Astro Nusantara International BV and others *v* PT Ayunda Prima Mitra and others [2012] SGHC 212

Case Number	: Originating Summons No 807 of 2010 (Registrar's Appeal No 278 of 2011 and Summons No 4065 of 2011) and Originating Summons No 913 of 2010 (Registrar's Appeal No 279 of 2011 and Summons No 4064 of 2011)
Decision Date	: 22 October 2012
Tribunal/Court	: High Court
Coram	: Belinda Ang Saw Ean J
Counsel Name(s)	: David Joseph QC (instructed), Chou Sean Yu, Lim Wei Lee, Melvin Lum, Chan Xiao Wei and Daniel Tan (WongPartnership LLP) for the plaintiffs; Toby Landau QC (instructed), Edmund Kronenburg and Lye Huixian (Braddell Brothers LLP) for the second defendant.
Parties	: Astro Nusantara International BV and others — PT Ayunda Prima Mitra and others

Arbitration – enforcement – Singapore award

Arbitration – award – finality of award

Civil Procedure – Service

22 October 2012 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 By two ex parte Orders of Court dated 5 August 2010 and 3 September 2010 ("the Enforcement Orders"), the plaintiffs in the present originating summonses ("the Plaintiffs") were granted leave pursuant to s 19 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA") to enforce five domestic international awards in Singapore (collectively referred to as "the Singapore Awards"). By the term "domestic international awards", I refer to international commercial arbitral awards made in the same territory as the forum in which recognition and enforcement is sought, *eg*, in the context of Singapore, these are arbitral awards rendered under the IAA and the Arbitration Rules of the Singapore International Arbitration Centre 2007 ("the SIAC Rules 2007"), with Singapore as the seat of arbitration. The Plaintiffs are Astro Nusantara International BV ("P1"), Astro Nusantara Holdings BV ("P2"), Astro Multimedia Corporation NV ("P3"), Astro Multimedia NV ("P4"), Astro Overseas Limited (formerly known as AAAN (Bermuda) Limited) ("P5"), Astro All Asia Networks PLC ("P6"), Measat Broadcast Network Systems Sdn Bhd ("P7") and All Asia Multimedia Networks FZ-LLC ("P8"). On 24 March 2011, the Plaintiffs obtained two judgments in terms of the Singapore Awards ("the 2011 Judgments") against all three defendants (collectively referred to as "the Defendants"), PT Ayunda Prima Mitra ("D1"), PT First Media TBK (formerly known as PT Broadband Multimedia TBK) ("FM") and PT Direct Vision ("D3").

2 There are four applications before this court. The Plaintiffs filed two applications, and the other two were filed by FM. Notably, D1 and D3 are not involved in these applications. As such, the 2011 Judgments remain valid, binding and conclusive in terms of their existence and legal effect against D1

and D3.

3 By Registrar's Appeal No 278 of 2011 ("RA 278") filed in Originating Summons No 807 of 2010 ("OS 807") and Registrar's Appeal No 279 of 2011 ("RA 279") filed in Originating Summons No 913 of 2010 ("OS 913"), the Plaintiffs are seeking to reverse the decision of the assistant registrar ("the Assistant Registrar") which set aside the 2011 Judgments against FM and granted leave to FM to apply to court to set aside the Enforcement Orders within 21 days from the date of the decision. FM duly filed Summons No 4064 of 2011 ("SUM 4064") in OS 913 and Summons No 4065 of 2011 ("SUM 4065") in OS 807 on 12 September 2011.

4 The four applications (*viz*, RA 278, RA 279, SUM 4064 and SUM 4065) were heard over three days from 23 to 25 July 2012. SUM 4064 and SUM 4065 were heard first. This was to accommodate the request and views of local counsel, previously made known to SAR Yeong Zee Kin on 17 July 2012, that Mr David Joseph QC ("Mr Joseph") and Mr Toby Landau QC ("Mr Landau") would be in Singapore to argue SUM 4064 and SUM 4065, leaving local counsel to argue RA 278 and RA 279. SUM 4064 and SUM 4065 were argued by Mr Landau on behalf of FM and by Mr Joseph on behalf of the Plaintiffs. As things eventually turned out, RA 278 and RA 279 were argued by Mr Joseph (instead of local counsel) on behalf of the Plaintiffs and by Mr Edmund Kronenburg ("Mr Kronenburg") on behalf of FM.

5 From the brief summary of the nature of the four applications, it is logical that this judgment deals with RA 278 and RA 279 (which relate to setting aside the 2011 Judgments) first before considering SUM 4064 and SUM 4065 (which relate to setting aside the Enforcement Orders).

6 On 13 August 2012, the parties were invited to submit further on two questions in the light of additional material in the *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (United Nations, 2012) ("the UNCITRAL 2012 Digest") that had not been addressed by the parties. The two questions which relate to SUM 4064 and SUM 4065 (see [135] below), are on the implication of the "no appeal" provision in Art 16(3) of the UNCITRAL Model Law on International Commercial Arbitration (see schedule 1 of the IAA) ("the Model Law"). The Plaintiffs and FM tendered their respective further submissions on 28 August 2012.

Overview

7 The principal issue in RA 278 and RA 279 is whether the Enforcement Orders were served on FM in accordance with Indonesian law. If RA 278 and RA 279 are allowed, the arguments in SUM 4064 and SUM 4065 will be moot.

8 However, if RA 278 and RA 279 are dismissed, the focus will then be on the Enforcement Orders, which, being made ex parte, are in principle capable of being set aside. On what grounds can the Enforcement Orders be set aside? FM's main ground of challenge in SUM 4064 and SUM 4065 concerns the proper construction of the IAA in relation to the Singapore Awards.

9 The debate centres on whether it is open to FM to invoke lack of jurisdiction as a ground to resist enforcement when FM did not make any prior applications to challenge the Singapore Awards under Art 16 or Art 34 of the Model Law. As at the date of the Enforcement Orders, the timelines prescribed in Art 16 and Art 34 had long expired. Mr Landau made clear that FM was not seeking to set aside the Singapore Awards. Instead, it was simply defending itself against the Singapore Awards by requesting refusal of enforcement in relation to restitutionary claims amounting to approximately US$250 million.

10 FM's want of jurisdiction argument seeks to re-open the ruling of the arbitral tribunal ("the Tribunal") joining P6 to P8 to the arbitration between the parties (*viz*, SIAC Arbitration No 62 of 2008 (referred to hereafter as "the Arbitration")). FM argues that the joinder was improper because there was no agreement to arbitrate between FM and P6 to P8, and the Tribunal accordingly had no jurisdiction to join P6 to P8 as parties to the Arbitration. Mr Landau relies on the underlying principles, policy considerations and drafting history of the Model Law to conclude that as a matter of statutory construction, s 19 of the IAA "imports" Art 36 of the Model Law, such that FM can invoke lack of jurisdiction as a ground for refusal of enforcement under Art 36(1)(*a*)(i). Alternatively, if s 19 of the IAA does not "import" Art 36, then, as a matter of construction, s 19 "imports" Art 34 since the prescribed reasons for setting aside under Art 34 are similar to those for refusing enforcement under Art 36. Mr Landau's line of argument resonates with English arbitration law's notion that passive remedies exist after an arbitral award has been made and are available to the losing party to defend enforcement proceedings. Specifically, Mr Landau argues that a post-award challenge at the enforcement stage is permissible as a matter of principle even if a party took no positive step to set aside the award (whether under Art 16 or Art 34). Support for this argument is drawn from the drafting history of the Model Law, where the possibility of a party raising defences both at the setting-aside stage (*ie*, under Art 34) and at the recognition and enforcement stage (*ie*, under Art 36) was specifically contemplated, debated and finally concluded on the note that a party should be able to choose between the two remedies in Art 34 and Art 36 respectively. [note: 1] In the light of this choice between active remedies and passive remedies, Mr Landau accepts that in the latter case, recognition and enforcement go hand in hand. His submissions on post-award defences to enforcement proceed on the premise that: (a) there should be no distinction between a domestic international award and a foreign award in international commercial arbitration because the Model Law de-emphasises the relevance of the place or seat of arbitration; and (b) the applicable timelines in Art 34(3) of the Model Law and O 69A r 2(4) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the ROC"), which have long expired on the facts of the present case, should not apply to a party who seeks to resist recognition and enforcement. [note: 2] The underlying rationale is that a party is free to decide whether to set aside the award in the country where that award was made or, alternatively, wait until the winning party applies for enforcement in the country where that award was made and then raise its jurisdictional objection as a defence in such proceedings.

11 Mr Joseph contests all these points. Notably, Mr Joseph asserts that as a matter of construction, Mr Landau's argument that s 19 of the IAA "imports" either Art 36 or Art 34 of the Model Law cannot get off the ground. Firstly, Art 36 has no force of law in Singapore. Secondly, there is no "hook" in the statutory provisions for the inclusion of the grounds under Art 34 of the Model Law to challenge a domestic international award where the prescribed time limits have lapsed. Furthermore, if a losing party like FM has not availed itself of either Art 16 or Art 34, these Arts, which provide for curial review of an arbitral award, cannot be deployed at the enforcement stage for FM to invoke lack of jurisdiction as a ground for refusing enforcement because FM is out of time to seek recourse. Accordingly, Mr Joseph submits that there is no basis or justification upon which recognition and enforcement of the Singapore Awards can be refused at any stage after the time limits for setting aside those awards have expired.

12 FM's jurisdictional challenge to the Singapore Awards engages an important threshold question, *viz*: is there a statutory basis for FM to invoke lack of jurisdiction as a ground to resist or refuse enforcement of the Singapore Awards ("the Threshold Question")?

13 Sections 19 and 19B of the IAA come under Part II of the IAA, which covers domestic international awards, as opposed to foreign awards in international commercial arbitration, which fall under Part III of the IAA. FM *can* challenge the enforcement of the Singapore Awards, but it must do

so by challenging the final and binding effect of the Singapore Awards (which effect is recognised in s 19B(1)) on the grounds reserved in s 19B(4).

14 Where a court is prepared to grant enforcement of an award under s 19, it will do so because it has recognised the award as final and binding. Section 19B(1) recognises the legal force and effect of a final and binding domestic international award without the need for any application to court by the successful party, and such recognition can occur independently of any enforcement proceedings. In this context, the concept of "recognition" is a stand-alone defensive process where the award is relied upon to defend any subsequent new or separate proceedings.

15 Section 19B(4) forms part of the defensive process which provides a losing party with the option of invoking the grounds found or incorporated in the IAA, subject to the time limits contained within the IAA, to challenge the recognition of a domestic international award in order to resist its enforcement. This defensive process acknowledges the fact that ss 19 and 19B do not operate in isolation: if an award is enforced under s 19, then it is necessarily also recognised because recognition is an indispensible part or condition of enforcement. From this perspective, to resist enforcement, a losing party must challenge a final and binding award under one or more of the grounds reserved in s 19B(4) and must do so within the time limits contained within the IAA. The discussion below will follow the various points outlined here.

16 Significantly, FM's challenge to enforcement of the Singapore Awards stands or falls on the success of its challenge to the award on jurisdiction issued by the Tribunal on 7 May 2009 ("the 7 May 2009 Award"). It is Art 16, and *not* Art 34, that is the governing provision in relation to the 7 May 2009 Award. Article 16 prescribes the scope of and the protocol for a jurisdictional challenge in the early stages of arbitration. FM's decision not to adopt the recourse in Art 16(3) and how that decision impacts the specific ground now raised by FM to resist recognition and enforcement of the award on jurisdiction will be discussed below (see Part B for discussion on SUM 4064 and SUM 4065).

17 Mr Joseph submits that FM's right to raise an objection to the Tribunal's jurisdiction has been lost as FM did *not* seek to challenge the 7 May 2009 Award on jurisdiction under Art 16. According to Mr Joseph, the 7 May 2009 Award is a final and binding award on jurisdiction which FM earlier opted not to challenge under Art 16(3). Instead, FM went ahead to defend the Plaintiffs' claims in the Arbitration on the merits under a reservation of rights which, in the circumstances, was ineffective. Consequently, Mr Joseph submits, objection to jurisdiction cannot be raised as a ground to resist enforcement. As I see it, Mr Joseph has rightly highlighted in his submissions an important issue, which is whether FM's general reservation of rights was effective under the IAA so to enable FM to raise lack of jurisdiction as a ground to resist the recognition and enforcement of the 7 May 2009 Award.

18 It is only if the Threshold Question (as defined at [12] above) is answered in FM's favour (*ie*, in the affirmative) that the arguments pertaining to the Tribunal's jurisdiction and the applicable standard of curial review arise for determination. The same would apply apropos the other issues and arguments raised by the parties, such as FM's conduct and the argument based on waiver by estoppel.

The background facts in summary

19 This dispute arises out of a failed joint venture between two groups of companies, the Astro group ("Astro") and the Lippo group ("Lippo"), to provide direct-to-home ("DTH") multi-channel digital satellite pay television ("Pay TV"), radio and interactive multimedia services in Indonesia (these services will hereafter be collectively referred to as "DTH services"). The Plaintiffs are part of Astro,

while FM is part of Lippo.

20 P1 to P5 and P7 to P8 are directly or indirectly owned by P6, a company incorporated in England and Wales. A significant share in P6 was held by Usaha Tegas Sdn Bhd ("UT"), a Malaysia-incorporated investment holding company, which ran an established Pay TV service in Malaysia and was looking to expand its business into Indonesia through Astro. Indonesian law prohibits Astro from entering the Indonesian market as it is foreign-incorporated and foreign-registered. FM is an Indonesian company and was, at the material time, planning to launch its own DTH services.

21 UT approached Lippo in October 2004 proposing, *inter alia*, a joint venture agreement between Lippo and Astro to provide DTH services in Indonesia through D3, a wholly-owned subsidiary of FM ("the Joint Venture"). An agreement was reached in March 2005.

The Subscription and Shareholders Agreement

22 On or about 11 March 2005, the Subscription and Shareholders Agreement ("the SSA") for the Joint Venture was executed. D3 was the vehicle through which the Joint Venture would be implemented. P6 to P8 were not party to the SSA, but the SSA contemplated their involvement in the provision of the services envisaged under the Joint Venture, as evidenced by their participation in providing services, equipment and funding (referred to hereafter as "supporting services and funding" for short) to D3 (the Joint Venture vehicle) to carry out DTH services in anticipation of the closing of the SSA.

