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AQZ
v
ARA

[2015] SGHC 49

High Court — Originating Summons No 530 of 2014 and Summons No 3168 of 2014
Judith Prakash J
23 September; 26 November 2014

Arbitration — Award — Recourse against Award — Setting Aside

13 February 2015 Judgment reserved.

Judith Prakash J:

Introduction

1 This matter came before me as an application by the plaintiff to set aside a "Ruling and Partial Award on Preliminary Issues relating to Jurisdiction and Liability" dated 12 May 2014 ("the Award") made by an arbitral tribunal. It raises interesting questions as to how the court's power to hear questions of jurisdiction *de novo* should be exercised and on the application of the expanded definition of "in writing" in the current version of the International Arbitration Act (Cap 143A, Rev Ed 2002) (the "current IAA") to arbitration agreements that were concluded before the amendments came into force.

2 The plaintiff (whom I shall refer to as "the Supplier") is a mining and commodity trading company incorporated in Singapore and the defendant (whom I shall refer to as "the Buyer") is the Singapore subsidiary of an Indian trading and shipping conglomerate. In or around November 2009, the parties discussed the possibility of entering into two separate sale and purchase agreements under each of which the Supplier would sell and the Buyer would buy 50,000 metric tonnes (± 10%) of Indonesian non-coking coal. The negotiations were carried on concurrently. Although prior to these negotiations the parties had never dealt with each other, both had considerable experience in the Indonesian coal trade as they each owned or controlled coal mines and also engaged in substantial trading in coal with third parties.

3 By 7 December 2009, these discussions resulted in a contract for the shipment of 50,000 metric tonnes of coal in January 2010 ("the First Shipment") at a price of US$56/mt. The dispute between the parties was whether the discussions also resulted in a further contract for a second shipment of the same quantity of coal in January 2010 ("the Second Shipment"). The Buyer's position was that the Second Shipment was concluded and the Supplier subsequently breached the contract. The Supplier maintained that the contract for the Second Shipment never came into existence.

4 On 20 March 2013, the Buyer issued a Notice of Arbitration, purportedly under cl 16 of the alleged Second Shipment, to commence arbitration proceedings in the Singapore International Arbitration Centre ("SIAC") against the Supplier. In the Notice of Arbitration the Buyer's claim was quantified at US$706,750 plus interest and costs. The next day, the Buyer applied to the SIAC for the arbitration to be conducted under the Expedited

Procedure pursuant to r 5 of the Arbitration Rules of the SIAC (4th Ed, 1 July 2010) ("SIAC Rules 2010"). On 18 April 2013, the Supplier's solicitors wrote to the SIAC and challenged the existence of an arbitration agreement. The Supplier also objected to the Expedited Procedure.

5 By a letter dated 20 May 2013, the SIAC notified the parties that having considered their submissions on the suitability of Expedited Procedure, the President of the SIAC Court of Arbitration ("SIAC President") had decided to allow the Buyer's application. Thereafter, there was further exchange of correspondence between the parties and the SIAC. In the event, the parties agreed to proceed with a joint nomination of a sole arbitrator, but the Supplier made clear that it was proceeding with the arbitration "under protest with all of its rights reserved, including the right, *inter alia*, to challenge the effectiveness of the Arbitration Agreement, the applicability of the SIAC Rules 2010, the conduct of the Arbitration under the Expedited Procedure before a sole arbitrator and/or the Tribunal's own jurisdiction". On 8 July 2013, the SIAC President appointed an arbitrator ("the Arbitrator") to conduct the arbitration proceedings.

6 By a letter dated 10 September 2013, the Arbitrator made a procedural order to address the Supplier's plea of lack of jurisdiction. He ordered a preliminary hearing to resolve the issues of jurisdiction and liability.

7 The preliminary hearing was conducted from 16 to 18 October 2013. The Arbitrator issued the Award on 12 May 2014. In it, the Arbitrator found that the tribunal had jurisdiction and that the Supplier was liable to the Buyer for breach of contract.

8 Dissatisfied with the Arbitrator's ruling, the Supplier took out these proceedings (Originating Summons No 530 of 2014 ("OS 530")) on 11 June 2014 to have the Award reversed and/or wholly set aside. In response, the Buyer took out Summons No 3168 of 2014 ("Sum 3168") on 26 June 2014. I will say more about these applications later.

Further facts concerning the disputed Second Shipment

9 The parties accepted that by 8 December 2009 they had discussed and verbally agreed on the terms of the Second Shipment, albeit it was the Supplier's position that such agreement had not resulted in a binding contract. All the terms of the Second Shipment, except the period during which the coal was to be shipped, were to be identical to those in the First Shipment. For the Second Shipment, the agreed laycan (*ie*, the shipment period) was between 15 and 25 January 2010. It should be noted that later on 8 December itself the Supplier asked the Buyer to consider an increase in the agreed price by 50 cents to US$56.50/mt.

10 At all material times, the negotiations were carried on chiefly between two representatives of the parties. The Supplier's representative, whom I shall refer to as "KSR", was then stationed in Jakarta as the President Director of an Indonesian company related to the Supplier. KSR is now a director of the Supplier. The Buyer's representative, whom I shall refer to as "MM", was then the General Manager of the Buyer. He is now a director of the Buyer.

11 The First Shipment had probably been agreed between the parties on 4 December 2009 but, at the latest, by 7 December 2009. The written contract was signed on 9 December 2009 but dated 27 November 2009. Drafts of the proposed contract had been passing between the parties from 30 November

2009 onwards. The parties worked on a draft originally produced by the Buyer and although certain changes were made to it to reflect subsequent negotiations, cll 2 ("Term of Contract") and 16 ("Arbitration") remained the same throughout.

12 In relation to the Second Shipment, on 11 and 15 December 2009, the Buyer requested that certain changes be made to the specifications of the coal ("Changed Coal Specifications") to meet the requirements of Coal Pulse Pte Ltd ("Coal Pulse"), with whom it was negotiating for a sub-sale of the coal. In an e-mail dated 15 December 2009, the Supplier rejected the Changed Coal Specifications. Nevertheless, the Buyer continued to negotiate with Coal Pulse. The Arbitrator found that the Buyer subsequently concluded a contract with Coal Pulse on or about 14 December 2009 (the "Sub-sale Contract") for the sub-sale of the coal it was to purchase under the Second Shipment.

13 The parties had a dinner meeting in Jakarta on 16 December 2009 during which the Buyer endeavoured to persuade the Supplier to agree to the Changed Coal Specifications. The Buyer's position was that it had been able to obtain the Supplier's concurrence at this meeting. However, the Supplier maintained that it did not agree to the Changed Coal Specifications because they involved material changes to the quality of the coal that it was obliged to supply which raised the possibility of the Supplier having to obtain the coal from a different source.

14 On 18 December 2009, the Buyer sent the Supplier an e-mail, to which was attached a draft contract which had been amended to reflect the increase in price to US$56.50/mt and to incorporate the Changed Coal Specifications. The e-mail read:

> Dear [KSR],
>
> Please go through the 2nd contract as per attached.
>
> I have made certain changes as per what we had discussed during our dinner on Wednesday night in Jakarta and previous emails.
>
> Kindly approve and ask your Singapore office to sign 2 originals and have them sent to our office to sign and return 1 copy.
>
> …

15 There was no response from the Supplier, and on 22 December 2009, the Buyer sent another e-mail asking the Supplier to go through the Second Shipment and have it signed and returned so that the "paper work formality" could be completed. On 23 December 2009, the Supplier informed the Buyer by e-mail that it "shall not be able to do the 2nd shipment" for various reasons including "a sudden shortage of high GCV coal supply in Indonesia due to excessive rains, huge demand from China and some of [its] suppliers facing forestry issues in Central Kalimantan". The Buyer responded the same day and said:

> My dear [KSR],
>
> I heard that Deepak called and e-mailed [MM] and wanted to cancel the 2nd shipment due to some minor issues in the contract, which in fact we had already agreed upon during our dinner in Jakarta on 16th December.
>
> As discussed with you during the dinner, please ensure that the 2nd shipment is done in time. …
>
> As also discussed, market goes up and down and I remember your promise that whatever happens, you will honour your commitment.
>
> …

16 Thereafter, there were telephone discussions between KSR and MM. The Buyer contended that on 23 December 2009 the Supplier agreed to

perform the Second Shipment with a later shipment period (1 to 10 February 2010) and with some but not all of the Changed Coal Specifications accepted. The Buyer sent the Supplier a revised contract incorporating these changes for execution the same day. The Supplier did not sign the contract.

17 On 5 January 2010, the Buyer sent an e-mail to the Supplier asking for confirmation of the laycan for the shipment of the coal under the Second Shipment. The Supplier's employee replied, "I suppose it was already agreed that the tentative laycan for second shipment would be 1–10 Feb10".

18 On 11 January 2010, Coal Pulse nominated the vessel, *Medi Lisbon*, for the shipment of the coal under the Sub-sale Contract. After an unsuccessful attempt to persuade Coal Pulse to agree to a later laycan date to assist the Supplier, the Buyer insisted that the Supplier ship the coal during the original laycan period. On 15 January 2010, the Buyer nominated the *Medi Lisbon* as the vessel to which delivery of coal under the Second Shipment should be made. The Supplier then made it known that there was no way it could perform the Second Shipment. The Buyer insisted that the Supplier had to perform unless there was an event of *force majeure* and asked for supporting documents if that indeed was the Supplier's position. The Supplier responded by sending over some documents. The documents referred to large waves in South Kalimantan waters and a prohibition issued by the administrator of the Kotabaru port which forbade certain types of vessels from sailing from that port from 12 to 20 January 2010. In a separate e-mail, the Supplier stated:

> … please note we don't have any contract as yet for second vessel, which we are discussing, so let's respect each other's understanding. But I sure we cannot do any shipments for the month of February 2010 as the required grade of cargo is not available because of excessive rains, flooding at Mines and their cascading effects.

The Buyer responded:

> Thank you for your supporting documents. We have informed our buyer accordingly.
>
> Please note we truly appreciate your efforts in performing the first shipment.
>
> We also understand your position for the second shipment but please also understand that we have to answer to our buyer as well.

The Supplier replied, again reiterating that the shortage was caused by circumstances beyond its control.

19 Coal Pulse responded to the Buyer on 16 January 2010 asserting that the circumstances mentioned in the supporting documents from the Supplier that were forwarded to it did not qualify as an event of *force majeure*. On 21 January 2010, Coal Pulse's lawyers wrote to the Buyer rejecting the suggestion that there was an event of *force majeure* and terminating the Sub-sale Contract. The Buyer forwarded the termination notice to the Supplier.

20 The Buyer and the Supplier held another meeting in Jakarta on 2 February 2010. The Buyer's position was that it was clear to everyone present at this meeting that the Second Shipment was terminated and the only outstanding matter was the Buyer's claim against the Supplier for compensation. On 3 February 2010, the Buyer sent the Supplier an e-mail referencing their meeting the previous day. It stated that two options were available: the first was an amicable settlement and the second was for the Buyer to proceed with arbitration in which event all legal costs and expenses and all claims by Coal Plus would be to account of the Supplier.

21 The parties were not able to settle the matter and the Buyer then sent out its Notice of Arbitration.

The arbitration proceedings

Course of the proceedings

22 It should be noted that the SIAC had informed the parties on 20 May 2013 that since the SIAC President had determined that the arbitration was to be conducted in accordance with the Expedited Procedure, the following procedures were to apply to the arbitration:

(a) The tribunal shall hold a hearing for the examination of all witnesses and expert witnesses as well as for any argument.

(b) The award shall be made within six months from the date that the tribunal is constituted unless an extension of time is granted.

(c) The tribunal shall state the reasons upon which the award is based in summary form.

