal from varying, amending, correcting, reviewing, adding, or revoking the award or any part thereof after it has been signed and delivered. The fact that the parties had agreed that the arbitrator should defer his decision on costs for subsequent consideration could not justify or revive the arbitrator's mandate who, having made the costs orders in the main award, became *functus officio* and had no power to make the correction award (in so far as it related to the costs orders) and the costs award.

Setting aside an award under the IAA

Existence of an arbitration agreement

4.38 It is one thing to say that a party has not agreed to enter into a contract and not taken any steps at all to perform its obligations under that non-concluded contract,[38] and another thing for a party to say it did not agree to enter into a contract with another party but has, by its conduct, taken necessary steps toward performing its obligation under that contract. The latter was examined in the case of *Jiangsu Overseas Group Co Ltd v Concord Energy Pte Ltd*[39] ("*Jiangsu Overseas*") as was similarly undertaken by the court in *BCY v BCZ*, albeit the latter was made in the context of a stay application. Interestingly, the courts in *Jiangsu Overseas* and *BCY v BCZ* arrived at different conclusions in ascertaining the "existence" of a concluded contract and, consequently, the arbitration agreement contained therein.

4.39 Jiangsu Overseas Group Co, Ltd ("Jiangsu") and Concord Energy Pte Ltd ("Concord") had allegedly entered into two contracts where Concord was to deliver six shipments of green petroleum coke to Jiangsu. Concord initially sent a written contract relating to three shipments for the signature of Jiangsu's representative. Jiangsu did not respond. Upon changes made in their contractual arrangements, Concord sent another contract to Jiangsu for *all* six shipments. Jiangsu, again, did not reply. A few days thereafter, Jiangsu advised Concord on laycan and delivery dates. Concord chased for Jiangsu to sign their

38 *BCY v BCZ* [2017] 3 SLR 357; see also para 4.25 above.
39 [2016] 4 SLR 1336.

contract but no reply was forthcoming from Jiangsu. Concord sent out a shipping schedule for six shipments and Jiangsu's representative accepted the nomination of a vessel for the first two shipments and then sent a draft letter of credit to Concord. The contractual structure was again amended into the "Spot Contract" (for the first shipment) and for the remaining five, the "Term Contract", each containing an arbitration agreement. At all material times, the proposed agreement between the parties was for six shipments. Jiangsu failed to issue a letter of credit to Concord for the first shipment under the Spot Contract. Concord sent a letter of demand to Jiangsu who simply replied that it did not sign any official contract with Concord. Concord then terminated the Spot Contract in July 2013. In a fortunate turn of events, Jiangsu accepted two shipments of petroleum coke from Concord in about September and November 2013, issued draft letters of credit containing a reference number and price that was disputed by Concord. It was not clear between the parties to which contract the letters of credit would apply. Jiangsu had, eventually, shown it was not ready to take delivery of the remaining shipments when asked by Concord to nominate discharge ports and open letters of credit. Concord sent another letter of demand giving notice of termination of the Term Contract. Concord then proceeded to commence two SIAC arbitration proceedings against Jiangsu claiming damages for breach of the Spot Contract and Term Contract. Jiangsu was aware but chose to ignore both proceedings up until just before the substantive hearing when it then filed submissions to challenge the tribunal's jurisdiction on the basis that it did not agree to conclude the Spot and Term Contracts and it did not sign either of the two contracts. The tribunal proceeded with the hearing at which Jiangsu chose not to attend despite having been made aware of the hearing dates. The tribunal, eventually, issued two awards finding both the Spot and Term Contracts to have been validly concluded between the parties on the basis of evidence showing the parties' "affirming conduct" in favour of the conclusion of the contracts. On the merits, the tribunal awarded damages to Concord for Jiangsu's breach of the Spot Contract and the Term Contract. Jiangsu applied to set aside the two awards based on s 24 of the IAA read with Art 34(2) of the MAL, that is, that the arbitration agreement was not valid under the law to which the parties subjected it and, therefore, no arbitration agreement was formed as between the parties.