23 The SSA was subject to a number of conditions precedent which had to be fulfilled within three months before the parties would be bound to proceed with the transactions contemplated. One of the conditions precedent was the conclusion of service agreements between D3 and the Plaintiffs ("the Service Agreements"). As issues arose subsequent to the execution of the SSA, the parties agreed to a series of extensions, resulting in a new deadline of 14 July 2006 for the satisfaction of the conditions precedent. The closing date for the SSA was accordingly extended to 31 July 2006.

24 From about December 2005 or January 2006, in anticipation of the conclusion of the Service Agreements and the commencement of the Joint Venture, P6 to P8 began to provide supporting services and funding to D3 at FM's request. D3 commenced commercial operations in February 2006. The Service Agreements were never concluded.

25 After many failed attempts at re-negotiation and hammering out their differences, it became clear to the parties by August 2007 that the Joint Venture would not close. The parties began to explore exit options. In the meantime, P6 to P8 continued to provide supporting services and funding to D3, albeit subject to warnings issued by Astro to the Defendants that it (Astro) would cut off such services and funding if the parties were not able to reach an agreement on the new proposals offered by Astro.

26 A dispute subsequently arose over the provision of the supporting services and funding. P1 and P2 claimed that their affiliates were not obliged to and would not continue to provide such services and funding to D3. The Defendants alleged the contrary, arguing that P6 to P8 were obliged to continue the provision of supporting services and funding under an oral joint venture, the terms of which had been agreed upon before the SSA was executed. In August 2008, the Plaintiffs invoiced D3 for supporting services and funding which they had provided and demanded repayment of the cash advanced. The Defendants refused to pay and D1 instead commenced proceedings on 14 August 2008 against, *inter alia*, P6 to P8 in the Indonesian courts ("the Indonesian Proceedings"), alleging torts arising from the management and funding of D3. The Indonesian Proceedings proceeded on the basis

that there was an oral joint venture agreement preceding the SSA.

The Arbitration

27 The Plaintiffs took the position that the Indonesian Proceedings were in breach of clause 17 of the SSA, which required any disputes in connection with or in relation to the Joint Venture to be referred to arbitration. Accordingly, the Plaintiffs commenced the Arbitration on 6 October 2008 with Singapore as the seat of arbitration and in accordance with the SIAC Rules 2007. The Plaintiffs sought:

(a) an order that P6 to P8 be joined as parties to the Arbitration;

(b) declarations that there was no continuing binding joint venture and that the Plaintiffs were not obliged to continue to provide supporting services and funding to D3;

(c) final injunctive relief to restrain the Indonesian Proceedings, and final injunctive relief to restrain FM from funding (directly or indirectly) the prosecution of the Indonesian Proceedings and to restrain D1 from continuing those proceedings;

(d) costs for the Indonesian Proceedings and an indemnity against future costs for those proceedings;

(e) restitutionary relief approximating US$250 million in value in respect of the supporting services and funding provided; and

(f) interest and costs.

28 The Tribunal eventually constituted comprised Sir Gordon Langley (the Plaintiffs' nominee), Mr Stewart Boyd QC (the Defendants' nominee) and Sir Simon Tuckey (the chairman). The Plaintiffs were referred to as "the Claimants" and the Defendants as "the Respondents" in the Arbitration.

The 7 May 2009 Award on jurisdiction

29 The Defendants' first line of defence was that P6 to P8 were not party to the SSA and the Tribunal did not have jurisdiction to join them to the Arbitration. The Tribunal, after a four-day oral hearing, issued the 7 May 2009 Award finding otherwise. It found that the real issue was with the funding of the Service Agreements which were envisioned by the SSA. In construing clause 17 of the SSA, the Tribunal found that the Defendants' interpretation could not be sustained on an objective reading. They stated at [62] of the 7 May 2009 Award:

> Finally we have to say that if the Respondents' submissions about what was required to comply with Clauses 17.2 and 17.3 are right, these provisions created a formidable legal obstacle course. We cannot think this was intended in a series of provisions directed to resolving disputes "amicably" in the context of a joint venture. Commercial parties could not have intended to impose upon one another the exacting tasks contended for by the Respondents.

30 Once subject matter jurisdiction was established, the Tribunal found that the joinder of P6 to P8 was a matter of its powers under Rule 24(b) of the SIAC Rules 2007. The Tribunal considered that Rule 24(b) did give it the power to join P6 to P8 with their express consent and that such joinder was both desirable and necessary in the interests of justice (see [108] of the 7 May 2009 Award).

31 It gave further orders that D1 was to: (a) discontinue the Indonesian Proceedings against, *inter*

alia, P6 to P8; (b) take no further steps in the Indonesian Proceedings other than to discontinue them; and (c) be prohibited from bringing any further proceedings against P6 to P8 in relation to the Joint Venture.

32 FM argued that the above orders exceeded the Tribunal's jurisdiction as joinder related not to the powers of the Tribunal, but to the issue of whether or not the Tribunal had jurisdiction over the dispute between the Defendants and P6 to P8. After numerous emails between the parties, the Defendants announced its clear decision not to appeal against the 7 May 2009 Award under Art 16 of the Model Law. They proceeded to defend the substantive issues in the Arbitration, although they stated in their statement of defence that their actions were to be taken "without prejudice to the Respondents' position that any tribunal which is constituted has and will have no jurisdiction over any of the matters, claims and reliefs in the Notice of Arbitration dated 6 October 2008". [note: 3] The Defendants also filed a counterclaim against all the Plaintiffs (referred to in their counterclaim [note: 4] as UT shareholders), including P6 to P8, for failing to negotiate in good faith pursuant to clause 5.1 of the SSA and thereby causing the SSA not to be closed, but this was struck out by the Tribunal when the Defendants failed to provide security for costs.

The other four of the Singapore Awards made by the Tribunal

33 The Singapore Awards consisted of the 7 May 2009 Award and four other final awards made by the Tribunal, namely:

(a) an award dated 3 October 2009 ("the 3 October 2009 Award") declaring that: (i) the SSA was the only effective joint venture contract between the parties; (ii) there was no closing of the SSA; (iii) there was no continuing binding joint venture on the terms of the SSA; and (iv) accordingly, the Plaintiffs and their affiliates were not obliged to continue to provide supporting services and funding to D3;

(b) an award dated 5 February 2010 formalising an order for costs made pursuant to the 3 October 2009 Award;

(c) an award dated 16 February 2010 ("the 16 February 2010 Award") determining the main substantive issues in the Arbitration after a ten-day hearing and granting: (i) the restitutionary reliefs claimed by the Plaintiffs; (ii) a permanent injunction against the Defendants in relation to disputes within the scope of clause 17 of the SSA; and (iii) an order that FM was ordered to discontinue the Indonesian Proceedings and indemnify the Plaintiffs for further costs and expenses incurred in those proceedings; and

(d) an award dated 3 August 2010 granting the Plaintiffs interest on the restitutionary reliefs obtained in the 16 February 2010 Award and the costs of the Arbitration.

34 After the issuance of the 7 May 2009 Award, the Plaintiffs obtained judgment in terms of that award in England on 27 July 2009. On 30 July 2010, the Plaintiffs obtained registration of the 7 May 2009 Award in Malaysia. After all five of the Singapore Awards were issued, the Plaintiffs obtained judgment in terms of those awards in Hong Kong on 9 December 2010. The Plaintiffs obtained leave to enforce the Singapore Awards in Singapore on 5 August 2010 and 3 September 2010. SUM 4064 and SUM 4065 deal with the Plaintiffs' applications on 5 August 2010 and 3 September 2010 for the enforcement of the Singapore Awards. The execution proceedings in Hong Kong have been stayed pending the outcome of SUM 4064 and SUM 4065.

The Registrar's Appeals: RA 278 and RA 279

Events leading to RA 278 and RA 279

35 I have already mentioned that the Enforcement Orders were obtained pursuant to the Plaintiffs' ex parte applications for leave to enforce the Singapore Awards under O 69A r 6(1) of the ROC. The Enforcement Orders were purportedly served on FM on 14 January 2011 at its registered office in Jakarta, Indonesia. Believing that FM had been properly served with the Enforcement Orders, after expiry of the period to set aside the Enforcement Orders, the Plaintiffs entered the 2011 Judgments against FM on 24 March 2011.

36 FM applied by way of Summons No 1911 of 2011 and Summons No 1912 of 2011 to set aside the 2011 Judgments and for leave to apply to set aside the Enforcement Orders for improper service. FM stated in its supporting affidavit that it came to know of the 2011 Judgments from a letter dated 4 April 2011 from the Plaintiffs' lawyers, WongPartnership LLP ("WongPartnership"). [note: 5] On 22 August 2011, the Assistant Registrar made an order setting aside the 2011 Judgments and granted FM leave to apply to set aside the Enforcement Orders within 21 days from the date of the decision. The Plaintiffs disagreed with the decision and duly filed RA 278 and RA 279.

The parties' competing arguments

37 According to FM, it was never served with the Enforcement Orders. FM argued that under Indonesian law, the Enforcement Orders had to be served by either the Bailiff of the South Jakarta District Court or someone duly authorised to do so by the Chairman of the Council of the South Jakarta District Court, and certainly not by Indonesian lawyers appointed by WongPartnership. Besides, using Indonesian lawyers to effect service, the Plaintiffs' Indonesian lawyers had attempted service on a security guard, Mr Amiruloh, at the fifth floor offices of FM at Citra Graha ("the Building"), but had later taken back the documents. In any event, FM submitted that no documents were left at its registered office, which it claimed was on the fourth floor of the Building. [note: 6]

38 The Plaintiffs disagreed, arguing that under Indonesian law, service of the Enforcement Orders could be effected by Indonesian lawyers, and that their Indonesian lawyers, Lubris, Santosa & Maulana Law Offices ("LSM Law Offices"), had attempted to serve the Enforcement Orders and the certified translations thereof on FM at its registered office in Jakarta, Indonesia. The associate from LSM Law Offices who served the Enforcement Orders and the other relevant documents was Mr Hariadi. When Mr Hariadi arrived at FM's registered office on the fourth floor of the Building on 14 January 2011, he was told to proceed to the fifth floor of the Building because FM's mail room was located on that floor. At the fifth floor, Mr Hariadi left a sealed envelope containing the Enforcement Orders and some other documents, and obtained a signed receipt from Mr Amiruloh. The Plaintiffs submitted that this was sufficient to constitute service. As the documents relating to the Enforcement Orders were voluminous, Mr Hariadi made a second trip to FM's offices one and a half hours later to deliver another box containing exhibits to affidavits as well as the Bahasa Indonesian translations of all the documents. This time around, Mr Hariadi said that Mr Amiruloh not only refused to accept the new box of documents, but also asked him to take back the sealed envelope delivered earlier. Mr Hariadi said that he then explained to Mr Amiruloh the importance of the documents to FM as they concerned court proceedings in Singapore. According to Mr Hariadi, after Mr Amiruloh consulted somebody in FM's offices, he was told to take away both the box and the envelope. He had no choice but to comply as he saw that Mr Amiruloh was determined not to let him leave anything behind.

39 The Plaintiffs argued that even if service of the Enforcement Orders was found to be improper, this was an appropriate case for the court to exercise its discretion to cure the irregularity (see *ITC*

Global Holdings Pte Ltd (In liquidation) v ITC Ltd and others [2011] SGHC 150 ("*ITC Global Holdings*") at [49]–[50]) as FM was apprised of the enforcement proceedings.

The issues for determination in RA 278 and RA 279

40 The issues for determination in RA 278 and RA 279 are as follows:

(a) whether the service of the Enforcement Orders in Indonesia was in accordance with Indonesian law;

(b) whether the service of the Enforcement Orders by Mr Hariadi was valid service; and

(c) if the service by Mr Hariadi was not valid service, whether the irregularities of such service could be cured under the ROC.

Discussion and decision

(a) Whether the service in Indonesia was in accordance with Indonesian law

41 Both the Plaintiffs and FM produced conflicting expert opinions on how and by whom the Enforcement Orders were to be served on FM under Indonesian law. The Plaintiffs' expert, Mr Prahasto Wahju Pamungkas ("Mr Prahasto"), opined that service on FM of the Enforcement Orders by a lawyer from an Indonesian law firm by leaving copies of the same at FM's registered address in Indonesia was valid and effective under Indonesian law. [note: 7] In contrast, FM's expert, Mr M Arief Purwadi ("Mr Purwadi"), opined that service of the Enforcement Orders must be done by the Bailiff of the South Jakarta District Court or by someone duly authorised in writing to do so by a Stipulation of the Chairman of the Council of the South Jakarta District Court. [note: 8]

42 In addition, the experts on both sides turned to various courts in Indonesia for confirmation on the proper mode of service. On 16 June 2011, Mr Purwadi's law firm wrote to the South Jakarta District Court and received a reply on 21 June 2011 from the Chief Judge. [note: 9] Mr Purwadi then sought to rely on that opinion in support of his legal opinion. Mr Prahasto then followed with a letter dated 4 July 2011 to the High Court of Jakarta. [note: 10] In a letter dated 8 July 2011, the High Court of Jakarta replied. Mr Prahasto relied on the Jakarta's High Court's opinion to support his legal opinion. This series of correspondence finally culminated with Mr Purwadi writing to the Supreme Court of Indonesia. The reply from the Supreme Court of Indonesia came by a letter dated 26 September 2011, [note: 11] which was after the Assistant Registrar's decision on 22 August 2011. Mr Purwadi argued that the Indonesian Supreme Court's letter supported his legal opinion.

43 I begin with the relevance and evidential value of the letters from the various Indonesian courts. The experts appeared to have abrogated their role as experts on Indonesian law to the individuals who wrote those letters. If an expert witness on foreign law is to give evidence of his opinion, his evidence must be the opinion which he holds, and certainly not the opinion of another person (see Jeffrey Pinsler SC, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2010) at para 8.33). In the context of the present case, the expert *must provide his own opinion* on the proper mode of serving a foreign court order in Indonesia on an Indonesian company under Indonesian law based on his education, training and experience, and must also attempt to explain the basis of his interpretation of Indonesian law to this court in order to fulfil his duty to assist the court (see O 40A r 2 of the ROC).

44 The function of an expert on foreign law was succinctly summarised by the Court of Appeal in *Pacific Recreation Pte Ltd v SY Technology Inc* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [76] (endorsing the summary by Evans LJ in *MCC Proceeds Inc v Bishopsgate Investment Trust plc* [1999] CLC 417 ("*MCC Proceeds*") at [23]) as follows:

> (1) To inform the court of the relevant contents of the foreign law; identifying statutes or other legislation and explaining where necessary the foreign court's approach to their construction;
>
> (2) To identify judgments or other authorities, explaining what status they have as sources of the foreign law; and
>
> (3) Where there is no authority directly in point, to assist [the court] in making a finding as to what the foreign court's ruling would be if the issue was to arise for decision there.