23 Following a first procedural meeting in July 2013, the parties were given directions on filing and exchange of pleadings. After a second procedural meeting, the Arbitrator issued his procedural order on 10 September 2013 fixing the date of the preliminary hearing at which the preliminary issues would be addressed and determined. Subsequently, the parties submitted their documents including two witness statements and one expert report on behalf of the Buyer and one witness statement and an expert report on behalf of the Supplier.

24 At the preliminary hearing, the parties' witnesses and experts gave evidence and were cross-examined. Thereafter, written closing submissions were submitted, followed by a final hearing on 22 November 2013 at which both parties presented their oral closing submissions. At the conclusion of the hearing on 22 November 2013, after consulting with both parties, the Arbitrator declared that proceedings had been brought to a close in respect of the questions of jurisdiction and liability. Subsequently the parties agreed that the ruling and award on jurisdiction and liability could not be given within the original deadline of six months and that the tribunal should take such time as was necessary to deliver the same.

Parties' arguments before the tribunal on whether the Second Shipment was validly concluded

25 The Buyer argued that the Second Shipment which was concluded on 8 December 2009 was verbally varied as a result of the telephone discussions on 23 December 2009. Alternatively, it argued that the Second Shipment was concluded on 23 December 2009 and its terms were those stated in the written contract sent to the Supplier for execution on the same day. It argued that the Supplier had repudiated the Second Shipment by its failure to perform. It claimed damages in the sum of US$852,000 being the difference between the price of the coal under the Second Shipment and the prevailing market price at the material time.

26 The Supplier argued that the Second Shipment was not concluded on 8 December 2009, notwithstanding the parties' verbal agreement on the terms thereof because no contract was signed. It maintained that it was normal business practice in the Indonesian coal trade that there would be no binding contract until the contracting parties had signed a written contract. It claimed

that the parties had negotiated on this basis and that this was reflected in cl 2 of the disputed Second Shipment. It also argued that the written contracts that the Buyer sent to it for signature on 18 and 23 December 2009 did not reflect the terms that were verbally agreed on 8 December 2009, but instead incorporated the Changed Coal Specifications which it had not agreed to. It asserted that the Buyer's attempts to impose new terms amounted to a rejection of any earlier offer and/or a new counter-offer from the Buyer. It also argued that even if the Second Shipment was validly concluded on 8 December 2009, the Buyer must be taken to have "waived and/or abandoned and/or threw up and/or is estopped from enforcing its rights" because of its subsequent conduct (*ie*, the fact that its Sub-sale Contract with Coal Pulse was on different terms).

Parties' arguments on whether there was a valid and binding arbitration agreement between the parties

27 The Supplier's position was that even if the Second Shipment had been concluded, it was an oral agreement only and as such could not constitute an arbitration agreement as the same had to be in writing. The Supplier's argument that there was no valid and binding arbitration agreement was premised on its assertion that this issue had to be determined based on the law as it stood in December 2009 which was when the Second Shipment took effect and was before the changes enacted by the International Arbitration (Amendment) Act 2012 (No 12 of 2012) ("Amendment Act 2012") came into force. These changes were only effective on 1 June 2012. The Buyer, in response, relied on s 12(1) of the Amendment Act 2012 which provided that the Amendment Act 2012 "shall apply to arbitral proceedings commenced on or after the date of commencement of this Act".

The Arbitrator's decision

28 The Arbitrator noted that the issue of whether the Second Shipment was validly concluded between the parties turned on the following sub-issues:

(a) Had the parties verbally agreed to the terms of the Second Shipment on 8 December 2009?

(b) Was it normal business practice in the Indonesian coal trade that there would be no binding contract until the contracting parties signed a written contract?

(c) Was cl 2 a "subject to contract" provision and were the negotiations between the parties on the Second Shipment carried out on a "subject to contract" basis?

(d) Did the parties verbally agree to vary the terms of the Second Shipment before or on 23 December 2009?

(e) Alternatively, between 8 and 23 December 2009, did the parties agree to vary the terms of the Second Shipment?

(f) Did the Buyer's request for Changed Coal Specifications amount to a rejection of any earlier offer and/or a new counter-offer from the Buyer?

29 On the issue of whether the Second Shipment was validly concluded, the Arbitrator held:

(a) The parties had verbally agreed to the terms of the Second Shipment on 8 December 2009. Other than the price per metric tonne of coal and the laycan period, all other terms were to be as per the First Shipment.

(b) It was not part of normal business practice in the Indonesian coal trade that there would be no binding contract until the contracting parties signed a written contract.

(c) Clause 2 was not a "subject to contract" provision and the negotiations between the parties on the Second Shipment were not carried out on a "subject to contract" basis.

(d) The parties verbally agreed to vary the terms of the Second Shipment to incorporate the Changed Coal Specifications during the 16 December 2009 dinner meeting in Jakarta and/or during the telephone conversations between the parties on 23 December 2009 and the terms were those set out in the written contract presented to the Supplier for signature on the same day.

(e) There had not been any rejection of any earlier contractual offer and/or a new counter-offer by the Buyer.

30 The Arbitrator also concluded that there was a valid and binding arbitration agreement between the parties. He rejected the Supplier's argument that this issue should be determined based on the law as it stood in December 2009. He stated that s 12 of the Amendment Act 2012 was dispositive of the matter and that s 2A of the current IAA would govern the issue of whether there was a valid and binding arbitration agreement. He further concluded that there was a valid and binding arbitration agreement between the parties that conformed to the requirements of ss 2A(3) and 2A(4) of the current IAA.

31 The Arbitrator ruled that the SIAC Rules 2010 applied to the arbitral proceedings and that the proceedings could be conducted under the Expedited Procedure contained in r 5 of the SIAC Rules 2010 before a sole arbitrator.

32 Finally, he held that the Supplier was liable to the Buyer for its claims in the arbitration.

The present proceedings

33 The Supplier took out OS 530 on 11 June 2014 to have the Award reversed and/or wholly set aside on grounds that the Arbitrator lacked jurisdiction to hear the dispute. It claimed, among other things, that there was no valid and binding arbitration agreement between the parties. The Supplier based its challenge on two grounds:

(a) That the Award should be reversed and/or wholly set aside under s 10(3) of the IAA and/or Art 16(3) of the UNCITRAL Model Law on International Commercial Arbitration set out in the First Schedule of the IAA ("Model Law") ("First Prayer"). This was the original jurisdictional challenge.

(b) Alternatively, that the Award should be wholly set aside under s 3(1) of the IAA read with Art 34(2)(*a*)(iv) of the Model Law ("Second Prayer"). The Second Prayer was the challenge to the Expedited Procedure and the appointment of one arbitrator instead of three.

34 In the event that the court found that there was a valid arbitration agreement, then the Supplier sought an order that the dispute be reheard before

three arbitrators and for the arbitral proceedings to be stayed pending the outcome of these proceedings.

35 The Second Prayer was amended some months later after the parties' first appearance before me. Originally the Supplier's challenge to the Award on jurisdictional grounds was based solely on the provisions of s 10(3) of the IAA and Art 16(3) of the Model Law. When faced with the original application, the Buyer took the position that these provisions could not be used to challenge the Arbitrator's jurisdiction at this stage and therefore took out Sum 3168 by which it sought to have the Supplier's First Prayer "heard and determined" before the other prayers in OS 530.

36 In the course of the first hearing of OS 530 on 23 September 2014, I granted the Supplier leave to amend the Second Prayer to include a challenge against the Award under Art 34(2)(*a*)(i) of the Model Law as well. This meant that the Second Prayer also contained a jurisdictional challenge. The amendment was duly filed.

Scope of *de novo* hearing in an application to set aside an arbitral award on grounds of lack of jurisdiction

37 This is an issue that was brought up in the course of the first hearing before me.

38 The Supplier argued that in an application to set aside an arbitral award on the ground that the arbitral tribunal lacked jurisdiction to hear the dispute, a court was required to carry out a *de novo* hearing of the matter. According to the Supplier, this meant the court had to conduct "a complete retrial and/or rehearing" of the question of whether the arbitral tribunal had jurisdiction.

Hence, the court ought to hear oral evidence from the parties' witnesses before deciding such applications. This was so regardless of whether the application was brought pursuant to s 10(3) of the IAA and/or Art 16(3) of the Model Law; or s 3(1) of the IAA read with the relevant limb of Art 34(2)(*a*) of the Model Law. The Supplier relied on *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and another appeal* [2014] 1 SLR 372 ("*First Media*"), *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763 ("*Dallah*"), and *Azov Shipping Co v Baltic Shipping Co* [1999] 1 Lloyd's Rep 68 ("*Azov*") to support its contention.

39 After some argument however, the Supplier withdrew this submission and was content for its challenge in this court to proceed on affidavit evidence alone. Notwithstanding this withdrawal, given that the parties had made submissions on the scope of *de novo* hearing in the context of an application to set aside an arbitral award for lack of jurisdiction, and because guidance on this matter will be useful for future cases, I give my brief views on this issue. I will begin by discussing the cases that the Supplier relied on.

First Media

40 In *First Media*, a subscription and shareholders' agreement ("SSA") containing the terms of a proposed joint venture ("JV") was concluded between companies belonging to the Lippo Group on the one hand, and companies belonging to the Astro Group on the other ("the Astro Contractors"). The vehicle for the JV was to be PT Direct Vision ("DV"). The SSA contained an arbitration agreement. It also contained a number of conditions precedent upon which the parties' respective obligations in the JV were predicated. Even before the conditions precedent were fulfilled, funds

and services were provided by three other Astro companies (the "Astro Suppliers") to DV to build up the latter's business. The Astro Suppliers were not parties to the SSA.

41 The conditions precedent were not fulfilled. A dispute then arose over whether the Astro Suppliers had separately agreed that they would continue funding and providing services to DV. A Lippo Group party to the SSA, commenced court proceedings in Indonesia against, amongst others, the Astro Suppliers. The Astro Contractors viewed these Indonesian proceedings as a breach of the arbitration agreement in the SSA. They commenced arbitration proceedings against the Lippo parties to the SSA, namely: PT Ayunda Prima Mitra ("Ayunda"), DV, and PT First Media TBK ("FM"). They then applied for the Astro Suppliers to be joined as co-claimants in the arbitration proceedings and were granted leave to do so by the tribunal. The tribunal subsequently issued four other awards on the merits of the dispute between the parties pursuant to which the respondents were ordered to pay substantial sums to the Astro Suppliers. All the Astro parties then applied to the High Court for leave to enforce the awards rendered by the tribunal. Leave was granted and two orders ("Enforcement Orders") were purportedly served on Ayunda, DV and FM. FM applied to set aside the Enforcement Orders on the ground, *inter alia*, that there was no arbitration agreement between FM and the Astro Suppliers.