4.40 The main issue in this case that concerned the very foundation of arbitral jurisdiction was whether the parties had agreed to conclude the Spot and Term Contracts and whether an arbitration agreement existed as between the parties. Where the "existence" of an arbitration is put into question, Singapore courts' approach has been consistently to take the "objective test", where a court must examine the language used by the parties as can be gleaned from the parties' correspondence, background, industry, character of the relevant documents, and course

of dealing between the parties.[40] Adopting an objective test, Chong J dismissed the applications to set aside. His Honour concluded that the Spot and Term Contracts were validly concluded between Jiangsu and Concord. The fact that Jiangsu had not signed the Spot and Term Contracts did not prevent the formation and execution of these contracts as between the parties. Jiangsu's conduct of advising laycan dates, informing Concord of delivery dates, accepting Concord's nomination of vessel, taking delivery of the first two shipments, and forwarding a first draft of the letter of credit could not have prevented the conclusion of the contracts between the parties, but had instead affirmed the parties' intention to conclude and be bound by the terms (including the arbitration agreement) of those contracts.[41] Consequently, the arbitration agreements contained in the said contracts were validly concluded as well and the tribunal had jurisdiction to hear the disputes between Jiangsu and Concord.

Breach of natural justice – Award not set aside

4.41 The role of the court, when reviewing arbitral awards in setting-aside applications, can be defined into what it is not and ought not to be – a disguised appeal on the merits. The ground of "breach of natural justice" provided in s 24 of the IAA has often been used by an unsuccessful party in arbitration to seek to upset the arbitral award, treating it as an all-encompassing basis to cover all possible scenarios no matter how trivial they may seem. Such a trend is slowly creeping into something tantamount to an abuse of process, a questionable strategy that courts ought not to countenance and, in the authors' view, it should merit more serious consequences as to costs. Another such feigned attempt to set aside came before the court in *Mount Eastern Holdings Resources Co Ltd v H&C S Holdings Pte Ltd*.[42]

4.42 The parties, Mount Eastern Holdings Resources Co Limited ("Mount Eastern") and H&C S Holdings Pte Ltd ("H&C"), entered into a contract for H&C to supply iron ore to Mount Eastern. No such delivery was made to Mount Eastern. Mount Eastern claimed termination of the supply contract and then commenced arbitration claiming

40 See *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521; see also (2014) 15 SAL Ann Rev 47 at pp 53–56, paras 4.20–4.28 for the authors' views.

41 See also *Malini Ventura v Knight Capital Pte Ltd* [2015] 5 SLR 707; [2015] SGHC 225, discussed in (2015) 16 SAL Ann Rev 100 at 104–106, paras 4.14–4.20, which dealt with the allegation of a party not having signed and therefore had not concluded any contract with the other party; *AQZ v ARA* [2015] 2 SLR 972, mentioned in (2015) 16 SAL Ann Rev 100 at 111–113, paras 4.36–4.42, where the court ruled it did not matter that the written version of the contract was neither signed nor confirmed by all parties involved in that agreement.

42 [2016] SGHC 1.

contractual damages. Mount Eastern prevailed in the arbitration and sought leave to enforce the award as a judgment under s 19 of the IAA, which was granted by the High Court. Before the 14-day period to file an application to set aside the order for leave, H&C filed summons seeking an extension of time for the filing for the said application to set aside. The asst registrar refused to grant the extension ("asst registrar's order"). Two applications were then filed by H&C in the High Court in relation to the arbitral award: H&C's appeal on the asst registrar's order; and H&C's application to set aside the award itself. H&C's grounds for the setting-aside application were: the tribunal granted Mount Eastern an award that was not specifically pleaded ("Pleadings Issue"); and H&C had not been afforded a fair hearing ("Fair Hearing Issue"). H&C asserted that the success of either of the two issues would establish breach of natural justice.

4.43 On the Pleadings Issue, H&C argued that Mount Eastern claimed termination through a certain provision of the contract (that is, cl 13.1.1 of the supply contract) when the only basis for termination was the procedure found in cl 14.2 thereof. Under cl 14.2, Mount Eastern would have to convert a breach by H&C into a defaulting event and Mount Eastern's failure to do so meant its claim for damages must fail. H&C added that the last date of performance of the contract was agreed to be 31 August 2013 and by relying on events predating that date to establish termination, Mount Eastern had to plead anticipatory breach, which it failed to do. H&C concluded that by deciding in favour of Mount Eastern, the tribunal had, therefore, determined matters outside Mount Eastern's pleaded case. On the Fair Hearing Issue, the tribunal came to the view in the award that the "establishment of the termination of the contract … is *not* crucial to [Mount Eastern's] claim for damages". H&C submitted that such a conclusion raised the question of whether the issue of termination had even been considered by the tribunal at all. If not considered, then the tribunal would have failed to afford H&C the opportunity to be heard on that issue.