45 As foreign law is an issue of fact, the expert's role is "to assist the court in making a finding as to what the foreign court's ruling would be if the issue was to arise for decision there" (see *Pacific Recreation* at [76]). In context, this means that apart from placing the relevant sources of foreign law before the court, the expert *must provide his opinion* on the effect of the law (see *Pacific Recreation* at [78]). The expert's role is to "predict" what the foreign court would decide (see *MCC Proceeds* at [24]).

46 In the present case, both sides referred the question of law at issue directly to the foreign court for its opinion. The legal points sought to be established by the letters from the various Indonesian courts and their effects are at best ambiguous. In my view, both experts wasted their time and effort in soliciting the letters from the various Indonesian courts. Procuring such letters from the Indonesian courts was as egregious as obtaining an ex parte declaration from an Indonesian court that service of the Enforcement Orders under Indonesian law was regular or irregular, as the case may be. It is important to remember that matters relating to the service of the Enforcement Orders in Indonesia are procedural. Therefore, validity of service is a matter for the Singapore court as the *lex fori* (see *Pacific Assets Management Ltd and others v Chen Lip Keong* [2006] 1 SLR(R) 658 at [14]). In the circumstances, the letters from the various Indonesian courts are irrelevant.

47 I now turn to the opinions of Mr Purwadi and Mr Prahasto. As between the two experts, I prefer the evidence of Mr Prahasto for the following reasons.

48 It was noticeable from Mr Purwadi's curriculum vitae that his expertise was not in the area of Indonesian civil procedure. Mr Purwadi was admitted to the Indonesian Bar in 2007. His area of practice revolved around corporate work, and he had no actual experience in civil litigation and procedure.

49 Curiously, Mr Purwadi relied on two academics whose legal opinions had been sought by FM to clarify and support Mr Purwadi's opinion on the question of Indonesian law at issue. One legal opinion was from Prof Dr Tan Kamello and the other was from Mr H Mohammad Fajrul Falaakh. This move did nothing for FM's case, and served only to undermine Mr Purwadi's standing and credentials as an expert on the question of Indonesian law at issue.

50 In contrast, Mr Prahasto not only had significant experience litigating matters before the courts in Indonesia, but is also currently a member of a team of ten experts preparing the "Academic Draft of the Codified and Unified Code of Civil Procedures", which is meant to replace the current procedural code governing Indonesian court proceedings. It was thus obvious that Mr Prahasto was far more

qualified than Mr Purwadi to assist this court as to the proper mode of serving the Enforcement Orders on FM in Indonesia.

51 Mr Purwadi's opinion was first contained in a letter of opinion dated 19 May 2011, which he later confirmed as correct in his first affidavit. A closer look at the letter of 19 May 2011 shows that Mr Purwadi and his co-author were expressing a legal opinion and conclusion on WongPartnership's purported service of the Enforcement Orders on FM under cover of WongPartnership's two letters dated 7 January 2011 and 15 February 2011. [note: 12] Mr Purwadi concluded that service of, *inter alia*, the Enforcement Orders on FM "under WongPartnership's letters dated January 7, 2011 and February 15, 2011 is invalid, illegal and is in contravention of the laws and regulations applicable in the jurisdiction of the Republic of Indonesia". [note: 13] Strictly speaking, the legal opinion was not on the question of whether service of the Enforcement Orders by Indonesian lawyers was a method of service authorised by Indonesian law. Besides, the opinion consisted mainly of bald assertions, with little or no discussion of the reasoning underpinning the conclusions set out therein. Indeed, Mr Purwadi appeared quite content to rely on the opinions of the District Court of South Jakarta and other academics without attempting an analysis of the issue himself. I am reminded of the Court of Appeal's observations in *Pacific Recreation* (at [85]) that "the expert cannot merely present his conclusion on what the foreign law is without also presenting the underlying evidence and the analytical process by which he reached his conclusion".

52 As alluded to earlier, FM obtained the legal opinion of two academics and they were commented upon by Mr Purwadi in his second affidavit to the effect that those legal opinions confirmed the opinion contained in his letter of 19 May 2011. The short point to this is that FM's expert evidence was given by the two academics and not their actual expert, Mr Purwadi.

53 In contrast, Mr Prahasto undertook a detailed and careful explanation and gave reasons not only of how the Indonesian Civil Procedure Code operated, but also of the possible application of international conventions, before concluding that there was no requirement that foreign court documents like the Enforcement Orders must only be served by a bailiff of an Indonesian court. Mr Prahasto in his opinion not only addressed squarely Mr Purwadi's opposing opinion, but also provided an analysis as to why he thought that opinion was wrong. Mr Purwadi, on the other hand, merely asserted, without more, that Mr Prahasto's opinion was "erroneous". [note: 14] In particular, I was persuaded by Mr Prahasto's explanation as to why Arts 388 and 390 of the *Herziene Indonesisch Reglement* (S.1848-16)(Indonesia)("the HIR"), which provide that service of documents must be done by the Bailiff of the South Jakarta District Court, is limited to documents issued by Indonesian courts. Given the parochial references in the HIR to service "on the village head" or the "head of the Chinese people", it seemed unlikely that the HIR was intended to apply to foreign court documents. In the light of the above, I accept Mr Prahasto's evidence that under Indonesian law, service of foreign court documents may be effected by a lawyer from an Indonesian firm leaving copies of the same at the registered address of the party sought to be served.

(b) Whether the service by Mr Hariadi was valid service

54 I now have to consider whether, as a matter of fact, the attempted service by Mr Hariadi on FM on 14 January 2011 constituted valid service. Mr Hariadi said that he went to FM's registered address on the fourth floor of the Building, but was told to go to the fifth floor, where mail for FM was to be delivered. I agree with Mr Joseph that Mr Kronenburg's argument that Mr Hariadi went to the wrong floor was not impressive.

55 The fact that Mr Amiruloh signed a receipt to acknowledge receiving the sealed envelope

addressed to FM and the fact that the sealed envelope was left at Mr Amiruloh's station for some time (*ie*, one and a half hours) are not determinative of whether the Enforcement Orders were properly served on FM. Instead, what is critical is the fact that Mr Hariadi subsequently took away *unopened* the sealed envelope addressed to FM. This went to the heart of whether Mr Hariadi's service of the Enforcement Orders was valid service. This issue turns on the absence of notice of the terms of the Enforcement Orders and, in particular, the absence of notice that FM, as the "debtor" for the purposes of O 69A r 6(1) of the ROC, had 21 days to apply to the Singapore court to set aside the Enforcement Orders (see O 69A r 6(4) of the ROC). The effect of O 69A r 6(4) is required to be stated on the copy of the order served on the debtor (see O 69A r 6(5)).

56 Mr Joseph argues that FM would have had notice of the Enforcement Orders and that FM, at the very least, would have known that the shortest possible time available to apply to court was 14 days under O 69A r 6(4). He relies on notice to FM's lawyers, Drew & Napier LLC ("D&N"), who were involved throughout the whole of the Arbitration. The last of the Tribunal's awards issued on 3 August 2010 was received on 6 August 2010, and was sent to both D&N and WongPartnership. In the ordinary course of things, on 17 September 2010, WongPartnership wrote to D&N to ask whether it had instructions to accept service of the Enforcement Orders on behalf of D1 and FM. D&N replied on 6 October 2010 stating that it had no instructions to accept service of the Enforcement Orders. The Plaintiffs then proceeded to attempt to effect service on FM in Indonesia.

57 Mr Joseph submits that there was no indication that D&N did not inform FM about WongPartnership's letter. Since September 2010, FM knew about the Enforcement Orders but did not instruct D&N to accept service. Mr Joseph's further point is that since FM controls D1, FM would have had notice of the Enforcement Orders sent by courier to D1, which had the same business address as FM, on 15 February 2011, and that there was documented evidence to prove that D1 received the same on 17 February 2011. [note: 15]

58 I have already emphasised that the purpose of service of the Enforcement Orders is to give notice to FM of not only the orders themselves, but also of FM's right to apply to the Singapore court to set aside the orders within 21 days of the date of service. The Enforcement Orders were not sent under cover of WongPartnership's letter of 17 September 2010 to D&N; neither did WongPartnership set out the terms of the Enforcement Orders in its letter.

59 Relying on the receipt signed by Mr Amiruloh, WongPartnership assumed that the sealed envelope delivered by Mr Hariadi to Mr Amiruloh was served on and retained by FM. There is no indication that WongPartnership was earlier aware that Mr Hariadi had been asked to take away the sealed envelope and the box of documents. This information came out in Mr Hariadi's second affidavit. Mr Joseph argues that FM should not be allowed to rely on its refusal to accept service to its advantage. With respect, Mr Joseph's argument misses the point. Typically, if a party evades or refuses service, the court, on the application of the other party, would order substituted service (see generally Jeffrey Pinsler SC, *Singapore Court Practice* (LexisNexis, 2009) at para 62/5/2). This course of action was available to the Plaintiffs when their efforts to serve the Enforcement Orders on FM outside the jurisdiction were rebuffed or thwarted by FM.

60 In the circumstances, I agree with the Assistant Registrar that there was no proper service of the Enforcement Orders on FM. The sealed envelope containing the Enforcement Orders was taken away unopened. There was no suggestion that any of FM's employees, or even Mr Amiruloh, opened the envelope. Under the circumstances, the receipt signed by Mr Amiruloh was not in itself evidence of service.

(c) Whether the irregularities in service could be cured

61 In *ITC Global Holdings*, which involved service of a writ in India to join the directors of the defendant company to proceedings against the defendant company, it was not disputed that under Indian law, a natural person must be served either personally or by an agent properly empowered to accept service on behalf of the defendant. The plaintiff thus had to show that the defendant company, on whom it had effected service in India, was in fact an agent of the directors and was authorised to receive service on their behalf. As no evidence was produced to show this, service on the directors was found to be *prima facie* irregular. The court, however, applying the English case of *Golden Ocean Assurance Ltd and World Mariner Shipping SA v Christopher Julian Martin and others* [1990] 2 Lloyd's Rep 215, eventually decided to exercise its discretion to cure the irregularity. In coming to its decision, the court found the following factors material:

(a) the directors were apprised of the proceedings (see *ITC Global Holdings* at [50]);

(b) the plaintiff had properly done all that it could to effect service (see *ITC Global Holdings* at [49]); and

(c) to fail to cure the irregularities would cause undue prejudice to the plaintiff by denying it of its right to a hearing (see *ITC Global Holdings* at [50]).

62 As mentioned earlier, *ITC Global Holdings* involved the service of a writ to join the directors of the defendant company to a suit involving the company. Thus, unless the irregularity was cured, most of the prejudice would fall on the plaintiff as it would be denied its right to a hearing.

63 The facts of the present case are different and *ITC Global Holdings* is distinguishable. For the reasons stated above (at [54]–[60]), there was effectively no service of the Enforcement Orders. This is not an appropriate case to exercise the court's discretion.

64 However, I agree with the Assistant Registrar that now that FM is aware of the Enforcement Orders and the terms thereof, and has come to ask, *inter alia*, for leave to set aside the Enforcement Orders, there is no need for the Plaintiffs to effect service of the Enforcement Awards again in Indonesia, but FM will be given an opportunity to make its argument as to why the Singapore Awards should not be enforced. I therefore affirm the Assistant Registrar's order granting, amongst other things, leave to FM to apply to set aside the Enforcement Orders within 21 days of his decision, namely, by 4.00pm on 12 September 2011.

Result

65 For the reasons stated, RA 278 and RA 279 are dismissed.

The Summonses: SUM 4064 and SUM 4065

66 In the summonses before me, FM seeks to challenge the enforcement of the Singapore Awards. Of the five awards which make up the Singapore Awards, the 7 May 2009 Award, is the most important since the other four awards made by the Tribunal (see [33] above) were premised on that award giving the Tribunal jurisdiction to make the Singapore Awards. FM's position is that the Singapore Awards should not be enforced in relation to the "restitution claims" described in the 16 February 2010 Award, whereby FM and the rest of the Defendants were found liable to pay P6 to P8 the sum of approximately US$250 million. [note: 16] In the main, FM's application rests on an argument of lack of jurisdiction. If FM succeeds in showing that the Tribunal had no jurisdiction (let alone the power) to join P6 to P8 to the Arbitration in the first place, all the other four awards made by the Tribunal would also be rendered otiose. While FM is challenging all five of the Singapore Awards

in SUM 4064 and SUM 4065, Mr Landau's arguments were really focused on the 7 May 2009 Award.

Outline of this judgment

67 The Threshold Question is whether there is a statutory basis for FM to invoke lack of jurisdiction as a ground to resist enforcement of the Singapore Awards (see [12] above). In answering the Threshold Question, it is important to keep in mind the distinction between an award on jurisdiction and an award which deals with the issue of jurisdiction at the same time as it deals with the merits. In this case, the Tribunal issued an award on jurisdiction (*ie*, the 7 May 2009 Award), and FM decided not to challenge that award in the manner prescribed by Art 16(3) of the Model Law. FM instead proceeded to defend the merits of the Arbitration, albeit under protest, and even lodged a counterclaim against the Plaintiffs (see [32] above). FM also did not take steps to set aside any of the four awards which the Tribunal made on the merits of the Plaintiffs' claims (*eg*, the 16 February 2010 Award). The prescribed time periods under the IAA to set aside those awards (as well as the 7 May 2009 Award) have long expired.

68 Mr Landau has framed the Threshold Question as whether FM can resist recognition and enforcement of the Singapore Awards in circumstances where no application to set aside those awards was ever made under the IAA. [note: 17] In my view, this simplified characterisation misses the point. The IAA does not preclude FM from defending itself against the Plaintiffs' attempt to recognise and enforce the Singapore Awards. The IAA (and Part A of this judgment) proceeds on the basis that FM *can* challenge the recognition and enforcement of the Singapore Awards, but it must do so under one or more of the grounds found or incorporated in the IAA and subject to the time limits contained within the IAA (see s 19B(4) of the IAA). Part A of this judgment discusses, amongst other matters, the interplay between s 19 and s 19B of the IAA, and how they interact with Art 34 of the Model Law.