42 The Court of Appeal accepted that an objection to the enforcement of an arbitration award on the ground that the alleged arbitration agreement was never concluded between the relevant parties was capable of being subsumed under Art 36(1)(*a*)(i) of the Model Law. It then set out the standard of review that the court would apply when reviewing the tribunal's decision on whether

an arbitration agreement had been formed between the relevant parties. It stated at [162]–[163]:

> 162 … Mr Landau submitted that this court can and should review the Tribunal's decision *de novo*. He relies in particular on the authority of [*Dallah*], and emphasised the following passage from Lord Mance JSC's decision (at [30]):
>
> > The nature of the present exercise, is in my opinion, also unaffected where an arbitral tribunal has either assumed or, after full deliberation, concluded that it had jurisdiction. There is in law no distinction between these situations. The tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all. This is so however full was the evidence before it and however carefully deliberated was its conclusion. …
>
> 163 The extracted passage represents the leading statement on the standard of curial review to be applied under the New York Convention, and there is no reason in principle for the position under the Model Law to be any different. Significantly, the jurisprudence of the Singapore courts has also evinced the exercise of *de novo* judicial review (see [*Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)* [2010] 3 SLR 661] at [38]–[39] and *Galsworthy Ltd of the Republic of Liberia v Glory Wealth Shipping Pte Ltd* [2011] 1 SLR 727 at [8]). We affirm these local authorities. *In particular, we also agree with Lord Mance JSC that the tribunal's own view of its jurisdiction has no legal or evidential value before a court that has to determine that question.*
>
> [emphasis added]

Dallah

43 *Dallah* involved an agreement between Dallah Real Estate and Tourism Holding Co ("Dallah") and Awami Hajj Trust ("the Trust") under which Dallah would purchase land in Saudi Arabia and construct housing facilities which the Government of Pakistan ("the Government") would lease

for the use of Pakistani pilgrims. The Trust was established by means of an ordinance promulgated by the President of Pakistan while Ms Benazir Bhutto's government was in power. The agreement also provided that the Trust shall pay Dallah an advance of US$100m subject to Dallah arranging a US$100m financing facility for the Trust guaranteed by the Government and counter guaranteed by a Bahraini bank. The agreement contained an arbitration clause. The Government was not expressed to be a party to the agreement, nor did it sign the same in any capacity. When a change in Pakistan's ruling party took place, the new government did not take the legal action necessary to ensure the existence of the Trust and it ceased to exist.

44 Sometime after the Trust had ceased to exist as a legal entity, Dallah invoked ICC arbitration against the Government. Throughout the arbitration, the Government denied being party to any arbitration agreement, maintained a jurisdictional reservation, and did nothing to submit to the jurisdiction of the arbitral tribunal or waive its sovereign immunity. The arbitral tribunal found that it had jurisdiction in its first partial award on jurisdiction. In its final award the tribunal ordered the Government to pay Dallah damages for breach of the agreement, plus costs and fees. Dallah obtained leave to enforce the final award in England on a without notice application. The Government then applied to set aside the order granting leave pursuant to s 103(2) of the Arbitration Act 1996 (c 23) ("1996 Arbitration Act") and Article V(1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").

45 The UK Supreme Court considered the "nature of the exercise which an enforcing court must undertake when deciding whether an arbitration agreement" existed under the law of the country where the award was made

and "the relevance of the fact that the arbitral tribunal had itself ruled on the issue of its own jurisdiction". Lord Mance JSC's comments quoted by the Court of Appeal in *First Media* (see above at [42]) were made in connection with this issue. It is also worth mentioning that although Lord Mance was of the view that an arbitral tribunal's views of its jurisdiction had no "legal or evidential value" he proceeded to state (at [31]):

> This is not to say that a court seised of an issue under article V(1)(a) and section 103(2)(b) will not examine, both carefully and with interest, the reasoning and conclusion of an arbitral tribunal which has undertaken a similar examination. Courts welcome useful assistance. …

46 Lord Collins of Mapesbury JSC in considering the same issue stated (at [96]):

> The consistent practice of the courts in England has been that they will examine or re-examine for themselves the jurisdiction of arbitrators. This can arise in a variety of contexts, including a challenge to the tribunal's jurisdiction under section 67 of the [1996 Arbitration Act], or in an application to stay judicial proceedings on the ground that the parties have agreed to arbitrate. Thus in *Azov Shipping Co v Baltic Shipping Co* [1999] 1 Lloyd's Rep 68 Rix J decided that where there was a substantial issue of fact as to whether a party had entered into an arbitration agreement, then even if there had already been a full hearing before the arbitrator the court, on a challenge under section 67, should not be in a worse position than the arbitrator for the purpose of determining the challenge. …

Azov

47 *Azov* concerned an agreement between a number of former Soviet shipping companies to deal with the consequences flowing from the split up of the U.S.S.R. The agreement contained an arbitration clause. Baltic Shipping Co commenced arbitration against Azov Shipping Co ("Azov"). Azov denied being party to the agreement. The arbitrator considered the issue of whether

Azov was a party to the agreement as a preliminary point. Azov participated in the preliminary hearing while maintaining full reservation on the jurisdiction point. The arbitrator had to consider a number of questions of fact and foreign law to determine the preliminary point. Over a three-day hearing, witnesses of fact and expert witnesses on foreign law gave evidence before him and were orally cross-examined. He came to the conclusion that Azov was party to the agreement and that he did have jurisdiction to hear the dispute. On his own admission, he reached this conclusion with "some uncertainty". One reason for his conclusion was that Azov's expert witness was somewhat evasive and partisan and he found difficulty in deciding what the applicable foreign law principles were.

48 Azov challenged the award under s 67(1)(a) of 1996 Arbitration Act. Mr Justice Rix framed the issue that was before the court in the following terms (at 69):

> …where a full scale hearing on jurisdiction has been heard before the arbitrator…and there is a challenge to his award under s. 67, can the challenger seek an order from the Court as to directions (for the purpose of the relevant arbitration application) which enable him to present his case and challenge the opposing party's case on the question of jurisdiction with the full panoply of oral evidence and cross-examination, so that, in effect, the challenge becomes a complete rehearing of all that has already occurred before the arbitrator?

He referred to O 73 r 14 of the English Rules of Court which granted the court the power to order oral evidence in an arbitration application if it considered that there was or might be "a dispute as to fact and that the just, expeditious and economical disposal of the application" could be best secured by allowing oral evidence. He was of the view that the case before him was an appropriate one to allow oral evidence and cross-examination. He stated (at 70–71):

> … Where … there are substantial issues of fact as to whether a party has made the relevant agreement in the first place, then it seems to me that, even if there has already been a full hearing before the arbitrators the Court, upon a challenge under s. 67 should not be placed in a worse position than the arbitrator for the purpose of determining that challenge. On the particular facts of this case, this seems to me to be a fortiori the position where the arbitrator who did have the benefit of oral evidence has said that he has come to his final decision as to whether Azov is a party to the agreement with uncertainty. …
>
> … [T]he Court may well be at a disadvantage in deciding issues of foreign law in the absence of oral evidence and cross-examination of the expert lawyers. Moreover, given that the finding of [the arbitrator] as to the partisanship of Azov's expert cannot in any way bind the Court, it is, *I think, desirable, where there may well be submissions before the Court as to the helpfulness of that expert's evidence, that the Court should have the advantage of hearing his oral evidence for itself.*
>
> … Undoubtedly costs will be increased by an oral hearing and that hearing will take somewhat longer, perhaps some 50 per cent. longer, than it would have taken without oral evidence. … Nevertheless, and although there may be some prejudice to the expeditious and economical disposal of the application by permitting oral evidence, it seems to me that the justice of the matter requires that I accede Azov's application. Ultimately a question of justice, where it conflicts with a modest prejudice to expedition or increase in cost, must be given greater weight. …
>
> [emphasis added]

My views

49 From the abovementioned authorities, there can be no doubt that the court will undertake a *de novo* hearing of the arbitral tribunal's decision on its jurisdiction in an application to set aside an arbitral award on the ground of lack of jurisdiction to hear the dispute. But that does not mean that oral evidence and cross-examination will be allowed in every application, in effect, turning every challenge into a complete rehearing of all that had occurred before the arbitral tribunal. As I stated in *Insigma Technology Co Ltd v Alstom*

Technology Ltd [2009] 1 SLR(R) 23 at [21], witnesses who had already been heard by the tribunal will only be called back when necessary.

50 In Singapore, an application to set aside the arbitral award is made by Originating Summons. The procedure to be followed is found in O 69A r 2 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") which provides:

> **2.—**(1) Every application to a Judge —
>
> …
>
> (*c*) to appeal against the ruling of the arbitral tribunal under section 10 of the Act or Article 16(3) of the Model Law; or
>
> (*d*) to set aside an award under section 24 of the Act or Article 34(2) of the Model Law,
>
> must be made by originating summons.
>
> …
>
> (4A) The affidavit in support must —
>
> (*a*) state the grounds in support of the application;
>
> (*b*) have exhibited to it a copy of the arbitration agreement or any record of the content of the arbitration agreement, the award and any other document relied on by the plaintiff;
>
> (*c*) set out any evidence relied on by the plaintiff; and
>
> (*d*) be served with the originating summons.
>
> …
>
> (4C) Within 14 days after being served with the originating summons, the defendant, if he wishes to oppose the application, must file an affidavit stating the grounds on which he opposes the application.

51 Order 28 r 4 of the ROC that deals with the conduct of proceedings started by Originating Summons empowers the court to make certain directions for the purposes of securing the "just, expeditious and economical

disposal" of the matter. One such direction is to permit oral evidence and cross-examination. It provides:

> **Directions, etc., by Court (O. 28, r. 4)**
>
> **4.—**(1) …
>
> (2) Unless on the first hearing of an originating summons the Court disposes of the originating summons altogether or orders the cause or matter begun by it to be transferred to a District Court or makes an order under Rule 8, the Court shall give such directions as to the further conduct of the proceedings as it thinks best adapted to secure the just, expeditious and economical disposal thereof.
>
> (3) Without prejudice to the generality of paragraph (2), the Court shall, at as early a stage of the proceedings on the originating summons as appears to it to be practicable, consider whether there is or may be a dispute as to fact and whether the just, expeditious and economical disposal of the proceedings can accordingly best be secured by hearing the originating summons on oral evidence or mainly on oral evidence and, if it thinks fit, may order that no further evidence shall be filed and that the originating summons shall be heard on oral evidence or partly on oral evidence and partly on affidavit evidence, with or without cross-examination of any of the deponents, as it may direct.
>
> (4) Without prejudice to the generality of paragraph (2), and subject to paragraph (3), the Court may give directions as to the filing of evidence and as to the attendance of deponents for cross-examination and any other directions.

52 In my view, O 69A r 2 does not envisage a *de novo* rehearing of all the evidence in every case of an application to set aside an award as the default rule. Rather it contemplates that generally the matter will be resolved by way of affidavit evidence. The plaintiff is expected to include in the affidavit he files in support of his application, among other things, the award and "any evidence" he seeks to rely on. The defendant is then entitled to file an affidavit stating the grounds and evidence on which he opposes the application. Thus, it is likely that in most cases the court would have before it, in addition to the arbitral tribunal's award, material such as the official transcripts of the

proceedings before the arbitral tribunal (if there are any) and the documents the parties relied on at the arbitration. Should the court have such a wide array of material before it, I can see no reason why, in most cases, it would be in any worse a position than the arbitral tribunal to make findings of fact and/or law and reach a conclusion as to the tribunal's jurisdiction. This would especially be so where electronically recorded verbatim transcripts of the proceedings before the arbitral tribunal are available. As was recently reiterated by the Court of Appeal in *Sandz Solutions (Singapore) Pte Ltd v Strategic Worldwide Assets Ltd* [2014] 3 SLR 562 ("*Sandz Solutions*") at [40] "improvements to the record, such as verbatim transcripts that are electronically recorded" have shrunk "some of the previously exclusive advantages of triers of fact". Moreover, the need to rehear the evidence is further reduced due to the Court of Appeal's caution that witness demeanour is often inconclusive and ought not to be relied upon exclusively to make findings of fact: see *Sandz Solutions* [42]–[46].