4.44 Quentin Loh J dismissed the applications ruling there had been no breach of natural justice that caused prejudice to H&C. On the Pleadings Issue, it was clear to Loh J that the tribunal did not reach its determination on the basis of unpleaded issues. Mount Eastern's pleaded case and claim for damages was on the basis of cl 13.1.1 of the contract and the tribunal applied this clause to reach its decision and, thereafter, made the conclusion that there was no need for Mount Eastern to plead or rely on the anticipatory breach of cl 14.2 to support its claim. By stating so, the tribunal did not make a determination on the award based on an "unpleaded case" but simply stated it was unnecessary for Mount Eastern to plead or rely on what H&C referred to as the "unpleaded case", that is, anticipatory breach. Loh J added that if H&C was so keen on relying on cl 14.2 to defeat Mount Eastern's claim, it

should have pleaded the same in its defence but it chose not to. On the Fair Hearing issue, H&C was given the opportunity to respond to Mount Eastern's case relating to the termination of H&C's supply contract. Evidence had shown the tribunal giving that opportunity at the hearing, to which counsel for H&C replied that it would do so in its written closing submissions. H&C did so and went into the details on how Mount Eastern's failure to plead anticipatory breach and its failure to rely on cl 14.2 of the contract to establish termination were fatal to Mount Eastern's claim. The tribunal had, therefore, considered H&C's objections and submissions and had simply reached a different view from what H&C had advanced. By reaching a different view from that proffered by H&C, the tribunal could not be said to have not afforded H&C a fair hearing and, thereby, be in breach of natural justice.

4.45 The case is not controversial, having affirmed the Singapore court's consistent approach of setting a high threshold for any setting-aside applicant to overcome when seeking to set aside an arbitral award on the ground of breach of natural justice.

Breach of natural justice – Award set aside

4.46 In one of the rare cases, the High Court in *JVL Agro Industries Ltd v Agritrade International Pte Ltd*[43] set aside the arbitral award for breach of natural justice under s 24 of the IAA. The plaintiff, JVL Agro Industries Limited ("JVL"), manufactured edible oils in its factories in India. One of the raw materials it required at an uninterrupted rate of supply was palm oil. The defendant was Agritrade International Pte Ltd ("Agritrade"), a company in Singapore engaged in the trade of agricultural commodities that included palm oil. The parties entered into a series of contracts between March and August 2008 where JVL agreed to buy palm oil from Agritrade ("High Price Contracts"). In the second half of 2008, the market price of palm oil fell below the prices that JVL had committed to pay in the High Price Contracts. JVL negotiated with Agritrade a "price-averaging arrangement" to work out something to this effect – when Agritrade would be ready to ship cargo to JVL, the parties would carry out a price-averaging exercise where the parties would negotiate and agree on the quantity of the cargo to be shipped and the ratio in which that cargo would be deliverable under the High Price Contracts and under the Market Price Contracts, averaging down the overall unit price for the palm oil at which it had agreed to pay Agritrade. JVL then continued to enter into new contracts with Agritrade, but this time, at the prevailing market price ("Market Price Contracts").

43 [2016] 4 SLR 768.

4.47 In June 2010, the market price for palm oil had risen significantly when five Market Price Contracts had yet to be discharged by Agritrade ("disputed contracts"). The parties were unable to agree on the price to be set out in the fresh Market Price Contracts in order for the price-averaging arrangement to continue. Due to the standstill, JVL served a notice of default against Agritrade and took steps to mitigate its loss by buying its remaining palm oil requirements from the open market. JVL demanded damages to be paid by Argitrade for breach of the disputed contracts. Agritrade denied the claim arguing that it was JVL who was in repudiatory breach of the contracts that had been accepted by Agritrade, resulting in Agritrade terminating the disputed contracts.

4.48 JVL commenced arbitration against Agritrade, whose initial defence was that the price-averaging arrangement rendered each disputed contract void for uncertainty ("uncertainty defence"). In further written submissions, however, Agritrade advanced a new defence, that is, that Agritrade was not in breach because the price-averaging arrangement meant that its obligation to perform was not yet due ("prematurity defence"). Both defences, according to the tribunal, gave rise to a subsidiary issue: whether the price-averaging arrangement was within the scope of the parol evidence rule (or for Agritrade, the exceptions to the parol evidence rule such as it being a collateral contract). Under the parol evidence rule, unless one of a limited number of exceptions applies, a party to a contract which has been reduced into documentary form cannot rely on evidence which is extrinsic to the document to vary, contradict, add to, or subtract from the contract.[44] One of the recognised exceptions is the "collateral contract exception". All members of the tribunal agreed that the ultimate issue to be determined turned on whether the price-averaging arrangement was a "collateral contract". If yes, then the price-averaging arrangement would have been in law capable of varying the parties' performance obligation under the disputed contracts notwithstanding the parol evidence rule.[45]

4.49 The majority dismissed JVL's claim hinging their decision on their finding that the price-averaging arrangement did amount to a collateral contract and as such, Agritrade could not have been in breach of the disputed contracts. They also concluded it was JVL who repudiated the disputed contracts when it bought palm oil from third parties even though the parties had not yet applied the price-averaging arrangement to the disputed contracts. The minority arbitrator dissented, taking the view that the price-averaging arrangement was too uncertain to amount to a contract and, therefore, it could not be considered a

44 *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 at [38].
45 *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 at [108].