69 Part B of this judgment will discuss the specific ground raised by Mr Landau to resist enforcement of the Singapore Awards. FM wants to invoke lack of jurisdiction at the enforcement stage as a reason why the court should refuse to enforce the 7 May 2009 Award. Is lack of jurisdiction a ground that is still available for FM to invoke to resist enforcement, given that FM earlier decided not to pursue the recourse prescribed in Art 16(3) of the Model Law to challenge the 7 May 2009 Award? What is the consequence of FM's decision not to challenge that award? It was argued that a losing party may decide not to apply to set aside an award on jurisdiction whilst still retaining its right to resist recognition and enforcement of that award in the country in which it was made. [note: 18] Therefore, instead of actively applying to set aside an award (whether under Art 16 or Art 34), a losing party may choose to remain passive, refuse to implement the award and wait for the winning party to attempt to enforce the award. When enforcement is sought, the losing party can then move to resist recognition and enforcement. FM argues that it has taken the passive course of action (as just described), having earlier reserved and retained the right to invoke lack of jurisdiction as a ground to resist enforcement of the 7 May 2009 Award. Part B of this judgment discusses this issue in the context of the Model Law regime (as found or incorporated in the IAA) to see if FM has the right to resist recognition and enforcement of the 7 May 2009 Award on the ground of lack of jurisdiction despite having earlier chosen not to take steps to set aside that award (as well as the rest of the Singapore Awards).

Part A

Discussion on the recognition and enforcement of domestic international awards

70 Recognition and enforcement of arbitral awards are concerned with giving effect to such

awards. There is a difference between "recognition" *per se* and "recognition and enforcement". An award may be recognised without being enforced, but a court cannot enforce an award which it does not recognise.

71 Challenging the enforcement of a *domestic* international award is more properly analysed as challenging the recognition of such an award. The pro-arbitration stance taken by the IAA privileges party autonomy and the finality of awards, and espouses limited curial intervention. This is in line with numerous other civil jurisdictions and jurisdictions which have adopted the Model Law (referred to hereafter as either "Model Law jurisdictions" or "Model Law countries"), and favours the summary enforcement of a domestic international award which has been recognised. It is not surprising that the court of the country in which the seat of the arbitration is located is more willing to enforce such an award. In this context, a court grants enforcement because it has recognised the domestic international award as final and binding. Notably, Mr Landau accepts that recognition and enforcement go hand in hand. Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) explains the combination of these two concepts (recognition and enforcement) as follows (at para 11.23):

> A court that is prepared to grant enforcement of an award will do so because it recognises the award as validly made and binding upon the parties to it and, therefore, suitable for enforcement. *In this context, the terms recognition and enforcement do run together*. *One is a necessary part of the other.*
>
> [emphasis added]

72 There are three situations where a challenge to a *domestic* international award may be brought at the enforcement stage before this court where the seat of arbitration is Singapore, namely:

(a) where there has been an application to set aside a domestic international award and the application has been finally disposed of (in this situation, there will be no grounds for refusing to enforce the award as the application to set it aside has been conclusively dismissed);

(b) where the time limit for setting aside under Art 34 of the Model Law has not expired and there has been no application for setting aside (in this situation, if a timely application for enforcement is brought, the domestic international award, in a proper case, may be set aside under Art 34); and

(c) where the time limit for setting aside under Art 34 of the Model Law has expired and an application for setting aside has not been brought and is now time-barred.

73 In my view, the question in all three of these scenarios is the same: should the domestic international award be set aside or should it be recognised and enforced as a Singapore judgment under s 19 of the IAA? The only difference between the first two situations and the third is that in the third situation, the grounds under Art 34 of the Model Law are *no longer available* to the party which brings its challenge to the award out of time. The relevant question in the present case is simple: are there any *remaining grounds* found or incorporated in the IAA for Mr Landau to challenge the recognition and enforcement of the Singapore Awards? For the reasons set out in this judgment, I find that there are no remaining grounds for this court to refuse recognition and enforcement of the Singapore Awards.

74 The IAA has made provision for domestic international awards, *viz*, where such an award has not been set aside under any of the grounds for setting aside, it is *recognised* as final and binding,

and is not subject to any further grounds for refusal of enforcement. The legal basis for a refusal of enforcement is not, *stricto sensu*, that grounds have been found for refusing enforcement, but that there is no award to speak of (*ie*, the award in question has not been recognised and has instead been set aside).

75 Section 19 read with s 19B of the IAA renders an arbitral award final and binding, and enforceable with the leave of the court, subject to the grounds within the IAA and the Model Law for setting aside the award or refusing recognition and enforcement of it. Section 19 reads as follows:

> An award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award.

76 Section 19B(1) clarifies the effect of a domestic international award, and reads as follows:

> An award made by the arbitral tribunal pursuant to an arbitration agreement is *final* ***and*** *binding* on the parties and on any persons claiming through or under them and may be relied upon by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction.
>
> [emphasis added in italics and bold italics]

77 The words "final and binding" belong to the paradigm of recognition. A party seeking recognition may, for example, want to rely on the legal force and effect of a final and binding arbitral award for the purposes of a defence or a set-off in subsequent court proceedings. At other times, recognition constitutes an indispensible part of or a condition for enforcement. In this second situation, enforcement (which is dependent on recognition) comes immediately subsequent to recognition and is effected on an award which has *already become final and binding*. As I have alluded to at [15] and [70] above, enforcement and recognition can go hand in hand. This is neither a new concept, nor is it exclusive to domestic international awards. The same concept applies to foreign awards. For instance, s 27(2) of the IAA, which clarifies the meaning of "enforcement" of foreign awards, includes recognition in the definition of "enforcement". Section 27(2) reads as follows:

> **Interpretation of Part III**
>
> **27.**—(1) …
>
> (2) In this Part, where the context so admits, "enforcement", in relation to a foreign award, includes the recognition of the award as binding for any purpose, and "enforce" and "enforced" have corresponding meanings.

78 In my view, any challenge to enforcement must also come as a challenge to the recognition of an domestic international award, that is to say, a challenge to an otherwise final and binding domestic international award recognised pursuant to s 19B(1) of the IAA. Section 19B(4), which qualifies when such an award may be recognised as final and binding, reads as follows:

> This section shall not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this Act and the Model Law.

79 This means that the final and binding effect of a domestic international award is qualified by the ability to set it aside on the grounds prescribed in Art 34 of the Model Law and s 24 of the IAA.

Should such grounds exist, this court may refuse to recognise the award in question as final and binding and set it aside instead; enforcement would then be moot.

80 For a foreign award coming under Part III of the IAA, the binding effect of such an award is qualified by s 31 of the IAA, which reproduces the grounds for refusal of enforcement in Art V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded in New York on 10 June 1958 ("the New York Convention"). Articles 35 and 36 of the Model Law are *excluded* from the IAA by s 3 of the IAA, and are thus *not* grounds for qualifying the binding effect of either a foreign or a domestic international award.

81 Lest it be thought that the idea of a domestic international award being susceptible *only* to setting aside *and* refusal of recognition but not to refusal of enforcement is new, I hasten to mention that this is also the position in numerous civil law and Model Law jurisdictions. For example, the German Zivilprozessordnung (Tenth Book on the Code of Civil Procedure) (Germany) ("the ZPO") provides for different enforcement regimes for domestic international awards (see s 1060 of the ZPO) and foreign awards (see ss 1061–1065 of the ZPO). Section 1060 of the ZPO and Art 34 of the Model Law provide exhaustively for the enforcement of domestic international awards. Section 1060 of the ZPO reads as follows:

> **Section 1060 – Domestic awards**
>
> (1) Enforcement of the award takes place if it has been declared enforceable.
>
> (2) An application for a *declaration of enforceability shall be refused* ***and*** *the award set aside* if one of the grounds for setting aside under section 1059 subs. 2 exists. Grounds for setting aside shall not be taken into account, if at the time when the application for a declaration of enforceability is served, an application for setting aside based on such grounds has been finally rejected. Grounds for setting aside under section 1059 subs. 2, no. 1 shall also not be taken into account if the time-limits set by section 1059 subs. 3 have expired without the party opposing the application having made an application for setting aside the award. [note: 19]
>
> [emphasis added in italics and bold italics]

82 Refusal of recognition and enforcement cannot be divorced from setting aside – a domestic international award is either recognised and not set aside, or it is *not* recognised and is set aside. Contrary to Mr Landau's argument, there is no "double control". Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2nd Ed, 2007) ("Poudret and Besson") describes the German position as follows (at para 864):

> … ZPO, s 1060(2) second sentence provides that a decision rejecting the application to set aside the award is "binding" and prevents the defeated party from raising the same ground to oppose the recognition. There is therefore *no "dual control" of a domestic award* … German law practically obliges the defeated respondent to challenge the award [in order to set it aside] if it wants to preserve its arguments in case of a recognition *and* enforcement of the award in Germany. [emphasis added]

83 Germany is not alone in taking this stance. In Quebec, a refusal to recognise and enforce a domestic international award (homologation) is equivalent to a setting aside (annulment) of an award. The correct legal basis for a refusal to enforce is therefore that there is no award to enforce, *ie*, the award has been set aside. Articles 947, 947.1 and 947.2 of Book VII of the Code de Procédure Civile, LRQ, c C-25 (Quebec) ("the CPC") read as follows:

947. The *only possible recourse* against an arbitration award *is an application for its annulment*.

947.1. Annulment is obtained by motion to the court or by opposition to a motion for homologation [recognition and enforcement].

947.2. Arts 946.2 to 946.5 [governing grounds for refusal of homologation], adapted as required, apply to an application for annulment of an arbitration award. [note: 20]

[emphasis added]

84 I find it curious that while Mr Landau admits that the UK is out of line with the rest of the Model Law countries, most of his authorities, including *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763 (which is irrelevant to the analysis in the present case), still emanate from the UK. The Model Law is not a creature typical of the statutes emanating from common law jurisdictions; it more properly resembles civil law drafting. Commenting on the drafting process of the IAA with reference to the Model Law, Charles Lim, who was involved in the drafting of the IAA, wrote in his article "The Developmental Life Cycle of International Arbitration Legislation – Singapore IAA Case Study" (2011) 7 AIAJ 1 (at pp 6–7):

> Apart from physical and telecommunications infrastructure, central geographical location and ease of access, all of which Singapore possessed, Dr [Gerold] Herrmann [Senior Legal Officer of UNCITRAL and later Secretary of UNCITRAL] advised that international parties and their arbitrators look for a familiar law and minimal curial intervention (emphasis on respect for party autonomy). International parties and their counsel are averse to expending precious time and effort in learning a new set of arbitration laws and being entangled with protracted local domestic court processes. Such domestic court processes would usually be alien to their counsel. For these reasons, Dr Herrmann advised that *the Singapore Act should treat the UNCITRAL Model Law much like an international convention. He advised that it be enacted in whole and unedited with any modifications Singapore made stated upfront.* Parties and their counsel would then be able to learn very quickly and easily the differences between the Singapore Act and the Model Law. This was indeed *a revelation to the author who was trained to draft Bills in the traditional common law drafting style*, similar to how the English draftsman drafted the English Arbitration Act 1996 (c 23). Indeed, the Mustill Report stated that ***the Model Law is expressed in language which differs from that of a typical English statute*** …
>
> … Some members of the subcommittee argued persuasively that the world's economic power then was not concentrated in the common law countries but was shared between the common law and civil law countries such as the European Union, China and Japan. In the ASEAN region, several major trading partners of Singapore — Indonesia, Thailand and Vietnam — are civil law jurisdictions. With her multicultural and multi-lingual society, Singapore was in a unique position to attract parties from both Asia and Europe. The exclusion of civil law concepts and processes might have the unintended effect of deterring parties from civil law jurisdictions who are used to conducting arbitrations in accordance with civil law processes. For example, civil law counsel and arbitrators may not accept the common law adversarial approach. Art 12(3) of the Model Law allows the adoption of inquisitorial processes if the arbitral tribunal thinks fit unless the parties disagree. Art 28(3) is yet another example of an innovation under Singapore law as it allows a tribunal to decide *ex aequo et bono*, or as *amiable compositeur*. These are concepts unfamiliar to a lawyer trained in the common law. They are, however, commonly applied in international arbitration and in civil law jurisdictions. *The Singapore Report recognised this unfamiliarity of common law lawyers with these concepts, and recommended their adoption*, albeit with limitations.

[emphasis added in italics and bold italics]

85 I find that any sensible discussion of the Model Law must draw from arbitration law in civil law jurisdictions. Harmonisation of the Model Law draws heavily from these jurisdictions. The treatment of domestic international awards by the IAA as susceptible to a refusal of recognition *and* setting aside is in good company. There are examples of civil law jurisdictions that have either abandoned Art 36 of the Model Law in relation to domestic international awards (*eg*, Germany), or included Art 36 in a modified form or with a modified application (*eg*, Quebec). Such exclusion and adaptation is permissible under the Model Law regime itself (see [106]–[110] below). Contrary to what Mr Landau has argued, the applicability of Art 36 to both foreign and domestic international awards simply does not exist in all Model Law jurisdictions. I find that the appropriate jurisdictions which I should examine are those which, like Singapore via the IAA, treat domestic international awards separately from foreign awards and either exclude or modify the application of Art 36 of the Model Law.

86 A challenge on jurisdictional grounds may be revived where enforcement is being sought in a court *other than* the court of the seat of arbitration. Where enforcement is sought in countries which are party to the New York Convention, a losing party may still go to court to resist enforcement on the grounds set out in Art V of that Convention. Even in this situation, the enforcement court may not permit the party to revive a jurisdictional objection at the enforcement stage because of its conduct and failure to or decision not to raise the jurisdictional objection before the curial court (see generally *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another* [2006] 3 SLR(R) 174 at [56] and *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 1 HKLRD 665 at 689). As discussed, the position is different only where the court is the court stipulated in Art 6 of the Model Law (in this case, the High Court in Singapore) and it is a Singapore domestic international award which is sought to be recognised and enforced in Singapore under the IAA.