53 However, pursuant to O 28 r 4(3), the court may allow oral evidence and/or cross-examination when it considers (a) that there is or may be a dispute as to fact; *and* (b) that to do so would secure the "just, expeditious and economical" disposal of the application. In this respect, if a party considers that the just way to deal with the application is for the oral evidence to be re-taken, that party should at an early stage and preferably at the time he files the application, if he is the applicant, file the affidavits of evidence of the witnesses he intends to call and a further application to have these witnesses and the witnesses for the other side heard and cross-examined in court. This was not done in the present case. KSR filed a lengthy affidavit in support of OS 530 in which he set out the course of the arbitration proceedings and gave a description of the dispute. Attached to the affidavit were copies of the

transcripts of all the hearings before the tribunal, the award and all the documents and correspondence produced to and by the tribunal. Although KSR was a witness at the arbitration hearing, his affidavit did not contain an account of all the facts that led up to the making of the Second Shipment and the discussions between the parties regarding the Changed Coal Specifications. It was far from an affidavit of evidence-in-chief such as one would expect to be produced when witnesses are to be called and cross-examined. As a result, the affidavits which the Buyer filed in reply to OS 530 were not affidavits of evidence either. When the matter came on for hearing before me, neither party was really in a position to proceed with calling witnesses and cross-examining them. For this purpose further orders would have had to have been made. The Supplier had not applied for these orders prior to the hearing.

54 If, on the appropriate application, the court has to decide whether to allow oral evidence and cross-examination, it should be mindful that parties would have already examined the witnesses fully once before the arbitral tribunal. Whilst the view of the arbitrator is of no legal or evidential value to the court, this does not mean that the court cannot assess and rely on the evidence that was given before the tribunal. It cannot be gainsaid that a court is fully competent to sift through transcripts of oral evidence and the documentary evidence produced before a lower court or a tribunal and thereafter make findings of fact on such evidence notwithstanding that the court was not the original trier of facts. There must be a reason beyond the existence of factual disputes to allow oral examination and cross-examination.

55 I decline to accept the suggestion in *Azov* that the existence of substantial disputes of fact as to whether a party has made the relevant

arbitration agreement is alone a sufficient reason to allow oral evidence and/or cross-examination. In any event, the court in *Azov* did not decide to rehear the evidence purely on the fact that there were substantial factual disputes. The court also appears to have been influenced by, among other things, the fact that the arbitrator had himself expressed uncertainty about his conclusion that Azov was party to the arbitration agreement and the fact that the dispute raised issues of foreign law. The court was of the view that it would benefit from hearing oral evidence and cross-examination of expert witnesses to decide those issues of foreign law.

56 In a subsequent case, *Astra S.A. v Sphere Drake* [2000] 2 Lloyd's Rep 550 at 551, *Azov* was applied and witnesses were selectively recalled to give oral evidence. But in that case too, the need to recall the witnesses appears to have been necessitated by the unique circumstances involved. The court observed that there were "awkward and recondite issues" involving Romanian law. Specifically, the court had to consider the effect of a Romanian decree dissolving a state owned enterprise and whether a private company that was established in its place was bound by a reinsurance contract containing an arbitration agreement which the state owned enterprise had entered into.

57 Additionally, the statement in *First Media* that the "tribunal's own view of its jurisdiction has no legal or evidential value before a Court that has to determine that question" does not mean that all that transpired before the Tribunal should be disregarded, necessitating a full re-hearing of all the evidence. I am of the view that it simply means that the court is at liberty to consider the material before it, unfettered by any principle limiting its fact-finding abilities.

58 This is in line with *Electrosteel Castings Ltd v Scan-Trans Shipping & Chartering Sdn Bhd* [2003] 1 Lloyd's Rep 190 (*Electrosteel*) at [22] where the English court held that it would carry out a "re-hearing rather than simply a review" when an arbitral award is challenged for lack of jurisdiction under s 67 the 1996 Arbitration Act. It explained that "[t]he question for the Court is … not whether an arbitrator was entitled to reach the decision to which he came but whether he was correct to do so". The suggestion appears to be that a rehearing does not entail a *de novo* rehearing of all the evidence. Rather, in a rehearing, the court considers the correctness of the decision, unfettered by any principle which would limit its discretion which would apply when it is reviewing a decision of a lower court or tribunal.

59 Moreover, in *Electrosteel*, the court also considered whether evidence on rehearing should be confined to that adduced before the arbitrator. The court came to the conclusion that parties were free to adduce new evidence because there was no provision restricting the introduction of additional evidence on rehearing. However, it cautioned that parties should not:

> … seek two evidential bites of the cherry in disputes as to the jurisdiction of arbitrators, not least because: (1) evidence introduced late in the day may well attract a degree of scepticism and (2) the Court has ample power to address such matters when dealing with questions of costs. …

I would agree with this proposition as well. There is nothing in O 69A r 2(4A)(*c*) which restricts parties from adducing new material that was not before the arbitrator. Parties can adduce new evidence in the affidavits they file in the Originating Summons and if there is a need, the court may order the deponents to appear and be cross-examined on the new evidence.

60 I note that in the present case there was no attempt by the Supplier to rely in the court proceedings on any evidence that had not been produced before the tribunal. Further, all questions of law considered by the tribunal were questions of Singapore law involving the interpretation of the current IAA and the effect of the 2012 Amendment Act and the applicability of the SIAC Rules 2010 to the arbitration agreement. These are all questions which a Singapore court is competent to adjudicate upon without the assistance of expert evidence.

The substantive issues before me

61 I now turn to consider the substantive issues raised by the application. These are:

(a) Whether, in view of the fact that the Arbitrator's decision to hear the dispute is contained in an award which also deals with the merits of the dispute, the Supplier can apply for relief under s 10(3) of the IAA and Art 16(3) of the Model Law.

(b) Whether the Arbitrator's decision on jurisdiction can be impeached under Art 34(2)(*a*)(i) of the Model Law in that there was no valid arbitration agreement.

(c) Whether the Award can be set aside under Art 34(2)(*a*)(iv) in that the composition of the arbitral tribunal (*ie*, the appointment of a sole arbitrator instead of three arbitrators) or the arbitral procedure (*ie*, the Expedited Procedure) was not in accordance with the agreement of the parties.

The applicability of s 10(3) of the IAA and Art 16 of the Model Law

62 The provisions that are relevant to this issue are set out here:

> **Appeal on ruling of jurisdiction**
>
> **10.—**(1) This section shall have effect notwithstanding Article 16(3) of the Model Law.
>
> (2) An arbitral tribunal may rule on a plea that it has no jurisdiction at any stage of the arbitral proceedings.
>
> (3) If the arbitral tribunal rules —
>
> (*a*) on a plea as a preliminary question that it has jurisdiction; or
>
> (*b*) on a plea at any stage of the arbitral proceedings that it has no jurisdiction,
>
> any party may, within 30 days after having received notice of that ruling, apply to the High Court to decide the matter.
>
> (4) An appeal from the decision of the High Court made under Article 16(3) of the Model Law or this section shall lie to the Court of Appeal only with the leave of the High Court.
>
> (5) There shall be no appeal against a refusal for grant of leave of the High Court.
>
> …
>
> ***Article 16. Competence of arbitral tribunal to rule on its jurisdiction***
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
>
> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its

> authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
>
> (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this Article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in Article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

The parties' arguments

63 The Supplier argues that it is entitled to the relief under s 10(3) of the IAA and/or Art 16(3) of the Model Law notwithstanding the fact that the Arbitrator's decision on his jurisdiction to hear the dispute is contained in an award which also deals with the merits of the dispute. The Supplier considers that the Arbitrator's declaration on 22 November 2013, after consulting with both parties, that proceedings had been brought to a close in respect of the questions of jurisdiction and liability makes no difference to its right to rely on those provisions. It makes the following arguments in support:

(a) There is nothing in either s 10(3) of the IAA or Art 16(3) of the Model Law which restricts the availability of relief under those provisions to instances where an arbitral tribunal's preliminary ruling deals *only* with the issue of its jurisdiction. All that is required is that there should be a decision on jurisdiction in a preliminary ruling and it does not matter if that decision is contained in an award which also deals with some of the merits of the dispute.

(b) It was the Buyer who requested the arbitration hearing to be split into two tranches and proposed that issues relating to jurisdiction and liability be considered together first because they were intertwined and for the quantum of damages to be separately decided later if necessary. The Arbitrator split the hearing into two tranches with the understanding that the Supplier could challenge his ruling on jurisdiction, if necessary, before the arbitration proceeded.

64 The Buyer argues that as a matter of law, relief under s 10(3) of the IAA and/or Art 16(3) of the Model Law is not available when the award deals with the merits of the dispute. Therefore it does not matter that the Arbitrator may have thought he was making an award exclusively on the preliminary question of his jurisdiction. The Buyer argues that this is evident from the *travaux préparatories* of the Model Law.

Analysis and decision

(1) Supplier's entitlement to relief under Art 16(3)

65 A review of the drafting history of the Model Law makes clear that the drafters did not intend an award that deals with the merits of the dispute (however marginally) to be subject to challenge under Art 16(3) of the Model Law. Article 16(3) embodies the compromise the drafters eventually reached between two competing policy considerations concerning the issue of when courts should exercise control over the arbitral tribunal's decision on its jurisdiction. On the one hand, allowing courts to rule on pleas as to the arbitral tribunal's jurisdiction early would prevent undue waste of time and money in conducting an unnecessary arbitration. However, the availability of such a

challenge could also be abused by a party for purposes of delay or obstruction and therefore it may be more desirable to defer court control until after the arbitral tribunal has issued its award (*ie*, in a proceeding to set aside an eventual award): see *Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session* (A/40/17, 3–21 June 1985) at paras 158–157.

66 The Working Group on International Contract Practices ("Working Group") considered a wide variety of proposals relating to court control. One permutation gave the court concurrent power to rule on pleas as to the arbitral tribunal's jurisdiction, either when considering whether to refer a matter to arbitration or in response to a specific request for a declaration that the arbitral tribunal lacks jurisdiction and also granted the court power to order the stay of the arbitral proceedings while the issue of jurisdiction was pending before the court: see draft Art 8 (Arbitration agreement and substantive claim before court) and draft Art 17 (Concurrent court control) reproduced in Yearbook of the United Nations Commission on International Trade Law, 1984, vol XV at pp 221 and 223 ("UNCITRAL Yearbook vol XV"). However, direct consideration of the tribunal's ruling on jurisdiction was still postponed to the setting aside proceedings: see draft Art 16(3) reproduced in UNCITRAL Yearbook vol XV at pp 222–223.

67 The UNCITRAL Secretariat then suggested that Arts 16(3) and 17 were "from a substantive point of view and for all practical purposes … in conflict with each other": *Composite draft text of a model law on international commercial arbitration: some comments and suggestions for consideration: note by the secretariat* (A/CN.9/WG.II/WP.50, 16 December 1983) at para 18 reproduced in UNCITRAL Yearbook vol XV at p 232. The Working Group's

final draft attempted to resolve this apparent conflict by limiting early court control. Under its final proposal, a court could still consider the jurisdiction of the tribunal in considering whether a substantive claim should be referred to arbitration. However, a party could no longer bring an action merely to seek a ruling on the arbitral tribunal's jurisdiction (*ie*, the abovementioned draft Art 17 was deleted). Additionally, the court could not order a stay of arbitral proceedings and direct consideration of the tribunal's finding on its jurisdiction by the court was still deferred to the setting aside proceedings: *Report of the Working Group on the Work of its Seventh Session* (A/CN.9/246, 6 March 1984) at paras 20–23 and 49–56; reproduced in UNCITRAL Yearbook vol XV at pp 192, 195–196).