"collateral contract" for purposes of the collateral-contract exception to the parol evidence rule. JVL applied to set aside the award on the ground of breach of natural justice when it was unable to present its case or failure of the tribunal to grant it a fair hearing on the "collateral contract" exception.

4.50 The High Court set aside the award on the ground that the tribunal had dismissed JVL's claims based on the "collateral contract exception" which Agritrade had *not* chosen to advance as part of its defence. Art 18 of the MAL provides for "full opportunity to present its case", which essentially means "reasonable" opportunity encompassing both a positive (that is, for a party to establish its claim or defence and counterclaim) and a responsive (that is, for a party to respond to the case made by the other party's claim or defence and counterclaim) aspect.[46] JVL alleged it was denied that *responsive* aspect in connection with the "collateral contract" exception.

4.51 In determining whether a tribunal has indeed failed to accord fair hearing to party, a court must determine whether there is a connection between the chain of reasoning the tribunal has adopted in the award and the case which the parties themselves have chosen to advance. Coomaraswamy J summarised the approach in the following manner, *viz*, where:

> (a) "a particular chain of reasoning will be open to a tribunal if it arises from the party's express pleadings";[47]
>
> (b) "a particular chain of reasoning will also be open to a tribunal if it is raised, not expressly, but by reasonable implication in a party's pleadings";[48]
>
> (c) "a particular chain of reasoning will be open to a tribunal even if it features nowhere in a party's [actual notice] pleadings but [has been brought to] the opposing party's actual notice";[49] and
>
> (d) "a particular chain of reasoning will be open to a tribunal if the links in the chain flow reasonably from the

46 *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 at [146].

47 *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 at [150]; see also *AUF v AUG* [2016] 1 SLR 859.

48 *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 at [152]; see also *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [34] and [38].

49 *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 at [154]; see also *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98.

> arguments actually advanced by either party or are related to those arguments."[50]

His Honour found the tribunal's chain of reasoning on the "collateral contract" exception *not* falling within any of the categories mentioned. Agritrade did not advance, whether expressly or informally, the "collateral contract exception". It could not also be said that the "collateral contract exception" arose by reasonable implication from Agritrade's "uncertainty" or "prematurity" defence, as these defences implicitly rejected or were inconsistent with the "collateral contract exception". It follows, therefore, that the tribunal, by dismissing JVL's claims on the basis of an unpleaded defence, had denied JVL a reasonable opportunity to present its responsive case on a substantial point that was eventually considered dispositive of the arbitration.

4.52 It is interesting that the learned judge had, prior to making his decision, granted time for the parties to refer the matter to the arbitral tribunal to take steps to eliminate the grounds for setting aside pursuant to Art 34(4) of the MAL. The tribunal did receive further submissions from the parties on the issues. It was not suggested that the tribunal had not, during the resumed proceedings, given JVL the opportunity to be heard on the issue of the "collateral contract exception". The process contemplated in Art 34(4) of the MAL is not a remission for the tribunal to reconsider the case on the merits but to enable the tribunal to take steps to eliminate the ground for setting aside. As the ground alleged by JVL was that it was not given the opportunity to be heard on the issue of "collateral contract exception", it is curious that the court decided that the award still ought to be set aside without a finding that the tribunal at the resumed proceedings had failed to give JVL the opportunity to be heard on the issue. Curiously, the learned judge, in setting aside the award, said that he could not agree with the tribunal's decision in maintaining his prior view. In reaching his decision, the learned judge assiduously combed through the award, the transcripts, and written statements, and concluded that JVL was not given a fair hearing.

4.53 Another interesting aspect of this decision is the court's view of the parole evidence rule. While accepting that s 2(1) of the Evidence Act[51] has no application to arbitration proceedings, the court maintains that the "doctrine which forms a part of Singapore's substantive law of contract, the parol evidence rule applies to every contractual dispute which is resolved in accordance with Singapore law, whatever mode of

50 *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 at [156]; see also *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972.

51 Cap 97, 1997 Rev Ed.

dispute resolution is used".[52] If that be correct, Art 19 of the MAL, which gives express power to the tribunal to "determine the admissibility, relevance, materiality and weight of any evidence" will now be largely exhortatory.

52 *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 at [39].