87 Mr Landau argues that the IAA gives statutory effect to Art V of the New York Convention via s 31 of the IAA, which applies to foreign awards, but there are no corresponding express provisions for recognition or enforcement (and for refusing recognition or enforcement) of domestic international awards. At this point, I note, however, that Mr Landau falls short of saying that there is a lacuna as a lacuna would leave him with no grounds for FM's challenge to the Singapore Awards. Instead, relying on s 4 of the IAA, Mr Landau has embarked on, *inter alia*, a lengthy discourse on the drafting history of the Model Law to support his expansive interpretation of s 19, which rests on the argument that there *should* be no distinction between domestic international awards and foreign awards as the drafters of Art 36 of the Model Law intended a unified treatment of domestic international awards and foreign awards. Mr Landau also submits that s 19 must be read consistently with Art 36, or, if not Art 36, then with Art 34, both of which contain grounds for FM to challenge recognition and enforcement of the Singapore Awards at the enforcement stage by relying upon lack of jurisdiction. Finally, in respect of the prescribed time period set out in Art 34(3) of the Model Law for recourse against an arbitral award, Mr Landau's answer is simply that the time limit applies to an application to set aside an award, and as FM is applying not to set aside but to resist enforcement of the Singapore Awards, FM is not faced with any time limit issue. [note: 21]

88 I am unconvinced by Mr Landau's submissions. I have explained, and it is clear for the reasons stated above, that there is no merit in Mr Landau's argument that there is no express provision in the IAA that contains permitted grounds to resist recognition and enforcement of domestic international awards. Section 19B of the IAA, read with Art 34 of the Model Law, requires FM to take positive steps to set aside the Singapore Awards on one of the specified grounds. The distinction which Mr Landau makes on time bar between enforcement and setting aside in the context of a domestic international award is patently fanciful. The only argument left to Mr Landau is that there *should* be no distinction

between domestic international awards and foreign awards. This argument, too, is a non-starter under the IAA. Mr Landau's arguments rest on Art 36 of the Model Law being part of the Singapore legal regime. This is of no help to FM as Art 36 does not have the force of law in Singapore. Singapore's decision not to include Art 36 and to treat domestic international awards in the manner outlined above is consistent with a legitimate pro-arbitration stance. That FM would prefer the Singapore legal regime to be in *pari material* with Art 36 of the Model Law is not a valid argument against the position which Singapore has decided to take.

89 Mr Landau's other submission that FM is approaching this court in its enforcement and not its curial capacity, and that this is not an application to set aside the Singapore Awards is wholly misconceived. It is an argument that seeks to make a distinction when none exists, and serves only to obfuscate matters. As explained above, the permitted grounds to resist recognition and enforcement are limited in the case of a domestic international award where the award is being enforced in the same country in which it is made. Section 19B of the IAA recognises that for all practical purposes, judicial intervention in respect of domestic international awards is undertaken at the curial stage and s 19B thus makes no distinction between a court sitting in its curial capacity and in its enforcement capacity.

90 In context, intervention at the curial stage seeks to curtail a re-escalation of conflict by the losing party's attempts to open a final and binding domestic international award to repeated and possibly indefinite challenge post-award. Finality of the arbitral process is an important principle of international commercial arbitration. Judge of Appeal V K Rajah, on behalf of the Court of Appeal in *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732, opined (at [29]):

> There are myriad reasons why parties may choose to resolve disputes by arbitration rather than litigation … [A]n arbitral award, once made, is immediately enforceable both nationally and i*nternation*ally in all treaty states. One would imagine that parties might be equally motivated to choose arbitration by othe*r crucia*l considerations such as *confidentiality, proce*dural *flexibility* and the choice of arbitrators with particular technical or legal expertise better suited to grasp the intricacies of the particular dispute or the choice of law. *Another crucial factor that cannot be overlooked is the finality of the arbitral process. Arbitration is not viewed by commercial persons as simply the first step on a tiresome ladder of appeals.*
>
> *It is meant to be the first and only step*.
>
> [emphasis added]

91 I should add, for completeness, that I am unconvinced by Mr Landau's submission that the interpretation of s 19B of the IAA is determined by the circumstances in which it was enacted. Mr Landau argues that s 19B was only put into the IAA to statutorily reverse the position under *Tang Boon Jek Jeffrey v Tan Poh Leng Stanley* [2001] 2 SLR(R) 273 ("*Stanley Tan* (*CA)*"). *Stanley Tan (CA)* extended the notion of *functus officio* under Art 32 of the Model Law to include a power for a tribunal to reconsider and reverse its decision (at [38]). Mr Landau argues that s 19B deals with the narrow point of *functus officio* and is irrelevant to the grounds for refusing to recognise and enforce a domestic international award.

92 This submission is not borne out by a reading of s 19B of the IAA. Only s 19B(2) of the IAA relates to *functus officio*, and, thus, it is only s 19B(2) which addresses the *Stanley Tan (CA)* situation. Section 19B of the IAA taken as a whole is broader, and sub-section (2) cannot be used to read down to limit the rest of s 19B. Section 19B of the IAA is primarily about the *effect of an award*, and not the *functus* status of a tribunal. If Mr Landau is right and s 19B of the IAA had merely been

included to reverse the decision in *Stanley Tan (CA)*, then s 19B would have clarified the powers of a tribunal, and *not* the effect of an award.

93 In my view, s 19B of the IAA is relevant to the question of whether a domestic international award may be revisited after timelines for an application to set it aside have expired. If the award is final and binding and there are no further exceptions to this result, then it may not be challenged. The only way for FM to challenge the Singapore Awards is to claim that they are *not* final and binding, and are instead subject to grounds for setting aside and refusal of recognition.

The grounds for refusal of recognition and setting aside

Grounds under Art 34 of the Model Law

94 The grounds under Art 34 of the Model Law are not available to FM for setting aside and refusing recognition of the Singapore Awards as FM is time-barred. Mr Landau submits that the grounds in Art 34 are available to FM notwithstanding that the prescribed time limits have expired. However, he has given this court no legally valid reason why Art 34(3), which establishes a time bar of three months for the bringing of a challenge, should be divorced from Art 34(2), wherein the grounds for setting aside are found. I agree with Mr Joseph that Art 34(1) is important. It provides for one means of recourse which is available during a period (as specified in para (3)) and for limited reasons (as specified in para (2)).

95 I find that there is no legal basis for separating the grounds for setting aside from the time limit imposed upon a setting-aside application. It is clear from the way in which Art 34 is structured that recourse to a court under this Art is subject to *both* paras (2) and (3) thereof.

96 I draw support from the UNCITRAL Analytical Commentary on Draft Text of Model Law on International Commercial Arbitration, Report of the Secretary General, UN Doc, A/CN 9/264, 25 March 1985 ("UNCITRAL Commentary A/CN 9/264") on Art 34 of the Model Law, where it is stated (at para 1):

> Sole action for attacking award, paragraph (1)
>
> 1. Existing national laws provide a variety of actions or remedies available to a party for attacking the award. Often equating arbitral awards with local court decisions, they set varied and sometimes extremely long periods of time and set forth varied and sometimes long lists of grounds on which the award may be attacked. Art 34 is *designed to ameliorate this situation by providing only one means of recourse (paragraph (1)), available during a fairly short period of time (paragraph (3))* and for a rather limited number of reasons (paragraph (2)). It does not, beyond that, regulate the procedure, neither the important question whether a decision by the Court of Art 6 may be appealed before another court nor any question as to the conduct of the setting aside proceedings itself.
>
> [emphasis added]

97 It is clear that Art 34 is meant not only to limit the grounds for setting aside an award, but also to ensure that any challenge is brought promptly within the period specified. *ABC v XYZ Co Ltd* [2003] 3 SLR(R) 546 illustrates the strictness of the prescribed three-month time limit. In that case, the question was whether new grounds could be added after the expiry of the prescribed three-month period. Judith Prakash J held (at [9]):

> All [Art 34(3)] says is that [an] application [to set aside] may not be made after the lapse of three months from a specified date. Although the words used are "may not" these must be interpreted as "cannot" as it is clear that the intention is to limit the time during which an award may be challenged. This interpretation is supported by material relating to the discussions amongst the drafters of the Model law. It appears to me that the court would not be able to entertain any application lodged after the expiry of the three-month period as art 34 has been drafted as the all-encompassing, and only, basis for challenging an award in court. It does not provide for any extension of the time period and, as the court derives its jurisdiction to hear the application from the Art alone, the absence of such a provision means the court has not been conferred with the power to extend time.

98 Above all, there is simply no "hook", as Mr Joseph puts it, for the inclusion of the grounds under Art 34 of the Model Law to resist enforcement of a domestic international award where the prescribed time limit has lapsed. There are no exceptions to the time bar contained within Art 34, and there is no basis for Mr Landau's argument that since the grounds in Art 34 were drafted to mirror in almost every respect the provisions of Art 36, the meaning of Art 34 has been modified by the inclusion of Art 36 to render the time limit moot at the enforcement stage. [note: 22]

Grounds under Art 36 of the Model Law

99 The grounds under Art 36 of the Model Law cannot be imported into the IAA for the simple reason that s 19B(4) of the IAA only provides for challenges "in accordance with the provisions of this Act *and* the Model Law" [emphasis added].

100 Section 3(1) of the IAA is clear: it states that "the Model Law, *with the exception of Chapter VIII thereof*, shall have the force of law in Singapore" [emphasis added]. I am unable to read s 3(1) of the IAA as anything other than an exclusion of the Art 36 grounds for refusing recognition and enforcement. There is a corresponding explanatory note to the same effect in the First Schedule to the IAA *vis-à-vis* Chapter VIII of the Model Law on Recognition and Enforcement of Awards. The note states: "Chapter VIII does not have the force of law in Singapore by virtue of section 3(1)".

101 The preference of Art V of the New York Convention over Art 36 of the Model Law was no accident. Notably, as stated in *Halsbury's Laws of Singapore* vol 1(2) (LexisNexis, 2011 Reissue) (at footnote 10, p 155), the intention of the Legislature in excluding Arts 35 and 36 was to have the enforcement of foreign awards governed separately under the New York Convention, with Singapore awards being governed by s 19 of the IAA. The New York Convention applies on the basis of *reciprocity* between Convention States for foreign awards. Article 36 of the Model Law applies more generally "irrespective of the country in which [the award] was made" (see Art 36(1)). This was a deliberate choice to enhance enforceability *on the grounds of reciprocity*. Dr Gerold Herrmann's observations on the importance of reciprocity to enhance enforceability of an award to any arbitration centre's competitive edge were also shared by Christopher R Drahozal in his article "Commercial Norms, Commercial Codes, and International Commercial Arbitration" (2000) 33 Vanderbilt Journal of Transnational Law 79, and the comments were reproduced by Charles Lim in his article (see [84] above) at p 6:

> Countries compete to be venues in which international arbitration hearings are held. International arbitration hearings are very mobile. *To* ***enhance enforceability*** *, the award must be made in a country that is party to the New York Convention; otherwise, the parties are free to choose* the *situs where the arbitration will take place and the award will be made*. Prospective arbitration sites have a strong incentive to make their arbitration laws responsive to the demands of the consumers of arbitration services. As one American commentator stated, '(b)ecoming a venue for

arbitration can be a very lucrative business and, especially in the international arena, is seen as a distinctly desirable objective'.

[emphasis added in italics and bold italics]

102 As far as enforceability of a foreign award is concerned, the important instrument is *not* the Model Law (and, accordingly, Art 36), but the New York Convention, which is based on reciprocity. The then Parliamentary Secretary to the Minister of Law, Associate Professor Ho Peng Kee, in *Singapore Parliamentary Debates*, *Official Report* (31 October 1994) vol 63 ("the 1994 Parliamentary Report") affirmed this (at col 627):

> The Bill will also consolidate all provisions on international arbitrations in a single Act by re-enacting substantially unchanged the Arbitration (Foreign Awards) Act (Cap. 10A) in Part III. The Arbitration (Foreign Awards) Act presently gives effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. The Convention which is set out in the Second Schedule allows arbitral awards made in one Convention country to be recognised and enforced in any of the other Convention countries.

103 In the light of the IAA's deliberate choice of reciprocity and the clear exclusion of Chapter VIII of the Model Law by virtue of s 3(1) of the IAA, Mr Landau's argument that Art 36 grounds may be implied into the IAA via s 19 to refuse recognition and enforcement of an award is an egregious point.

104 Mr Landau's contention that a party is free to choose between two remedies – *viz*, setting aside an award or resisting its recognition and enforcement – is founded on both Arts 34 and 36 being incorporated into the IAA. In this way, awards are subject to a "double control", and in the case of a domestic international award, the "double control" would be within a single jurisdiction. [note: 23] He has further suggested that excluding Art 36 brings Singapore out of line with other Model Law jurisdictions. This suggestion is fanciful for the three main reasons set out below.

105 First, Singapore is not the only country to exclude Art 36 in favour of its counterpart in Art V of the New York Convention. There are at least 12 Model Law countries which have unqualifiedly dispensed with Art 36 in favour of Art V of the New York Convention (see Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet and Maxwell, 3rd Ed, 2010) at pp 600–601). Other Model Law countries have also made a distinction between domestic international awards and foreign awards in terms of the applicability of the grounds under Art 36 of the Model Law (see, for example, s 20 of Australia's International Arbitration Act 1974(Cth), which contains different grounds for refusal of enforcement for New York Convention awards, foreign awards and enforceable money awards from certain Commonwealth countries and the UK), and still other Model Law countries have excluded Art 36 of the Model Law without more (see, for example, Austria, Turkey, California (USA) and Texas (USA)). Closer to home, ss 82 and 83 of the Hong Kong Arbitration Ordinance (Cap 609) (LN 38 of 2011) states that both Arts 35 and 36 are "without effect". In fact, Hong Kong had excluded Arts 35 and 36 from the outset when Hong Kong adopted the Model Law: see s 34C(1) of the Hong Kong Arbitration Ordinance (Cap 341)(Repealed 17 of 2010 s 109)(30 June 1997) and *Halsbury's Laws of Hong Kong* vol 1(2) (LexisNexis, 2008 Reissue) at para 25.008.

106 Second, exclusion or modification of Art 36 is permissible under the Model Law, which allows States to pick and choose. The Model Law is more properly described as an instrument (or model, as the name suggests), and not a blueprint, of harmonisation. There are many different means of implementing the basic rules stated in the Model Law. José Angelo Estrella Faria, secretary of the UNCITRAL Working Group on Electronic Commerce, helpfully described the role of model laws in his article "Legal Harmonization through Model Laws: The Experience of the United Nations Commission on

International Trade Law (UNCITRAL)" (at p 13): [note: 24]

> A model law is a legislative text that is *recommended* to States for enactment as part of their national law. A model law is an appropriate vehicle for modernization and unification of national laws when it is *expected that States will wish or need to make adjustments* to the text of the model to accommodate local requirements that vary from system to system, or *where strict uniformity is not necessary*.
>
> [emphasis added]

107 Mr Landau has conflated harmonisation with uniformity. Harmonisation does not demand wholesale adoption of the Model Law.