68 The Commission, having considered the proposal of the Working Group, struck a compromise between the two competing policy considerations in the following manner. It allowed the tribunal to choose between deciding the issue of its jurisdiction in a preliminary ruling which would be subject to instant court control or in a procedural decision which may be contested only in an action for setting aside the award. Therefore, the tribunal was empowered to assess whether there was a greater risk of dilatory tactics or a possibility of time and costs being wasted by carrying out an unnecessary arbitration and decide whether it should make its decision on jurisdiction open to immediate court control. The learned authors of *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation, 1989), Howard M Holtzmann and Joseph E Neuhaus, describe the mode of court control that was finally adopted in the following terms (at p 486):

> First, under Article 8 a court may decide a jurisdictional objection in the course of deciding whether to refer a

> substantive claim before it to arbitration. During the pendency of this question before the court, the arbitral tribunal has discretion to continue the proceedings. *Second, under Article 16, the arbitral tribunal has a choice whether to decide a jurisdictional question preliminarily or only in the final award. If it issues a preliminary ruling, that is subject to immediate review by a court. Otherwise, review must wait for a setting aside proceeding.* The advantage of this procedure is that the arbitral tribunal can assess in each case and with regard to each jurisdictional question whether the risk of dilatory tactics is greater than the danger of wasting money and time in a useless arbitration. The dangers of delay in the arbitration while the court is reviewing a preliminary ruling are further reduced by provision of short time period for seeking court review, finality in the court's decision, and discretion in the arbitral tribunal to continue the proceedings while the court review is going on. These procedures … allow the tribunal to postpone decision of frivolous or dilatory objections, or ones that are difficult to separate from the merits of the case.
>
> [emphasis added]

69 From the above, it should be apparent that relief under Art 16(3) is not available when a party seeks to set aside a ruling which is predominantly on jurisdiction but also marginally deals with the merits because that is simply not the purpose that the drafters intended Art 16(3) to serve. In such situations, the dissatisfied party can seek to set aside the award pursuant to s 3(1) of the IAA read with the relevant limbs of Art 34(2) of the Model Law. That would be the obvious and more appropriate remedy. This sentiment is expressed in the *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (A/CN.9/264, 25 March 1985) at p 40:

> … Where a ruling by the arbitral tribunal that it has jurisdiction is, exceptionally, included in an award on the merits, it is obvious that the judicial control of that ruling would be exercised upon an application by the objecting party for the setting aside of the award. …

(2) Supplier's entitlement to relief under s 10 of the IAA

70 The Supplier also argues that the difference in wording between s 10 of the IAA and Art 16(3) of the Model Law means that it is entitled to challenge the Award under the former even if it is precluded from doing so under the latter. In particular, it points out that under s 10, a tribunal may rule on a plea that it has no jurisdiction "at any stage of the arbitral proceedings". However, this argument is not sustainable. As noted in *Arbitration in Singapore: A Practical Guide* (Sundaresh Menon CJ gen ed) (Sweet & Maxwell, 2014) at para 3.084, s 10 of the IAA modifies Art 16 of the Model Law in so far as it:

(a) allows parties to apply to the High Court for reviews of negative jurisdictional rulings by arbitral tribunals; and

(b) allows decisions of the High Court on reviews of jurisdiction to be appealed to the Court of Appeal with leave of the High Court.

These modifications are immaterial for present purposes. The fact that the tribunal may rule on its own jurisdiction "at any stage of the arbitral proceedings" deals with the issue of when such a determination can be made rather than the question of the form that the tribunal's ruling is to take. The form that the ruling takes determines the question of whether it is amenable to be reviewed by a supervisory court pursuant to Art 16(3) of the Model Law. As explained above, only a preliminary ruling on jurisdiction can be challenged under Art 16(3) of the Model Law.

Conclusion

71 For the abovementioned reasons, I hold that the Supplier cannot rely on s 10(3) of the IAA and/or Art 16(3) of the Model Law to set aside an award that also deals with the merits of the dispute. Therefore, I dismiss the Supplier's First Prayer.

Was there a valid arbitration agreement?

72 It was established in *First Media* that an applicant can seek to set aside an award pursuant to Art 34(2)(*a*)(i) of the Model Law on the basis that there was no valid arbitration agreement. The Court of Appeal held in that case that the language in the Article, *viz*, "the said [arbitration] agreement is not valid under the law to which the parties have subjected it" covers the contention that no arbitration agreement existed at all because the parties had never concluded one. In the overwhelming majority of cases the basis of such a contention would be that the parties had never entered into contractual relations at all.

73 Before me the Supplier contends, as it had before the Arbitrator, that no arbitration agreement had come into existence because:

(a) No valid and binding contract for the Second Shipment (based on the specifications and terms of the First Shipment) was formed on 8 December 2009.

(b) Parties intended that the 8 December 2009 agreement must be "subject to contract" before it became binding.

74 It further contends that even if there was a valid and binding contract for the Second Shipment, there was no valid arbitration agreement which

satisfied s 2(1) of the version of the IAA in force in December 2009 ("IAA 2009").

Evidence relating to the formation of the Second Shipment

75 Three persons gave evidence in the arbitration proceedings in relation to the alleged formation of the Second Shipment. They were, on behalf of the Supplier, KSR; and on behalf of the Buyer, MM, and its expert witness PG, a geologist and owner and director of a coal-mining company.

76 KSR affirmed that at the material time he was the only person authorised to agree to cargo specifications and contract terms on behalf of the Supplier. The other employees of the Supplier performed operational and administrative roles only. KSR stated that the negotiations for the first and second shipments of coal began around 22 November 2009 when MM called him to ask for the specifications of coal that the Supplier could provide. The negotiations proceeded on the basis that the specifications and contractual terms for each shipment would be the same. He stated that from 25 November 2009 to 7 December 2009, the parties exchanged numerous emails to discuss the exact cargo specifications and contract terms for the first shipment. Since KSR was the only person with authority, whenever the Buyer asked for changes to the contractual terms or specification it would ask for KSR's approval or agreement.

77 KSR averred that it was normal business practice in the Indonesian coal trade that there was no binding contract until a contract was signed by the contracting parties. This was how he had been doing business in Indonesia prior to and after these transactions with the Buyer. This practice was also reflected in cl 2 of the First Shipment. Hence, he asserted the parties operated

on the basis that there would be no valid or binding contract until and unless a written contract was actually signed by the parties.

78 KSR went on to give details of the signing of the contractual document for the First Shipment. This was signed by him on 9 December 2009 at 1420 hours and countersigned by the Buyer at 1615 hours the same day. He noted that while the negotiations for the First Shipment were concluded on 7 December 2009, the Second Shipment was still being discussed at that time. He then said that there was a dinner meeting in Jakarta on 7 December 2009 during which the parties discussed only the price and laycan for the Second Shipment and therefore he assumed that the cargo specifications and contract terms would be the same as for the First Shipment. In the course of this meeting, it was agreed that the laycan and price for the Second Shipment would be 15 to 25 January 2010 and US$56/mt respectively. Significantly, KSR stated "although price had been agreed, during this meeting I also raised the possibility of a price increase of $0.50". It should be noted also that in his witness statement, KSR said that he had discussed possibility of the price increase with MM's father, MCM, the founder and managing director of the Buyer.

79 I should point out that KSR subsequently accepted that there was no dinner meeting in Jakarta on 7 December 2009 and that all his discussions had been over the phone and by e-mail with MM. A dinner meeting in Jakarta did take place but this was on 16 December 2009 and the discussions conducted then were in respect of the Changed Cargo Specifications, not the laycan for the Second Shipment.

80 MM's evidence was that he had been the one negotiating by telephone and e-mail with KSR about the price and the shipment laycans for the two shipments. On or about 23–24 November 2009, both of them had agreed on the price of US$56/mt for both shipments. The laycan remained to be agreed. MM considered that the First Shipment contract was concluded on about 4 December 2009 and he subsequently prepared the execution version, using a format supplied by his sub-buyer, and sent it to KSR by e-mail. According to MM's witness statement, on 8 December 2009, as the parties had concluded the First Shipment contract, he spoke with KSR on the telephone about the Second Shipment. They had already agreed on the price of US$56/mt and they maintained that agreement during the telephone conversation. They also agreed that the specifications would be the same as the Buyer had already provided, and the detailed terms would follow those of the First Shipment. They discussed the laycan and came to an agreement that this would be 15–25 January 2010. According to MM, following that telephone conversation, he believed and understood that the Buyer and the Supplier had concluded a contract for the Second Shipment with a price of US$56/mt and the laycan as stated earlier.

81 As regards the practice in the Indonesian coal trade, MM refuted what had been asserted by the Buyer. He said that the Buyer had been actively involved in the Indonesian coal market for nearly ten years and he himself had seven years' experience of that market. In his experience, there was no "normal business practice", that a signed contract was required before the buyer and seller could become legally bound. In his experience, contracts were treated as binding once the parties had expressly confirmed their agreement to the main terms whether orally or by e-mail. A signed full form contract usually comes later.

82 It should also be noted that the expert opinion given by PG was that it was standard practice in the Indonesian coal market for binding commitments to be made before a formal contract document was prepared and signed. Those agreements were often made verbally or by e-mail. The stage at which a formal contract document is signed would vary, usually depending on how sophisticated the parties were. He added that in his experience of coal trading in Indonesia in the preceding 15 years, he had not heard of any "normal practice" that agreements were not binding until a signed contract document was in place and he considered that there was no such practice.

83 In the analysis of whether the parties had agreed to be bound on 8 December 2009, it is important to look at the e-mails that passed between them thereafter and the statements that they made during cross-examination. The Supplier's position was somewhat difficult to understand. First, it accepted in its statement of defence that by 8 December 2009, "the main terms of the Second Shipment contract had been agreed". Secondly, in his witness statement, KSR said that during his telephone conversation with MM on 8 December 2009 he raised the possibility of a price increase of US$0.50. Thirdly, he asserted that if the Buyer had sent the Supplier a contract for the Second Shipment (based on the specifications and terms of the First Shipment) on 9 December 2009, he was prepared to sign the contract immediately and perform it. During cross-examination, KSR accepted that the "second shipment I was already committed as per the original terms of the 7th" and he also said "So whatever contract, whatever my email of 8 December was there, which was on the basis of the 7 December specification, I was binding by that". This was not the language of someone who considered that a valid contract had yet to come into existence.

84 The e-mail of 8 December 2009 to which KSR referred in his evidence was sent by him to MM at 2.10pm that day and read as follows:

> This refers to our discussion on date for 2nd shipment of 6361. *We confirm the same during the laycan of 15-25 Jan 2010.*
>
> *Though on verbal basis I had agreed for price of 56.0 USD PMT but would appreciate if the price is 56.50 USD for second shipment* as the quantity is large and high CV prices are showing an upward trend. *I leave the option to you on this*; also as discussed try to convince for appointment of Mitra SK as a surveyor for at least the second shipment the reason is because of their presence in China.
>
> Please liason [*sic*] with Suresh and Anuncia of my team for coordinating on contract and LC for both first and second shipment.
>
> [emphasis added]

85 In his witness statement, KSR stated that in the e-mail above he had asked the Buyer to liaise with Suresh and Anuncia "*for coordinating on contract and LC for both first and second shipment* [*sic*]" because at that time the Supplier operated on the basis that there was no valid and binding contract until the formal contract had been signed. KSR completely omitted any comment on the earlier portions of his e-mail which appeared to indicate that there was a binding contract. At the opening of the second paragraph of the e-mail he had asked for a change of price to US$56.50 although he accepted that "*I had agreed*" to US$56 and then he went on to say "*I leave the option to you*" meaning that he was leaving it to MM to accept or reject the increase in price. It is significant that KSR did not say to MM that he had changed his mind on price and that if the Buyer wanted the Second Shipment to proceed, it had to accept the new price of $56.50 specified by the Supplier. Whatever KSR may have said subsequently, his e-mail indicates to me that on 8 December 2009 he thought he was bound to observe the agreed price unless and until the Buyer accepted his new proposal.

86 Also, contrary to what KSR asserted was the meaning of the last paragraph of the 8 December 2009 e-mail, I consider that the Buyer's interpretation of the same is more consistent with what was going on. By that last sentence, KSR was asking the Buyer to contact his staff members, Suresh and Anuncia, about formally executing the contract documents and finalising the terms of the letters of credit because both the First and Second Shipments were now agreed contracts and the necessary bank procedures had to be put in place for the transactions to be accomplished. He was not saying that there would be no concluded Second Shipment until the formal contract document was signed.