108 The Model Law may be modified to take into account national sensibilities. The Working Group on International Contract Practices stated in the Report of the Working Group on the work of its sixth session, UN Doc, A/CN 9/245, 1983, (at para 133):

> The Working Group, after deliberation, was agreed not to take a final decision on these policy matters [in relation to the desirability of recognition and enforcement for the sake of unification]. Recognizing that these matters were of great importance and *ultimately related to a question of acceptability by any given State*, it was deemed desirable to retain provisions on recognition and enforcement of "domestic" and of foreign awards, closely modelled on the 1958 New York Convention, but taking into account the need for reconsidering the issue of recognition and of the relationship between Arts XXVII and XXX.
>
> [emphasis added]

While Arts 35 and 36 were eventually retained, it was recognised that these Arts may *not* be adopted by every State.

109 This recognition is also evident from the UNCITRAL website itself. Annexed to the list of Model Law countries is the following disclaimer: [note: 25]

> A model law is created as a *suggested pattern* for law-makers to consider adopting as part of their domestic legislation. Since States enacting legislation based upon a model law *have the flexibility to depart from the text*, the above list is only indicative of the enactments that were made known to the UNCITRAL Secretariat. *The legislation of each State should be considered in order to identify the exact nature of any possible deviation from the model in the legislative text that was adopted*. The year of enactment indicated above is the year the legislation was passed by the relevant legislative body, as indicated to the UNCITRAL Secretariat; it does not address the date of entry into force of that piece of legislation, the procedures for which vary from State to State, and could result in entry into force some time after enactment. [emphasis added]

110 The demands of the Model Law have been adequately met by Part II of the IAA, which makes all of Singapore's modifications and clarifications to the Model Law clear and determinable at a glance. The 1994 Parliamentary Report stated (at col 626):

> Part II also contains *modifications and clarifications* we have made to *clarify and improve* the Model Law… after studying the experiences of other countries and consulting the UNCITRAL Secretariat.

> The reason for this approach is to let foreign businessmen and lawyers know at the outset *the changes that have been made to the Model Law*. This will facilitate their choice of Singapore as a venue for their cases.
>
> [emphasis added]

111 Third, the IAA makes a clear distinction between domestic international awards and foreign awards. As stated, provisions under Part II of the IAA govern domestic international awards, whereas the provisions of Part III govern foreign awards in international commercial arbitration. This legislative intention is a clear departure from Art 36, which applies to all arbitral awards irrespective of the country where the award was made. As regards foreign awards in international commercial arbitration, s 31 of the IAA makes a distinction between the "competent authority of the country in which, or under the law of which, the award was made" (see s 31(2)(*f*)) and the enforcement "court", which has been defined in s 27(1) as "the High Court in Singapore". This is much more consistent with the rest of the Model Law, and in particular, Arts 16(3) and 34 of the Model Law, which limit a party's right to seek recourse from the Art 6 court (*ie*, the High Court in Singapore) by prescribing *both* limited grounds for curial intervention *and* strict timelines. By privileging party autonomy over judicial control of arbitrations, the IAA was thus intended to *reduce* the amount of curial intervention, whether at the setting-aside or the recognition stage. "Double control" via the introduction of Art 36 would have the *contrary* effect of decreasing party autonomy and increasing curial intervention.

112 Mr Landau's approach draws strongly from the English position of *increasing* judicial intervention *despite* his admission that it is the UK which has broken rank with other Model Law countries in so doing. Singapore has chosen the path of *less* curial intervention, in line with the objectives of the Model Law.

113 In conclusion, there is no room whatsoever for the inclusion of the grounds under Art 36 (by implication or otherwise) as permissible grounds to refuse to recognise the Singapore Awards (and especially the 7 May 2009 Award).

Grounds under s 24 of the IAA

114 Section 24 of the IAA reads as follows:

> **Court may set aside award**
>
> **24**. Notwithstanding Art 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Art 34(2) of the Model Law, set aside the award of the arbitral tribunal if —
>
> (*a*) the making of the award was induced or affected by fraud or corruption; or
>
> (*b*) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

115 Section 24 of the IAA provides the *only* additional grounds for setting aside outside of Art 34, which is time-barred where FM is concerned.

116 The Court of Appeal in *AJU v AJT* [2011] 4 SLR 739 made it clear that there is no room for an expansion of grounds under s 19B(1) of the IAA. It affirmed that s 19B(4) of the IAA does not leave the court free to find additional grounds for setting aside. After setting out the provisions of both s 19 and s 19B in a single paragraph, Chan Sek Keong CJ opined (at [31]):

> The relevant provisions in the IAA by which an IAA award can be challenged (pursuant to the right set out in s 19B(4)) are: (a) s 3(1), which gives the Model Law (with the exception of ch VIII thereof, which is not relevant in the present appeal) the force of law in Singapore; and (b) s 24, which sets out two additional grounds (other than the grounds listed in Art 34(2) of the Model Law) for setting aside an IAA award.

117 Chan CJ further opined (at [65]):

> Arbitration under the IAA is international arbitration, and not domestic arbitration. That is why s 19B(1) provides that an IAA award is final and binding on the parties, subject only to narrow grounds for curial intervention. This means that findings of fact made in [a domestic international award] are binding on the parties and cannot be reopened except where there is fraud, breach of natural justice or some other recognised vitiating factor.

118 It is not the case, contrary to Mr Landau's argument, that the regime under the IAA is onerous for the losing party, requiring it to challenge an award under Art 34 of the Model Law or else lose its rights to do so. FM's rights would not have been lost if FM could bring itself under one of the grounds in s 24 of the IAA. However, fraud or breach of natural justice is not FM's ground of challenge in the present case.

119 Digressing for a moment, I note that s 24 does not contain any express statutory time bar, but O 69A r 2(1)(*d*) of the ROC read with O 69A r 2(4) sets a time limit of three months for the bringing of a s 24 challenge to a domestic international award. A related procedural point that arises is whether the time frame laid down in O69A r 2(4) can be extended under O 3 r 4(1). That aside, it should also be noted that, unlike the IAA, the ROC is subject to a savings provision, namely, O 92 r 4, which reads:

> For the avoidance of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

120 If FM's case had been one of fraud which had only been discovered after the expiry of the applicable time bars, I have no doubt that this would be a case of "prevent[ing] injustice" which would warrant a court's exercise of its powers under O 92 r 4 of the ROC to remedy the procedural breach under O 69A r 2(4) of the ROC. It cannot be the case that mere procedural irregularity under the ROC forces a court to accept that an arbitration agreement is not impeached by fraud, or to accept the consequences of that fraud. Another instance where O 69A r 2(4) is not likely to apply is where a court in the country which is the seat of the arbitration, raises on its own motion a public policy objection at the enforcement stage. In this situation, the court's power is unfettered by time limits. Until a case comes squarely before the Singapore court for determination, I do not have to decide the procedural points and will say no more about the matter.

121 Even accepting that s 24 of the IAA may permit a "recognised vitiating factor" (per Chan CJ in *AJU v AJT* at [31]) as a ground for setting aside an arbitral award, I find that this cannot possibly include FM's jurisdictional grounds, which do not constitute a recognised vitiating factor under general law and which are also not analogous to fraud or breach of natural justice.

122 FM's problem is not that it cannot challenge the Singapore Awards at the enforcement stage, but rather, that the grounds for its challenge – *viz*, lack of jurisdiction of the Tribunal – do not fall under one of the grounds of challenge which are available to it at this stage.

123 It is apposite to end this discussion with extracts from the judgment of the Court of Appeal in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86. Although V K Rajah JA (delivering the judgment of the Court of Appeal) was summarising the court's approach towards natural justice, which is applicable to domestic as well as international arbitration, the Judge of Appeal's words are equally apt in the context of the limited scope of s 24 (at [65]):

> ...
>
> (b) Fairness, however, is a multidimensional concept and it would also be unfair to the successful party if it were deprived of the fruits of its labour as a result of a dissatisfied party raising a multitude of arid technical challenges after an arbitral award has been made. The courts are not a stage where a dissatisfied party can have a second bite of the cherry.
>
> (c) Indeed, the latter conception of fairness justifies a policy of minimal curial intervention, which has become common as a matter of international practice. To elaborate, minimal curial intervention is underpinned by two principal considerations. First, there is a need to recognise the autonomy of the arbitral process by encouraging finality, so that its advantage as an efficient alternative dispute resolution process is not undermined. Second, having opted for arbitration, parties must be taken to have acknowledged and accepted the attendant risks of having only a very limited right of recourse to the courts. It would be neither appropriate nor consonant for a dissatisfied party to seek the assistance of the court to intervene on the basis that the court is discharging an appellate function, save in the very limited circumstances that have been statutorily condoned. Generally speaking, a court will not intervene merely because it might have resolved the various controversies in play differently.

Part B

Overview

124 This part of the judgment considers Art 16 of the Model Law. FM wants to invoke lack of jurisdiction at the enforcement stage as a reason to justify why the court should refuse to enforce (*inter alia*) the 7 May 2009 Award. In this case, the Tribunal issued an award on jurisdiction (*ie*, the 7 May 2009 Award), and, at the outset, FM decided not have recourse to Art 16(3) to challenge that award. Instead, FM proceeded to defend the merits of the Plaintiffs' claims in the Arbitration, albeit under protest, and even lodged a counterclaim against the Plaintiffs, including P6 to P8 (see [32] above). After the 16 February 2010 Award on the merits was made, FM also did not take steps to set aside that award. The position is the same with the other three of the Singapore Awards mentioned at [33] above.

125 FM argues that it was entitled to wait, having reserved and retained the right to invoke lack of jurisdiction as a ground to resist enforcement. Mr Landau's point is that Art 16(3) and Art 34(2)(*a*)(i) of the Model Law were drafted as options, and not obligatory provisions which have the consequence, if breached, of causing the party in breach to lose its rights to object to jurisdiction at the enforcement stage. Mr Landau explains that the time limits are not for all purposes. They arise only if the losing party goes to court to set aside an award. The time limit cannot apply if the losing party is defending proceedings for recognition and enforcement. [note: 26] Mr Joseph disagrees, arguing that although Art 16(3) was drafted as an option, a party who chooses not to exercise the option would lose the right to challenge an award on jurisdiction. What it means is that a party can decide not to appeal an award on jurisdiction, with the result that it can no longer challenge the tribunal's ruling on jurisdiction. In this case, FM could no longer challenge the 7 May 2009 Award on jurisdiction after it decided not to do so and after the time limit had long expired. FM could have applied but did not

apply to set aside the other four of the Singapore Awards after they were made. No grounds under Art 34 now exist for FM to rely on as FM is out of time.

The situations giving rise to an Art 16 challenge

126 There are three different types of final awards which an arbitral tribunal may make:

(a) an award on jurisdiction prior to a hearing of the merits ("situation (a)");

(b) an award on jurisdiction and the merits given together after a hearing of a challenge to jurisdiction under Art 16(2) and of the merits ("situation (b)"); and

(c) an award on the merits alone where the jurisdiction of the tribunal has not been challenged ("situation (c)").

127 Article 16 does not arise in situation (c) as there is no challenge to the jurisdiction of the tribunal.

128 In both situation (a) and situation (b), where there is a challenge to the tribunal's jurisdiction, Art 16(2) obliges the party to raise this plea no later than the submission of the statement of defence. Articles 16(1) and 16(2) read as follows:

Art 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.

129 Both situation (a) and situation (b) are also contemplated by Art 16(3), which gives the arbitral tribunal the option of ruling on a plea that it does not have jurisdiction "as a preliminary question or in an award on the merits". Article 16(3) reads as follows:

(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.

130 In situation (b), the right to appeal under Art 16(3) does not arise until the merits have been heard and decided as there is no jurisdictional award apart from the award on the merits; the award on jurisdiction and on the merits is a combined award. If a party finds itself in situation (b), it would

be open to it to set aside the combined award on jurisdictional grounds under Art 34 by way of a final resolution of all the disputed issues by the curial court. A party does so on the premise that this is the first time it is being given the chance to subject the tribunal's decision on jurisdiction to curial control, and the decision on jurisdiction has not yet become final. The time limit of three months under Art 34(3) applies to situation (b). There is no need to appeal the jurisdiction part of the combined award separately under Art 16(3), even though that is an option open to the losing party.

131 The position is different in situation (a). In situation (a), at the time the award on merits is given, the party wishing to appeal the tribunal's jurisdiction would already have had prior opportunities to do so. There are three ways in which a party may challenge the tribunal's jurisdiction:

(a) it can appeal to the curial court under Art 16(3) within 30 days if the tribunal affirms its jurisdiction, which appeal may be heard before or concurrently with the hearing on the merits;

(b) it can choose to leave the arbitral regime in protest by refusing both to take part in the rest of the proceedings and to appeal to the curial court under Art 16(3); or

(c) it can choose not to appeal to the curial court under Art 16(3), but continue within the arbitral regime by fully participating in the hearing with an express reservation of its rights.

132 If a party chooses the first option of challenging the tribunal's jurisdiction by an appeal to a curial court under Art 16(3), there is an *additional* opportunity under the IAA for parties which are still dissatisfied with the ruling on jurisdiction given by the tribunal after objections are raised under Art 16(2) and by the High Court exercising its curial jurisdiction under Art 16(3), to appeal to the Court of Appeal under s 10 of the IAA if leave is granted to do so. Section 10 of the IAA reads as follows:

Appeal under Art 16(3) of Model Law

10.—(1) Notwithstanding Art 16(3) of the Model Law, an appeal from a decision of the High Court made under Art 16(3) of the Model Law shall lie to the Court of Appeal only with the leave of the High Court.

(2) There shall be no appeal against a refusal for grant of leave of the High Court.

133 If a party chooses the second option of challenge by choosing to leave the arbitral regime in protest and should the tribunal rule against it on the merits, that party, as the losing party, is entitled within the time stipulated in Art 34 to set aside the award under any of the grounds in Art 34. Article 34(2)(*a*)(i) is regarded as a jurisdictional objection. One way in which a party may challenge the jurisdiction of a tribunal is simply to step out of the arbitral regime and boycott the proceedings altogether. If this course of action is chosen (and this course is not without risk), then the rules for appeal which would apply to parties within the arbitral regime would no longer apply to the boycotting party. Arguably, the boycotting party would then be able to apply to set aside the award under Art 34(2)(*a*)(i) on jurisdictional grounds. The jurisdictional award would not be final *vis-à-vis* the boycotting party, and the opposing party would have ample notice of this from the boycotting party's absolute refusal to participate. This possibility is hinted at in UNCITRAL Commentary (A/CN 9/264) on Art 16(2) at para 9.

134 I now come to the third option and to the facts of this case. On 11 February 2009, FM's solicitors, D&N, raised, *inter alia*, their challenge to jurisdiction, pursuant to which the 7 May 2009 Award was rendered. A decision was made by FM not to challenge the 7 May 2009 Award by

appealing to a curial court pursuant to Art 16(3). FM proceeded under protest to defend the Plaintiffs' claims in the Arbitration. It also fully participated in the hearing with an express reservation of rights. The question here is whether FM can choose not to appeal to the curial court under Art 16(3), but continue with the arbitral regime by fully participating in the hearing with an express reservation of its rights. The nub of the issue is whether FM's general reservation of rights is effective so as to enable FM to raise lack of jurisdiction as a ground to resist or refuse enforcement of the 7 May 2009 Award. Given that FM has *not* brought these challenges *and* is now out of time to bring these challenges, can it raise lack of jurisdiction as a ground for non-recognition and setting aside of the 7 May 2009 Award?

135 The implications of bringing an appeal under Art 16(3) out of time were discussed in the material put forward by Mr Landau, but the relevant *travaux préparatoires* were not addressed. In addition, the UNCITRAL 2012 Digest contains commentaries and cases on this topic. It therefore became necessary for the court to invite submissions from the parties on two questions on 13 August 2012 (see [6] above). The two questions were:

(a) whether a failure to appeal an arbitral tribunal's jurisdiction ruling under Art 16 of the Model Law precludes parties from raising an objection to the same in later proceedings to set aside or enforce; and

(b) in what circumstances may a party be permitted to raise an objection to an arbitral award on jurisdictional grounds at the setting-aside or enforcement stage if it has not appealed under Art 16.

136 This part of the judgment discusses the two questions in the light of the further submissions tendered by the parties on 28 August 2012.

The effect of failing to challenge a jurisdictional award made prior to a hearing on the merits under Art 16(3)

137 The option to appeal a jurisdictional award under Art 16(3) is akin to and operates in the same manner as an option to purchase a property. Under an option to purchase, the option holder has a choice to proceed with the purchase or not. If he wishes to proceed with the purchase, he exercises the option by adhering to the time for exercising the option and making payment. If he decides not to proceed or fails to exercise the option, the right to purchase the property is lost. As Mr Joseph pointed out, the use of the words "*may* request" [emphasis added] in Art 16(3) is not meant to turn Art 16(3) into a mere option for challenging a tribunal's jurisdiction; it merely restates the (rather obvious) position that a party is not obliged to bring a challenge on jurisdiction under Art 16(3), and has the option of continuing with the arbitration on the understanding that it can apply to set aside the arbitral award under Art 34 on other public policy grounds, including the non-arbitrability of the dispute, subject to the time limits in Art 34(3). This is also the position taken in UNCITRAL Commentary (A/CN 9/264) on Art 16, which states (at para 10):

> As expressed in the above observation of the Working Group, there are limits to the effect of a party's failure to raise his objections. These limits arise from the fact that certain defects such as violation of public policy, including non-arbitrability, cannot be cured by submission to the proceedings. Accordingly, such grounds for lack of jurisdiction would be decided upon by a court in accordance with Art 34(2)(b) or, as regards awards made under this Law, Art 36(1)(b) even if no party had raised any objections in this respect during the arbitral proceedings. It may be added that this result is in harmony with the understanding (stated above, para. 3) that these latter issues are to be determined by the arbitral tribunal ex officio.

[underlining in original]

138 Given that Art 36 does not apply to a domestic international award in Singapore, the remarks in UNCITRAL Commentary (A/CN 9/264) above about Art 36 do not apply in this situation.

139 The only support for Mr Landau's position is the High Court decision of *Tan Poh Leng Stanley v Tang Boon Jek Jeffrey* [2000] 3 SLR(R) 847 ("*Stanley Tan (HC)*"), where G P Selvam J opined *obiter* (at [13]):

> Additionally, the right to request the High Court for a decision on the preliminary decision is an option. This is indicated by the words "may request". It does not bar a challenge by an application to set aside the award on the ground of lack of jurisdiction.

140 I find that this *obiter dictum* should be treated with caution, particularly since it takes an interpretation of Art 16 which is out of line with the decisions of other Model Law jurisdictions (see [144]–[150] below) and UNCITRAL Commentary (A/CN 9/264). Further, *Stanley Tan (HC)* is distinguishable on the facts. In that case, there was no preliminary decision on jurisdiction, and, hence, there was in fact no avenue for recourse under Art 16. I agree with Mr Joseph that the only relevant time limit under consideration in *Stanley Tan (HC)* was the three-month time limit under Art 34. In addition, I agree that the *obiter* dictum in *Stanley Tan (HC)* is incorrect for the reasons stated in this judgment. A party is not obliged to appeal under Art 16(3), but if it chooses not to appeal, it is taken to accept the finality of the award on jurisdiction. [note: 27]

141 UNCITRAL Commentary (A/CN 9/264) on Art 16 records at para 9 that if a party does not raise a timely objection to jurisdiction in accordance with the (then draft) Art 16(2) of the Model Law, then the party cannot raise the same objection to jurisdiction under Arts 34 and 36. The only exception is where a party has boycotted the proceedings altogether (see also [133] above). I accept Mr Joseph's arguments that the same rationale should apply to an appeal under Art 16(3), *viz*, where a party wishes to challenge the jurisdiction of a tribunal, it must raise the challenge at the earliest opportunity and, in any event, within the time limits prescribed; otherwise, it forfeits its right to challenge jurisdiction. Once the time limits under Art 16(3) have expired, it may be taken that the losing party has accepted jurisdiction.

142 This is in line with UNCITRAL Commentary (A/CN 9/264), which suggests that a timely regime for appeal is necessary to streamline the arbitration process and allow the arbitration to proceed on a sure footing. UNCITRAL Commentary (A/CN 9/264) on Art 16(3) states as follows (at paras 11–14):

> 11. Objections to the arbitral tribunal's jurisdiction go to the very foundation of the arbitration. Jurisdictional questions are, thus, antecedent to matters of substance and usually ruled upon first in a separate decision, in order to avoid possible waste of time and costs. However, in some cases, in particular, where the question of jurisdiction is intertwined with the substantive issue, it may be appropriate to combine the ruling on jurisdiction with a partial or complete decision on the merits of the case. *Art 16(3)*,*therefore, grants the arbitral tribunal discretion to rule on a plea referred to in paragraph (2) either as a preliminary question or in an award on the merits*.
>
> …
>
> 13. It was for the purpose of preventing dilatory tactics and abuse of any immediate right to appeal that this solution was adopted, reinforced by the deletion of previous draft Art 17, which provided for *concurrent court control*. The disadvantage of this solution, as was pointed out by the proponents of immediate court control, is that it *may lead to considerable waste of time and*

money where, after lengthy proceedings with expensive hearings and taking of evidence, the Court sets aside the award for lack of jurisdiction.

14. … *Thus* it may be worth considering *giving the arbitral tribunal discretion*, based on its assessment of the actual potential of these concerns, *to cast its ruling in the form either of an award*, *which would be subject to instant court control*, or of a procedural decision which may be contested only in an action for setting aside the later award on merits.

[emphasis added]

143 It is clear to me from the foregoing that Art 16(3) of the Model Law permits two permutations for challenging the tribunal's determination on its jurisdiction in order to minimise dilatory or obstructionist tactics so as to avoid unnecessary wastage of time and money:

(a) if the jurisdictional question can be decided before the hearing of the merits, the tribunal may give an award on jurisdiction, which would be subject to *instant court control* by an immediate appeal, to be filed within 30 days under Art 16(3), failing which a party would forfeit its right to set aside the award for lack of jurisdiction; and

(b) in the alternative, if the jurisdictional question is intertwined with the hearing on the merits, the tribunal may make a procedural decision to continue on the assumption that it has jurisdiction and only deliver an award on jurisdiction together with its later award on the merits, which award on jurisdiction may only be challenged in an action to set aside the later award on the merits.

144 Other Model Law jurisdictions have taken a leaf out of the comments set out in paras 11–14 of UNCITRAL Commentary (A/CN 9/264) on Art 16, ruling that all preliminary awards on jurisdiction (situation (a), and the 7 May 2009 Award) should be subject to instant court control under Art 16(3) of the Model Law, or else be treated as final and binding.

145 In the Quebec Superior Court's decision of *Imprimerie Régionale ARL Ltée v George Ghanotakis* [2004] CanLII 23270 (QC CS), two applications were made by the arbitration debtor to challenge the tribunal's award on jurisdiction and to annul two awards on the merits. There was also an application by the arbitration creditor for recognition and enforcement of the merits awards. Like FM, the arbitration debtor challenged both the award on jurisdiction as well as the two awards on the merits. The Quebec Superior Court rejected the arbitration debtor's submission that a failure to bring a challenge to jurisdiction under Art 943.2 of the CPC (the equivalent of Art 16(3) of the Model Law, save for the addition of the word "final" in relation to an appeal against a decision on jurisdiction) within 30 days did not prevent it from raising such objection to oppose recognition and enforcement. The court found (at [30]) that it had no basis to re-examine the question of jurisdiction when it came to the recognition and enforcement of all three awards (*viz*, the award on jurisdiction and the two awards on the merits). In the absence of an appeal to and a decision by the curial court, the tribunal's decision on jurisdiction was final. The Quebec Superior Court even went so far as to say that an award on jurisdiction which had not been challenged under Art 16(3) of the Model Law was *res judicata*. The court ruled (at [8] and [9]):

[8] In invoking *res judicata*, Mr Ghanotakis is relying on Art 943(1) of the Code of Civil Procedure of Québec, which provides as follows:

"If the arbitrators declare themselves competent during the arbitration proceedings, a party may within 30 days of being notified thereof apply to the court for a decision on that matter.

While such a case is pending, the arbitrators may pursue the arbitration proceedings and make their award."

[9] As the period of thirty days has expired, the exception of *res judicata* must be upheld in respect of the competence of Me Gagné.

146 While I note that the Quebec Superior Court's decision was swayed by Art 943.2 of the CPC, which departs slightly from Art 16(3) of the Model Law and renders "[a] decision of the court during the arbitration proceedings recognizing the competence of the arbitrators … *final* and without appeal" [emphasis added] (see Art 943.2 of CPC), I find that the general principles of international arbitration hold true, *viz*, it should not be open to a party to hold off bringing a jurisdictional challenge and, at the same time, participate in the arbitration on the merits in the expectation that it can revive its jurisdictional challenge at a later stage should it prove to be unsuccessful in the arbitration. Such behaviour is bound to make a mockery of the finality and effectiveness of arbitral awards on jurisdiction.

147 The leading decision of the German Federal Court of Justice in Case No III ZB 83/02 explains why time lines for filing a jurisdictional challenge should be strictly adhered to. In that case, the court found, in the context of situation (a), that the intent and purpose of s 1040 of the ZPO (which enacts Art 16 of the Model Law), in particular, bearing in mind the need to challenge an interim award on jurisdiction under s 1040(3) of the ZPO (which corresponds to Art 16(3) of the Model Law), was to ensure that jurisdictional issues were decided at an early stage in order to place the arbitral proceedings on a certain footing. Accordingly, allowing a party to wait until setting-aside or enforcement proceedings to raise an objection to jurisdiction beyond the 30-day time limit prescribed by s 1040(3) of the ZPO would defeat the spirit and purpose of the legislation. The German Federal Court's conclusions could not be clearer. It ruled (at pp 3–4 of the English translation):

> The intent of the provision in Section 1040 of the ZPO [Art 16 of the Model Law] is to ensure that the issue of jurisdiction is, as a rule, clarified at an early stage of the proceedings … Accordingly, the arbitral tribunal's decision is ***no longer subject to review in the proceedings to set aside the arbitration award or to grant execution*** *unless a petition for a court decision has been filed pursuant to Section 1040(3) sentence 2 of the ZPO* [Art 16(3) sentence 2 of the Model Law] *… Otherwise, the arbitration proceedings would stand, as intended by the establishment of the interim award pursuant to Section 1040(3) sentence 1 of the ZPO* [Art 16(3) sentence 1 of the Model Law] … Within the scope of Section 1040 ZPO [Art 16 of the Model Law], the arbitral tribunal is granted the power to decide on its own jurisdiction. ***If its interim award is not appealed, then that remains the case, even for proceedings before the state court to set aside the award and to grant execution*** .
>
> [emphasis added in italics and bold italics]

148 It is only in exceptional circumstances that a failure to institute proceedings does not preclude a challenge at a later stage. In Oberlandesgericht, Celle, Germany, 8 Sch 11_02, 4 September 2003 ("the Celle case") (published in *Yearbook Commercial Arbitration 2005 – Volume XXX* (Albert Jan van den Berg ed) (Kluwer Law International, 2005) at pp 528–535), the German Court of Appeal refused a declaration of enforcement as the defendant, who had raised its objections regarding the invalidity of the arbitration agreement before the arbitral tribunal and had not participated in the oral hearing, did not have the opportunity to object to the arbitral tribunal's decision. This case was unique as the foreign award (which alone distinguishes the Celle case from the present case) sought to be enforced was made in China, which has not adopted the Model Law. Going on the New York Convention alone, there was no procedure like that in Arts 16(2) and 16(3) of the Model Law (and ss 1040(2) and

1040(3) of the ZPO) giving the defendant the opportunity to formally object to the decision on jurisdiction. The German Court of Appeal clarified in the process of delivering its decision that the position would have been different had there been such an opportunity. It opined in the final sentence of its judgment that "[o]therwise, failure to institute proceedings against the arbitral tribunal's decision would have precluded the defence of an invalid arbitration agreement". A refusal to enforce thus arose out of unique circumstances where Arts 16(2) and 16(3) were *unavailable* and the award in question was foreign (*ie*, an action for setting aside was *also unavailable* to the aggrieved party). Clarifying the position under Art 16(3) in relation to a domestic international award as distinct from a foreign award under the New York Convention, the German Court of Appeal stated (at [12]):

> If the arbitral tribunal finds that it has jurisdiction, it rules on the objection of [lack of] jurisdiction by a preliminary ruling ([Art 16(3) or] Sect. 1040(3) first sentence ZPO). Each party may then request a decision by a court within one month after having received written notice of the ruling (Sect. 1040(3) second sentence ZPO). Failing to make such request rules out [the possibility to raise] the objection of the invalidity of the arbitration agreement in the arbitration and the setting aside and enforcement proceedings [see Federal Court of Justice decision in 2003]. The [New York] Convention does not provide for the possibility to obtain judicial clarification of the jurisdiction of the arbitral tribunal. [Section] 1040 ZPO [or Art 16] does not apply in the present case as the place of the arbitration is not in Germany (Sect. 1025(1) ZPO).