87 Further, e-mails were sent subsequently by MM to KSR which clearly conveyed that the Buyer thought that there was already a contract in place for the Second Shipment although no formal document had been signed. On 15 December 2009, MM asked KSR "Can we accept the following changes in the 2nd contract as per what is being proposed by my buyer". KSR replied the same day that the sub-buyer was being "too fussy" and that the Supplier could not "meet to any of his interested [*sic*] requirement at this stage". Plainly, on 15 December 2009, the Supplier was not prepared to agree to any changes in a contract which had already been finalised. KSR did not say that there was no contract. At that stage, obviously, he expected the Buyer to perform the Second Shipment on the original terms.

88 Two days later, the parties were in communication about a possible third shipment. On 17 December 2009, KSR wrote to MM stating that it was "impossible" for the Supplier to carry out the third shipment. He said also that if the Supplier "commit[ted] then there would be reasonably high chances of failing in my commitment". KSR recognised the difference between being

committed and not being committed and was not willing to commit to the third transaction. He never said in such unambiguous terms that the Supplier was not committed and could not commit to the Second Shipment.

89 KSR also mentioned a telephone conversation which he had with MM on 11 December 2009. He said that MM had asked him to agree to certain changes to the specifications for the coal in the Second Shipment. He was not receptive to this request and reminded MM that the parties had already verbally agreed to the cargo specifications. When asked about this conversation during cross-examination, KSR said:

> I had definitely mentioned that we had already agreed for the specification. I had already agreed and I cannot accept any changes from here onwards.

To my mind, this evidence was just another indication of KSR's state of mind at the material time. He did not consider that parties were negotiating and terms could be freely changed; he thought there was a binding contract in place from which the parties could not walk away.

90 Before me, the Supplier submitted that it was significant that the Buyer never sent the Supplier a written contract for the Second Shipment which was based on the original specifications and terms. This had been confirmed by MM during cross-examination. He further confirmed that the Buyer had never asked the Supplier to perform the Second Shipment based on the original specifications and terms. In the Supplier's submission, this showed that the Buyer never believed that the Second Shipment became contractually binding before any document was signed.

91 I do not accept that submission. MM explained, while being cross-examined, that he thought there was no urgency in procuring the signature of the formal contract for the Second Shipment because the urgency then was to have the terms of the letter of credit for the First Shipment agreed so that the bank arrangements could be made to pay for the First Shipment. Once the terms of the letter of credit had been agreed for the First Shipment, the second letter of credit would be almost identical to the first one with, at the most, some small changes. Whilst MM's reasoning for not preparing the second contract quickly may seem rather weak, the fact remains that on the day the Second Shipment was concluded, KSR had asked for a change in price and shortly thereafter the intended sub-buyer was asking for some other changes to the contract which MM was trying to persuade the Supplier to agree to. Further, the contract for the First Shipment was signed by both parties on 9 December 2009 and that provided a written record of the agreed terms of the Second Shipment as well. In these circumstances, the urgency to have the contract for the Second Shipment signed cannot have been apparent. I am satisfied, however, that from 8 December 2009 onwards, the Buyer considered the Second Shipment to be a binding contract. It is significant that on 18 December 2009 when MM was under the impression that the Supplier had agreed to the Changed Coal Specifications, he agreed to the revised price of US$56.50/mt and incorporated both the Changed Coal Specifications and the revised price into the written contract and sent it to the Supplier for signature. Although MM did not expressly state so, it appears to me that he did withhold agreement to the change in price until he thought he had an agreement from the Supplier on the Changed Coal Specifications. This action does not, however, imply that the Buyer had any doubts about the existence and validity of the contract for the Second Shipment.

92 Having considered all the evidence, both the contemporaneous e-mail correspondence and the statements from the witnesses both on paper and during cross-examination, I have concluded that once parties agreed on the main terms, they intended and recognised that these terms were binding on both of them and could not be changed without the other party's consent. From 8 December 2009 onwards, both parties acted as if there was a binding contract in place, notwithstanding that they had not yet signed a formal document. It was not until about mid-January 2010 that the Supplier clearly refuted the existence of a contract.

93 I will now go on to consider whether there was any other reason why a contract could not come into being despite the parties' verbal agreement.

Practice in Indonesian coal market and cl 2 of the contract document

94 The Supplier submits that the parties' intention that the 8 December 2009 verbal agreement must be "subject to contract" before it becomes binding was evident from the inclusion of cl 2 in the First Shipment contract which was a clause which was intended to appear in the Second Shipment contract as well. Further, the evidence of PG supported the Supplier's argument that it was in line with commercial practice and expectation for the 8 December 2009 agreement to be "subject to contract".

95 In relation to PG's evidence, the Supplier relies on his statement that companies with strong corporate governance would not book barges until a signed contract was in place. This was clarified during cross-examination as follows:

> Q: But when you say "a signed contract is in place", are you saying it is a signed contract in place between Adaro and the mines or Adaro and the buyer?
>
> A: I'm saying a signed contract in place between Adaro and the buyer. Only when that's in place will the corporate governance that Adaro operates under allow the particular managers to contract barges and to direct coal towards that contract.

96 The Supplier submits that based on PG's evidence, companies with a strong governance procedure would only start performing when the contract is signed. The Buyer had recognised that the Supplier was a "reliable and reputable" supplier. Further, MM had agreed that KSR had to approve the changes in the contractual document before his Singapore office could sign off on the document.

97 I consider the Supplier's reliance on PG's evidence to be misplaced. As stated in [82] above, PG was clear in his witness statement that there was no practice in the Indonesian coal market under which oral contracts were regarded as not binding. On the contrary, he specified that it was standard practice for binding commitments to be made (whether verbally or by e-mail or letter) before a formal contract document is prepared and signed. These assertions on the part of PG were not challenged by the Supplier in cross-examination at all. As far as PG's reference to strong corporate governance of some companies insisting that signed contracts be in place before action to perform the contract is taken, it is notable that in his expert report he did not put the Supplier and the Buyer into that category of companies. Instead, his understanding was that the parties to the Second Shipment fell into the bracket of companies where buyer and seller agreed on main terms and conditions of the sale and then began the process of assembling cargoes and chartering barges and vessels prior to the contract document being signed. Further, what

he said about companies like Adaro was simply a comment elaborating on his observation that the stage at which parties would go on to produce a formal signed contract depended on the corporate governance practices in place in their own organisations. The Supplier did not adduce any independent evidence of the practice and procedure in the Indonesian coal market.

98 In relation to the Supplier's own position, it should be noted that KSR never asserted that he always required a formal contract to be signed before he considered a binding contract to have come into force. What he said was that he had operated on the basis of "no contract until signed or there was a written confirmation or approval from both parties" and also "no contract until it has been signed, or e-mailed confirmation from both parties". In line with this evidence, he later accepted that his e-mail confirmation "OK noted go ahead" in an e-mail sent on 4 December 2009 in relation to the First Shipment was sufficient to create a valid and binding contract for the First Shipment. On KSR's evidence, the Supplier itself had no settled practice that a contract could not exist until a formal written document was signed.

99 The Buyer submits contemplations of a written contract *per se* do not preclude the existence of a binding oral contract, and the issue is ultimately a matter of construction of the documentary evidence as well as the interpretation of the objective intention of the parties. When the communications between the parties do not state expressly the phrase "subject to contract", it is a question of construction whether the parties intended that the terms agreed upon should merely be put into form or be subject to a new agreement the terms of which are not expressed in detail: *OCBC Capital Investment v Wong Hua Choon* [2012] 2 SLR 311 at [21] and [28]. I accept this submission.

100 In this case, though the words "subject to contract" were not used, the Supplier relied on cl 2 of the First Shipment contract as having a similar effect:

> 2. TERM OF CONTRACT
>
> The parties hereby agree that the term of this Contract shall commence from the date of signing of this Contract until the sale and delivery of the contracted quantity under this Contract has been fully performed by the parties and all the obligations with respect to this Contract have been fully completed or until both parties mutually agree to terminate this Contract, whichever comes earlier.

101 It should be noted that cl 2 was in the written contract from the time that a draft was sent to the Supplier on 30 November 2009. It had been taken wholesale from the Buyer's sub-buyer's form and in the negotiations that followed between the Supplier and the Buyer, neither commented upon it at all. The Arbitrator considered that cl 2 was not a "subject to contract" provision. Instead, he construed it as providing for the duration of the contract. This conclusion was based on the finding that there was no business practice in the Indonesian coal trade that a contract would not be concluded until a written contract was signed and also the fact that neither party ever said that the discussions on the Second Shipment would be "subject to contract" or that cl 2 would have such an effect. I agree that in the factual matrix in which cl 2 was produced, it is a "duration of contract" term rather than a "subject to contract term". I would point out that it makes no logical sense for a term of the formal written document which both parties intend to sign to be a "subject to contract" clause. If cl 2 had the effect for which the Supplier contends, it would be of null effect until the contract was signed, whereupon a significant part of it would immediately become redundant.

102 On this issue, I consider the Arbitrator's reasoning to be sound. I agree that in all the circumstances that were present during the negotiations for both the First Shipment and the Second Shipment, the parties understood that a binding contract could be formed prior to the signing of a formal document. As I had previously mentioned, KSR had accepted that a contract could be concluded by e-mail alone. One other indication of the Supplier's state of mind was that in its Statement of Defence it had said at para 14 that the contract for the First Shipment "was concluded on 7 December 2009". It would be recalled that the formal contract for the First Shipment was not signed until 9 December 2009.

103 The court, like the Arbitrator, has to construe the contract in the context of what occurred at the material time. There was no material before the Arbitrator or before the court that could lead to any conclusion other than that the parties did not negotiate on a "subject to contract" basis.

Conclusion on formation

104 I am satisfied that a valid and binding contract for the Second Shipment was formed on 8 December 2009 and that the terms of the same were, apart from the laycan, identical to the terms of the First Shipment contract.

Was the arbitration agreement "in writing"?

105 Clause 16 of the First Shipment contract, which was orally imported into the Second Shipment contract, reads:

> 16. ARBITRATION
>
> Any dispute, difference or disagreement between the parties arising under or in relation to this Contract, including (but not

> limited to) any dispute, difference or disagreement as to the meaning of the terms of this Contract or any failure to agree on any matter required to be agreed upon under this Contract shall, if possible, be resolved by negotiation and mutual agreement by the parties within 30 (thirty) days. Should no agreement be reached, then the dispute shall be finally settled by arbitration upon the written request of either party hereto in accordance with the rules of conciliation and arbitration of the Singapore International Arbitration Centre (SIAC) by three arbitrators in English Language. The result of all such arbitration shall be final and binding for the parties and for all purposes.

106 However, the Supplier argues that the arbitration agreement is not valid because it was not in writing as required by s 2(1) of the IAA 2009. The relevant part of s 2(1) of the IAA 2009 reads:

> "arbitration agreement" means an agreement in writing referred to in Article 7 of the Model Law and includes an agreement deemed or constituted under subsection (3) or (4).

Article 7 of the Model Law provides:

> ***Article 7. Definition and form of arbitration agreement***
>
> (1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> (2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

107 The Buyer on the other hand argues that s 2A of the current IAA governs the issue of the validity of the arbitration agreement. Section 2A was added when the IAA was amended by the 2012 Amendment Act. The definition of arbitration agreement contained in s 2(1) of the IAA 2009 was deleted and replaced with that contained in s 2A. The result of this amendment was to expand the definition of "in writing" to refer to the content of the arbitration agreement being recorded in any form so that if this requirement was met, it would not matter if the contract itself was oral. The relevant parts of s 2A state:

> **Definition and form of arbitration agreement**
>
> **2A.**—(1) In this Act, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> (3) An arbitration agreement shall be in writing.
>
> (4) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct or by other means.
>
> (5) The requirement that an arbitration agreement shall be in writing is satisfied by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.
>
> …
>
> (9) Article 7 of the Model Law shall not apply to this section.

(1) Version of the IAA which governs the validity of the arbitration agreement

108 The Buyer argues that the IAA 2009 does not apply to determine the validity of the arbitration agreement. Instead, the current IAA which came into force on 1 June 2012 applies because of s 12 of the 2012 Amendment Act which in gist states that the current IAA applies to all arbitral proceedings commenced on or after 1 June 2012. That section provides:

> **Transitional provision**
>
> **12.**—(1) This Act shall apply to arbitral proceedings commenced on or after the date of commencement of this Act but the parties may in writing agree that this Act shall apply to arbitral proceedings commenced before that date.
>
> (2) Notwithstanding subsection (1), where the arbitral proceedings were commenced before the date of commencement of this Act, the law governing the arbitration agreement and the arbitration shall be the law which would have applied if this Act had not been enacted.
>
> (3) For the purposes of this section, arbitral proceedings are to be taken as having commenced on the date of the receipt by the Supplier of a request for the dispute to be referred to arbitration, or where the parties have agreed in writing that any other date is to be taken as the date of commencement of the arbitral proceedings, then on that date.

The Buyer points out that the arbitration was commenced on 21 March 2013. Therefore, the current IAA should apply.

109 The Supplier argues that IAA 2009 should govern the validity of the arbitration agreement for two reasons. First, it maintains that the 2012 Amendment Act merely amended the then existing version of the IAA (*ie*, the version of IAA which came into force on 1 January 2010 ("IAA 2010")) and not the IAA 2009. Therefore, it argues that the definition of arbitration agreement contained in s 2(1) of the IAA 2009 continues to apply.

110 In my judgment, the Supplier's first argument is not sustainable. The definition of arbitration agreement contained in s 2(1) of the IAA 2009 was amended by the International Arbitration (Amendment) Act 2009 (No 26 of 2009). Hence, the definition of arbitration agreement contained in s 2(1) of the IAA 2009 ceased to be applicable as of 1 January 2010, when the IAA 2010 came into force. Thereafter, the sole applicable definition of arbitration agreement was contained in s 2(1) of the IAA 2010 which also contained a similar writing requirement. However, as previously mentioned, this was deleted by the 2012 Amendment Act and replaced with s 2A of the current version of the IAA which is applicable to all arbitral proceedings commenced on or after 1 June 2012.

111 Second, the Supplier argues that it should continue to have the benefit of being able to rely on the definition of an arbitration agreement contained in s 2(1) of the IAA 2009 notwithstanding any subsequent amendments to that definition because of the principle against the retrospective application of laws which is codified in s 16(1)(*c*) of the Interpretation Act (Cap 1, Rev Ed 2002). That section provides:

> **Effect of repeal**
>
> **16.**—(1) Where a written law repeals in whole or in part any other written law, then, unless the contrary intention appears, the repeal shall not —
>
> …
>
> (*c*) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed
>
> …

The Supplier does not specifically identify its "right, privilege or obligation" that was affected by a subsequent written law. However, it appears that the

Supplier is arguing that as at 23 December 2009, it had a right to resist arbitration on the basis that there was no valid arbitration agreement as per the requirements set out in s 2(1) of the IAA 2009. The subsequent amendment to the IAA in 2012 relaxing the writing requirement had the effect of depriving the Supplier of that right and therefore s 16(1)(*c*) of the Interpretation Act has been triggered.

112 There is a question as to whether the ability to resist arbitration on the basis that the arbitration agreement did not satisfy the "in writing" requirement set out in s 2(1) of the IAA 2009 can even be properly characterised as a "right" within the meaning of s 16(1)(*c*) of the Interpretation Act. The parties, however, did not deal with that question and, in the absence of full submissions, it would not be right for me to express an opinion on it. I therefore proceed on an assumption, not a decision, that such ability would amount to a right.

113 In my opinion, however, this assumption does not help the Supplier. First, it is evident from the wording of s 16(1)(*c*) of the Interpretation Act that the section is only triggered when existing or accrued rights are affected by subsequent legislation. In the present case, it cannot be said that the Supplier had an entitlement to rely on the writing requirements set out in s 2(1) of the IAA 2009 to resist arbitration before the IAA was amended in 2012. The entitlement to resist arbitration on the grounds that the arbitration agreement was invalid only arose when arbitral proceedings were commenced against the Supplier on 21 March 2013. This was well after the current IAA had come into force. Thus, the right had not accrued when the IAA was amended in 2012.

114 Secondly, even if the right had accrued by the time the IAA was amended in 2012, s 16(1)(*c*) of the Interpretation Act is not applicable because s 12 of the 2012 Amendment Act evinces an intention to deprive parties of any rights that may have accrued to them under the prior versions of the IAA in force before 1 June 2012. This is evident from the stipulation in s 12(1) of the 2012 Amendment Act that the current version of the IAA shall apply to all arbitral proceedings commenced on or after 1 June 2012.

115 In the result, the issue of the validity of the arbitration agreement is governed by the current IAA.

(2) Is the arbitration agreement "in writing" in the manner required by the current IAA?

116 The amendment of the definition of arbitration agreement in 2012 was prompted by UNCITRAL's revision of the Model Law in 2006. UNCITRAL amended Art 7 and suggested two alternative formulations for countries to choose from when drafting/amending their domestic legislations. The version of the amended Art 7 which Singapore adopted by introducing s 2A into the IAA reads as follows:

> *Option I*
>
> **Article 7. Definition and form of arbitration agreement**
>
> (1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> (2) The arbitration agreement shall be in writing.
>
> (3) *An arbitration agreement is in writing if its content is recorded in any form*, whether or not the arbitration agreement

> or contract has been concluded orally, by conduct, or by other means.
>
> [emphasis added]

117 The *Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration as amended in 2006*, provides an explanation for the amendment and clarifies the meaning of Art 7(3) which is identical to s 2A(4) of the IAA. It states at para 19:

> … It was pointed out by practitioners that, in a number of situations, the drafting of a written document was impossible or impractical. In such cases, where the willingness of the parties to arbitrate was not in question, the validity of the arbitration agreement should be recognized. For that reason, article 7 was amended in 2006 to better conform to international contract practices. In amending article 7, the Commission adopted two options, which reflect two different approaches on the question of definition and form of arbitration agreement. The first approach follows the detailed structure of the original 1985 text. … It follows the New York Convention in requiring the written form of the arbitration agreement but recognizes a record of the "contents" of the agreement "in any form" as equivalent to traditional "writing". The agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded. *This new rule is significant in that it no longer requires signatures of the parties or an exchange of messages between the parties*. [emphasis added]

118 At the second reading of the International Arbitration (Amendment) Bill (Bill No 10 of 2012) ("the Bill"), Mr Hri Kumar Nair asked the Minister who was moving the Bill whether the requirements of s 2A(4) would be satisfied if one party to the oral agreement recorded the arbitration agreement "without confirmation from the other party". The Minister's response echoed the aforementioned views of the UNICTRAL Secretariat. He stated (*Singapore Parliamentary Debates, Official Report* (9 April 2012) vol 89 (K Shanmugam, Minister for Law)):

> Mr Kumar has asked for some clarifications on the new section 2A which relaxes the requirement for an arbitration agreement to be in writing.
>
> First, what does section 2A(4) mean when it provides that an arbitration agreement is in writing, if its content is recorded in any form? The general intention is that an arbitration agreement can be entered into in any form, including orally, if there is some record of the content of the agreement which can subsequently be referred to. …
>
> *So, does the record made by one party suffice? The answer is "yes". This is the answer we give. At the end of the day, the courts have to decide. Our legislative intention is that, yes, a record by one party would suffice. Section 2A does not require that the record of the arbitration agreement to be confirmed by all parties.* Of course, there could be disputes as to the authenticity of the record if the record is made only by one party or if inconsistent records by different parties are produced. Those disputes would have to be resolved by the courts or by the tribunal in the same manner that disputes on authenticity of written arbitration agreements are resolved, or for that matter, any other dispute, on facts, are resolved.
>
> Legislatively, the question is whether the possibility of such disputes arising should preclude us from recognising unilateral records. The answer must balance the competing needs of certainty as opposed to flexibility, and that is of course a challenge that both legislation and the courts deal with in commercial law. In this case, the loosening of the writing requirement has been recommended by UNCITRAL. When we held consultations on the Bill, the feedback was also in support of relaxing the writing requirement.
>
> [emphasis added]

119 In essence, both the UNCITRAL Secretariat and the Minister who moved the Bill expressed the view that the requirement set out in the amended Art 7(3) of the Model Law and s 2A(4) of the IAA would be satisfied if one party to the agreement unilaterally records it in writing. It would not matter that the written version of the agreement is neither signed nor confirmed by all the parties involved. This is certainly a reasonable interpretation of the provisions of s 2A(4) and I adopt it.

120 In the present case, the arbitration agreement was recorded in the First Shipment contract as the parties had agreed on 8 December 2009 that all the terms of that contract would apply. I think that reference was sufficient to show that cl 16 of the First Shipment contract, signed on 9 December 2009 but in the parties' hands from 7 December 2009, was the arbitration agreement "recorded in any form" within the meaning of s2A(4). Further, the written draft of the contract for the Second Shipment that the Supplier sent the Buyer by e-mail for its signature first on 18 December 2009 and then again on the 23 December 2009 contained an arbitration clause that was identical to cl 16 of the First Shipment contract. The Buyer did not sign either draft of the Second Shipment contract but there is no evidence that its failure to sign was in any way related to disagreement with the terms of the arbitration clause. In my judgment, the draft Second Shipment also served as a record of the arbitration agreement. I am satisfied that as of 8 December 2008 or, at the latest as of 18 December 2009, there was a valid arbitration agreement that satisfied the requirements set out in s 2A(4) of the IAA.

Conclusion on the Supplier's challenge pursuant to Art 34(2)(a)(i)

121 The Supplier contended that there was no valid and binding contract for the Second Shipment and even if there was, there was no valid arbitration agreement which satisfied s 2(1) of the IAA 2009. I have found that a valid and binding contract for the Second Shipment was formed on 8 December 2009. Further, IAA 2009 is not applicable. Rather, s 2A of the current IAA governs the issue of the validity of the arbitration agreement. I have also found that there was a valid arbitration agreement pursuant to that section. Given the doctrine of separability, having found that there was a valid arbitration agreement, I need not concern myself with the issue of whether the underlying

contract for the shipment of coal was subsequently varied and what the terms of the varied contract were and whether the Supplier was in breach of the contract. Those are all matters falling within the jurisdiction of the arbitral tribunal.

Was the procedure followed by the arbitral tribunal in accordance with the parties' agreement?

122 Article 34(2)(*a*)(iv) of the Model Law provides:

> *Article 34. Application for setting aside as exclusive recourse against arbitral award*
>
> …
>
> (2) An arbitral award may be set aside by the court specified in Article 6 only if:
>
> > (*a*) the party making the application furnishes proof that:
> >
> > > …
> > >
> > > (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law;
>
> …

This article covers two separate possible grounds of challenge. An applicant can seek to set aside an award pursuant to Art 34(2)(*a*)(iv) on the basis that the composition of the arbitral tribunal and/or the arbitral procedure was not in accordance with the agreement of the parties.

123 The Supplier's arguments under this ground are in the alternative to its primary position that there was no valid arbitration agreement between the

parties. Assuming that there was such an agreement, the Supplier first contends that the arbitral procedure was not in accordance with the agreement of the parties because it was erroneously conducted under the Expedited Procedure contained in r 5 of the SIAC Rules 2010, and that there is no provision for such a procedure in the Arbitration Rules of the SIAC (3rd Ed, 1 July 2007) ("SIAC Rules 2007") which, according to the Supplier, are the applicable rules. Second, the Supplier argues that even if the SIAC Rules 2010 are applicable, the composition of the arbitral tribunal, insofar as the arbitration was conducted before a sole arbitrator, was not in accordance with the parties' agreement since they had expressly agreed to arbitration before three arbitrators.

Applicable version of the SIAC Rules

124 The arbitration clause is set out in [105] above. For present purposes, the material part of the clause reads:

> … the dispute shall be finally settled by arbitration upon the written request of either party hereto in accordance with the *rules of conciliation and arbitration of the Singapore International Arbitration Centre (SIAC) by three arbitrators* in English Language. The result of all such arbitration shall be final. [emphasis added]

125 There is a presumption that reference to rules of a particular tribunal in an arbitration clause refers to such rules as are applicable at the date of commencement of arbitration and not at the date of contract, provided that the rules contain mainly procedural provisions. If the rules contain mainly substantive provisions, then those in force as at the date the contract was entered into would apply: *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2010] 2 SLR 25 at [34]; *Black & Vetach*

Singapore Pte Ltd v Jurong Engineering Ltd [2004] 4 SLR 19 at [15], [19]–[20].

126 The rationale for this presumption was articulated in *Bunge SA v Kruse* [1979] 1 Lloyd's Rep 279 at 286:

> … Procedural provisions can easily become out of date and so become incapable of implementation. For instance, procedural rules might provide for documents to be sent to, or hearings to take place at, an address which later ceased to be appropriate or even to exist; or for members of a tribunal to possess a qualification, or to be appointed by a person holding an office, which is subsequently abolished. In either case amendment of the procedural rules concerned would be necessary to make them workable, and, if a clause incorporating such rules were not construed as incorporating them in their subsequently amended form, the operation of the clause might well be frustrated.

127 In the present case, the Supplier does not contend that the SIAC Rules contain mainly substantive provisions. However, it argues that the presumption is displaced because of the fact that the reference to the SIAC Rules in the arbitration clause is not followed by the phrase "for the time being in force". It relies on *Car & Cars Pte Ltd v Volkswagen AG* [2010] 1 SLR 625 to support its argument. In my view that case does not assist the Supplier at all. There, the judge held that the inclusion of the phrase "for the time being in force" in the arbitration clause indicated that parties intended to refer to rules that could not be precisely identified at the time of contracting. He stated that if the intention was to refer to rules existing at the date of the contract, there would not have been a need for the general words. Rather, the particular set of rules could easily have been identified by name (at [25]). Similarly here, if parties intended to refer to the SIAC Rules 2007, they could have identified them by name. The absence of the phrase "for the time being in force" does not displace the presumption. Had it been present, the Buyer's contention

would have been stronger but its absence does not assist the Supplier. On the basis of the presumption, the SIAC Rules 2010 are the applicable rules. Rule 5 of the SIAC Rules 2010 provides for arbitration to be conducted under the Expedited Procedure if the SIAC President agrees that this procedure should be used. Therefore, it cannot be said that the procedure that was followed was not in accordance with the Parties' agreement.

Arbitration before a sole arbitrator

128 Rule 5 of the SIAC Rules 2010 specifies that under the Expedited Procedure arbitration before a sole arbitrator is the default position. The rule provides:

> **Rule 5: Expedited Procedure**
>
> 5.1 Prior to the full constitution of the Tribunal, a party may apply to the Centre in writing for the arbitral proceedings to be conducted in accordance with the Expedited Procedure under this Rule where any of the following criteria is satisfied:
>
> a. the amount in dispute does not exceed the equivalent amount of S$5,000,000, representing the aggregate of the claim, counterclaim and any setoff defence;
>
> b. the parties so agree; or
>
> c. in cases of exceptional urgency.
>
> 5.2 When a party has applied to the Centre under Rule 5.1, and when the Chairman determines, after considering the views of the parties, that the arbitral proceedings shall be conducted in accordance with the Expedited Procedure, the following procedure shall apply:
>
> …
>
> b. The case shall be referred to a sole arbitrator, unless the Chairman determines otherwise;
>
> …

129 It would be noted in this case that the original quantum of the Buyer's claim as stated in the Notice of Arbitration was US$706,750. In the arbitration proceedings, the Buyer revised its claim to US$852,500 but the increased amount was still well within the monetary boundaries of the Expedited Procedure.

130 The Supplier argues that, even if the SIAC Rules 2010 are applicable, the arbitration should not have been conducted before a sole arbitrator, since the parties had expressly agreed to arbitration before three arbitrators. It relies on *NCC International AB v Land Transport Authority of Singapore* [2009] 1 SLR(R) 985 ("*NCC International*") to support its argument. There, the plaintiff sought a declaration from the court that, notwithstanding the parties' agreement for arbitration before a sole arbitrator, the Registrar of the SIAC had the discretion to appoint three arbitrators pursuant to r 5.1 of the SIAC Rules 2007. That rule states:

> **Rule 5: Number, Appointment and Confirmation of Arbitrators**
>
> 5.1 Unless the parties have agreed otherwise or unless it appears to the Registrar giving due regard to any proposals by the parties, the complexity, the quantum involved or other relevant circumstances of the dispute, that the dispute warrants the appointment of three arbitrators, a sole arbitrator shall be appointed.

The judge held that where the agreement to arbitrate provided for a sole arbitrator, r 5.1 did not vest the Registrar with the discretion to appoint three arbitrators. The judge went on to state that even if r 5.1 vested the Registrar with that discretion, its incorporation into the parties' agreement could not override the "express term of the arbitration clause (on a sole arbitrator) except as expressly assented to" (at [45]). He appears to have reached this conclusion based on his observation in [44] that the version of the SIAC Rules which was

in force when the parties had entered into the contract did not even contemplate the possibility that their express agreement on a sole arbitrator would be overridden in certain circumstances. The equivalent provision on the number and appointment of arbitrators in the Arbitration Rules of the SIAC (2nd Ed, 22 October 1997), which was in force at that time, simply stated:

> **Rule 6 – Number of Arbitrators**
>
> 6. A sole arbitrator shall be appointed unless the parties have agreed otherwise.

131 The Buyer, however, argues that if the number of arbitrators was of vital importance to the parties, then they should have specifically provided that their choice of number of arbitrators would prevail in any and every arbitration. It relies on a redacted SIAC Award, *W Company v Dutch Company and Dutch Holding Company* [2012] 1 SAA 97 ("*W Company*"), to support its argument. In that case, a sole arbitrator rejected a challenge to his jurisdiction brought on the basis that the parties' agreement required the appointment of three arbitrators. The arbitrator stated at [19]:

> … The parties chose the SIAC Rules to govern the arbitration and they accepted the entirety of the SIAC Rules including the Expedited Procedure in Rule 5 together with the powers that the Rule reserves to the Chairman and Registrar of the SIAC to administer and guide the proceedings. There is no derogation from party autonomy and it is precisely the parties' choice of the SIAC Rules that requires acceptance of the Chairman's decision. It may be otherwise if the parties had stipulated that there shall be 3 arbitrators even if the proceedings were under the Expedited Procedure but that is not the case here.

It appears that in *W Company*, the parties had expressly chosen a version of the SIAC Rules that contained the Expedited Procedure provision. Therefore, it was consistent with party autonomy for the Expedited Procedure provision to override their agreement for arbitration before three arbitrators. The

situation in the present case is quite different because the SIAC Rules that were in force at the time the parties entered into the contract did not contain the Expedited Procedure provision.

132 Nevertheless, the SIAC Rules 2010 have been incorporated into the Parties' contract and therefore as stated in *NCC International* at ([37]), the rules together with the rest of the contract must be interpreted purposively. I am of the view that "express assent" in the sense contemplated by *NCC International* is not necessary for the Expedited Procedure provision to override the parties' agreement for arbitration before three arbitrators even though the version of the SIAC Rules that was in force at the time the parties entered into the contract did not contain the Expedited Procedure provision. A commercially sensible approach to interpreting the parties' arbitration agreement would be to recognise that the SIAC President does have the discretion to appoint a sole arbitrator. Otherwise, regardless of the complexity of the dispute or the quantum involved, a sole arbitrator can never be appointed to hear the dispute notwithstanding the incorporation of the SIAC Rules 2010 which provide for the tribunal to be constituted by a sole arbitrator when the Expedited Procedure is invoked. That would be an odd outcome, especially since the Supplier appears to accept that the Expedited Procedure provision is no different from any other procedural rule contained in the SIAC Rules 2010.

133 Furthermore, due regard can be given to the fact that the agreement had been signed before the Expedited Procedure provision came into force. As suggested by Mark Mangan, Lucy Reed and John Choong in their book, *A Guide to the SIAC Arbitration Rules* (Oxford University Press, 2014) ("*A Guide to the SIAC Rules*"), at para 7.10, when making the decision

whether to displace the default provision and appoint a greater number of arbitrators instead, the SIAC President can and should take into account not just the complexity of the dispute, the quantum involved and the parties' agreement on the number of arbitrators (if there is one) but also whether the contract concerned was signed before the Expedited Procedure provision came into force.

134 In the present case, the Supplier objected to the arbitration being heard pursuant to the Expedited Procedure provision. However, it only objected on the grounds that the parties had not agreed to the application of this procedure and that there was no exceptional urgency requiring the matter to be heard on an expedited basis. In essence, the Supplier was attempting to argue that the grounds for Expedited Procedure provided in r 5.1(b) and (c) of the SIAC Rules 2010 were not made out. The Supplier did not expressly rely on the fact that the contract had been entered into before the Expedited Procedure provision came into force as a reason why that provision should not apply. Nonetheless there is nothing that suggests that the SIAC President had not taken that fact into consideration when he decided to allow the Buyer's application for the arbitration to be conducted under the Expedited Procedure provision.

135 Additionally, the learned authors of *A Guide to the SIAC Rules* point out that the ICC's new emergency arbitrator provisions expressly state that they do not apply in the context of arbitration agreements that were entered into before the new ICC rules came into force: at para 7.10, footnote 14; see ICC Rules (2012), Art 29(6). However, the SIAC's Expedited Procedure provision does not contain a similar exclusion. This fortifies my conclusion that the Expedited Procedure provision can override parties' agreement for

arbitration before three arbitrators even when the contract was entered into before the Expedited Procedure provision came into force.

136 Even if the Supplier is correct in its submission that the arbitration should not have been conducted before a sole arbitrator, the Supplier has not discharged its burden of explaining the materiality or the seriousness of the breach. Nor has it demonstrated that it suffered any prejudice as a result of the arbitral procedure that was adopted. While prejudice is not a legal requirement for an award to be set aside pursuant to Art 34(2)(*a*)(iv), it is a relevant factor that the supervisory court considers in deciding whether the breach in question is serious and thus whether to exercise its discretionary power to set aside the award for the breach: *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 at [54], [64] and [66]. In the present case, the Supplier has not made any submissions on this issue.

Conclusion on the Supplier's challenge under Art 34(2)(a)(iv)

137 For the above mentioned reasons, I find that the arbitral proceedings were conducted in accordance with the parties' agreement. There is no ground to set aside the Award based on Art 34(2)(*a*)(iv) of the Model Law.

Other prayers in OS 530

138 Given my findings above, I also dismiss the Supplier's other prayers in OS 530 for the dispute to be reheard before three arbitrators and for the arbitral proceedings to be stayed pending the outcome of these proceedings.

Costs

139 As the Supplier has failed in its application, it should bear the Buyer's costs. I shall hear parties on the basis on which costs should be taxed.

Judith Prakash
Judge

Thomas Tan and Ong Shao Rong (Haridass Ho & Partners) for the plaintiff;
Lawrence Teh, Melissa Thng and Sim Junhui (Rodyk & Davidson LLP) for the defendant.