149 Kaplan J, giving his opinion on the differences between the New York Convention and the Model Law in *China Nanhai Oil Joint Service Corporation Shenshen Branch v Gee Tai Holdings Co Ltd* [1995] 2 HKLR 215, suggested that a party may be estopped from raising a challenge to jurisdiction at the setting-aside or the enforcement stage where it fails to appeal an interim award on jurisdiction under Art 16(3) of the Model Law. He opined (at 224):

> A similar view is discernable from the Model Law. Art 16 requires parties to raise a plea that the arbitral tribunal does not have jurisdiction not later than the submission of a statement to defence. The tribunal may admit a later plea if it considers the delay justified but, if not, then clearly the party is estopped from raising the point. *Similarly, under Art 16(3) if the tribunal rules that it has jurisdiction any party may request within 30 days, the court to decide the matter. It seems to follow from this that if you do not seek the view of the court, then you cannot raise the matter subsequently at [the] enforcement stage.*
>
> [emphasis added]

150 The Plaintiffs also referred to *Jiangxi Provincial Metal and Minerals Import and Export Corporation v Sulanser Co Ltd* [1995] HKCFI 449 ("*Jiangxi Provincial Metal*"), where Leonard J felt able to apply the doctrine of estoppel to the conduct of the defendant and held that it was not open to the defendant to revive the point as to the validity of the arbitration agreement under the law of the People's Republic of China at the post-award stage as the defendant had not challenged the tribunal's interim award that it had jurisdiction over the dispute, and following that interim award, the defendant had submitted a substantive defence and had participated in the arbitral proceedings. *Jiangxi Provincial Metal* was cited for the following proposition in the UNCITRAL 2012 Digest at p 144 para 46:

> In one case dealing with a similar issue in substance but in the context of enforcing proceedings, the High Court in Hong Kong excluded reliance on that defence on the basis of the "doctrine of estoppel". The party opposing enforcement had ... after an unsuccessful challenge to the jurisdiction of the arbitral tribunal, participated in the arbitral proceedings. In that light, the court rejected the evidence submitted by the party to prove that the arbitration agreement was allegedly invalid under the law of the country where arbitration took place... .

151 The simple point is this: if a party fails to appeal or decides not to appeal an award on jurisdiction, the award will be treated as *final* between the parties and the hearing on the merits will proceed on the basis (and not simply the assumption) that the tribunal has jurisdiction. Challenging such an award on jurisdictional grounds is thus *excluded* from the grounds which a party may invoke at the setting-aside or the enforcement stage if the party has chosen not to bring an appeal under Art 16(3) of the Model Law. There is *no* avenue under the Model Law to participate in a hearing on the merits under protest *without* having lodged an appeal under Art 16(3) if a party wishes to properly and effectively retain its right to raise an objection to the tribunal's jurisdiction. There are no passive remedies when it comes to challenging jurisdiction under the IAA – a party wishing to oppose a jurisdictional award *must act*.

152 That the 7 May 2009 Award was final was confirmed by the Tribunal in an email from Sir Gordon Langley dated 22 May 2009, [note: 28] *and* that award was also accepted as final by FM in an email dated 22 May 2009. [note: 29] On 20 May 2009, WongPartnership had emailed the Tribunal to seek clarification as to whether the issue of jurisdiction had been "finally determined" in the 7 May 2009 Award. [note: 30] Attached to this email was a draft final order, which read as follows:

> Further to the Tribunal's Award on Preliminary Issues of Jurisdiction, Interim Anti-Suit Injunction and Joinder dated 7 May 2009 ("the Award of 7 May 2009"), the Tribunal hereby renders this Final Award and Order in respect of the *issues finally determined* in the Award of 7 May 2009 and for the reasons given in the Award of 7 May 2009, which is hereby incorporated, the Tribunal:
>
> 1. *Finally* dismisses the Respondents' challenge to the jurisdiction of the Tribunal as described in the Award of 7 May 2009.
>
> ...
>
> [emphasis added]

153 This email, copied to FM's lawyers, D&N, received the following response on 22 May 2009 from D&N:

> (1) Without prejudice to their position on any appeal, the First and Second Respondents would – if some further form of order were thought necessary – have no objection to paragraphs 1 and 2 of the proposed draft, since these accurately reflect the Preliminary Award. [note: 31]

154 After taking into account these two emails, Sir Gordon Langley responded on 22 May 2009 with the following:

> The Tribunal has considered the requests made in Wong Partnership's email letter sent on 20 May and the responses of Drew and Napier and Haq and Selvam sent on 22 May. In the absence of Sir Simon but with his and Mr Boyd's agreement, I have been asked to inform the parties of the decision of the Tribunal and do so by reference to the numbered paragraphs in the letter of 20 May.
>
> ...
>
> 8. We confirm that our Award *finally determined* the following issues:

(i) The Respondent's challenge to the Tribunal's jurisdiction which we dismissed; [note: 32]

...

[emphasis added]

155 There can be no doubt that in this case, we are dealing with an award on jurisdiction *which has been made final and which permits no further challenge, whether at the setting-aside or the enforcement stage*. It is also abundantly clear to me that FM knew all along what the implications were when it decided not to challenge the 7 May 2009 Award, and this is not a case of FM inadvertently losing its rights to challenge the Tribunal's jurisdiction. FM decidedly chose not to appeal the 7 May 2009 Award despite having reserved its position "on any appeal" in its 22 May 2009 email (see [153] above), and instead accepted that the 7 May 2009 Award was final and binding on it when it let the time limit for an appeal under Art 16(3) of the Model Law lapse without lodging an appeal. Section 19B(1) of the IAA fully entitles the Plaintiffs, in the circumstances, to immediately have the 7 May 2009 Award recognised and enforced without any further challenge on jurisdictional grounds.

156 I should note that exceptional situations such as that faced by the German Court of Appeal in the Celle case are amply provided for by s 24 of the IAA, which allows for the setting aside of an award for a breach of natural justice. There is therefore no reason for me to strain to find further exceptions to the general principle that Art 16(3) of the Model Law has an exclusionary effect. Had this been a situation where FM had no opportunity to respond to the joinder of P6 to P8 to the Arbitration, this might have been grounds for setting aside the 7 May 2009 Award under s 24 of the IAA (see [114]–[123] above). But, this is not the situation. FM was given every opportunity to object, was notified of its rights to do so, [note: 33] and took notice of those rights to object to jurisdiction under Art 16 *vis-à-vis* the 7 May 2009 Award. [note: 34] However, FM *decidedly chose* not to object. The effect of an appeal under Art 16(3) would have been to qualify the finality of the 7 May 2009 Award (see s 19B(1) of the IAA).

157 That Art 16 provides an *exclusive route* to challenge a tribunal's award on jurisdiction under the IAA is put beyond doubt by the presence of s 10(1) of the IAA, which allows an appeal from a decision made by the High Court under Art 16(3) to the Court of Appeal with the leave of the High Court.

158 There is some support for the proposition that *if* an objection has been raised earlier under Art 16(3) *and* the tribunal has chosen to continue the proceedings, a court may choose to treat the situation as analogous to situation (b) of [126] above, *ie*, where there is a joint award on the merits and jurisdiction, and decide on the jurisdiction issue only at the setting-aside stage. In *Christian Mutual Insurance Company & Central United Life Insurance Company & Connecticut Reassurance Corporation v Ace Bermuda Insurance Limited* [2002] Bda LR 56 ("*Christian Mutual Insurance Company*"), the Bermudan Court of Appeal was faced with appeals pending under both Arts 16(3) and 34 of the Model Law. It ruled that an award on jurisdiction could be challenged under Art 34 at the setting-aside stage even if the party had successfully challenged that award under Art 16(3).

159 The situation in *Christian Mutual Insurance Company* is wholly different from the present situation. In *Christian Mutual Insurance Company*, the party wishing to bring a challenge to jurisdiction had taken the active step of appealing the jurisdictional award under Art 16(3). In other words, it had done everything that it could reasonably have done under the Model Law regime, and the other party had notice that the award on jurisdiction was *not final*. In contrast, FM took no such active step, despite being aware of its rights to appeal the 7 May 2009 Award. On any view, the

7 May 2009 Award was final before the hearing on the merits commenced. Allowing FM to now come in under the guise of refusal of recognition and enforcement to have a second bite at the cherry would be contrary to the finality principle promoted by Art 16(3) and extended by s 10 of the IAA.

160 That the 7 May 2009 Award had become final, *vis-à-vis* the parties, was confirmed when FM participated in the hearing on the merits without appealing the 7 May 2009 Award under Art 16(3). The implication of finality is this: if a party has accepted a jurisdictional award and has not appealed it, then the party is taken to have accepted the jurisdiction of the tribunal. Any attempt to set aside an award on the merits subsequent to the expiry of the time limits under Art 16(3) must be made on one of the other grounds under Art 34, but the question of jurisdiction becomes *res judicata* and cannot be revisited.

161 It is also worth noting the criticisms of *Christian Mutual Insurance Company* raised by Prof Dr Alan Uzelac ("Prof Uzelac") in his article "Jurisdiction of the Arbitral Tribunal: Current Jurisprudence and Problem Areas under the UNCITRAL Model Law" [2005] Int ALR 154 at 156:

> This particular decision [*Christian Mutual Insurance Company*] opens a number of issues, including those relating to duplication of work, possible diverging decisions, applicability of the grounds from Art. 34 MAL, etc.

Further on at 163, Prof Uzelac observed:

> … the original concept of the MAL 16(3) certainly did not envisage multiple (double or even triple) court proceedings controlling one and the same arbitral decision on jurisdiction as the main matter – one under Art. 16(3); the other, independent setting aside of the award on jurisdiction; and, eventually, another setting aside of the award on the merits for the reasons stated in Art. 34(2)(i). If such practice would develop, it could have a discouraging effect on the arbitrators that would like to resolve jurisdictional issues in their preliminary decisions.

I endorse Prof Uzelac's criticisms and observations as they make eminent sense. Arguably, the effect of the approach which Mr Landau urges upon this court (at [125] above) is to provide an *additional* round for awards on jurisdiction to be subject to further review under Art 34(2)(*a*)(i). For the sake of argument, if an appeal or review under Art 16(3) is brought within time and the curial court under Art 16(3) or, for that matter, the highest court of the land (under s 10 of the IAA) finally elects *not to set aside* the award on jurisdiction, this should be the end of the matter. However, the effect of Mr Landau's submission is to subject this decision to a further High Court decision on *the same jurisdictional question* with a view to refusing enforcement. This amounts to an invitation to the High Court to ignore the earlier High Court decision under Art 16(3) or the earlier appellate decision on setting aside under s 10 of the IAA, effectively allowing a lower court to either revisit the same question post-award or disavow or overturn the ruling of a higher court. This would be absurd.

162 FM was a party to clause 17 of the SSA (see [27] above). Despite knowing what the appropriate process for launching an appeal on jurisdiction was, FM decided not to adopt the proper and most effective course, which was to appeal under Art 16(3) at the earliest possible stage. Should a losing party decide to hedge its bets as FM has done in the present case, the disadvantages and risks of this tactic are dire under the IAA if the outcome is an adverse award on the merits. The time limits under Arts 16(2) and 16(3) are intended to promote the finality of a decision on jurisdiction at an early stage. As stated, should a party elect to remain within the Model Law system, it must lodge an appeal on jurisdiction under Art 16(3) within the 30-day time limit set out; otherwise, the tribunal's award on jurisdiction will become final and binding on the parties and be taken as accepted by the parties, after which there is no possibility of further recourse at the post-award stage to challenge

jurisdiction.

Result

163 For the reasons stated, lack of jurisdiction cannot be invoked by FM as a ground for refusing recognition of and for setting aside the 7 May 2009 Award as well as the other four of the Singapore Awards. Accordingly, SUM 4064 and SUM 4065 are dismissed.

164 Given my decision in favour of the Plaintiffs on the Threshold Question, there is no need to consider the remaining issues raised by the parties such as waiver by estoppel to challenge the Tribunal's determination on jurisdiction, including the standard of curial review in the case of a jurisdictional challenge, as they do not arise for determination. In any case, any finding on the conduct of FM amounting to estoppel will, in the circumstances, be *obiter*.

Conclusion

165 For the reasons stated above, I have dismissed RA 278 and RA 279. With the dismissal of SUM 4064 and SUM 4065, there will be consequential orders to make. I will hear the parties on the consequential orders that are required to give proper effect to the outcome of the applications. I will also hear the parties on the costs in respect of RA 278, RA 279, SUM 4064 and SUM 4065.

[note: 1] FM's Skeleton Arguments, paras 40-44.

[note: 2] Transcript of Arguments dated 25/7/2, pp 41-43.

[note: 3] FM's Bundle of Affidavits Vol 2 at pp 383-384.

[note: 4] Plaintiffs' Bundle of Affidavits, Vol 9, pp 5083, 5183 and 5185.

[note: 5] Hengkie Liwanto's 1st Affidavit filed on 11/5/11, para 4.

[note: 6] FM's Skeletal Arguments in the Registrar's Appeals, para 8.

[note: 7] Prahasto's 1st Affidavit filed on 8/6/11, para 28.

[note: 8] Purwadi's 1st Affidavit filed on 23/6/11, Exhibit"MAP-1", p 9.

[note: 9] Purwadi's 1st Affidavit filed on 23/6/11, para 8.

[note: 10] Prahasto's 2nd Affidavit filed on 14/7/11, Exhibit "PP-4".

[note: 11] Purwadi's 3rd Affidavit filed on 27/10/11, p15.

[note: 12] Purwadi's 1st Affidavit filed on 23/6/11, Exhibit "MAP-1", p 9.

[note: 13] Purwadi's 1st Affidavit filed on 23/6/11, Exhibit "MAP-1", pp 9-10.

[note: 14] Purwadi's 1st Affidavit filed on 23/6/11, para 6.

[note: 15] Aw Wen Ni's Affidavit filed on 24/3/2011, para 3.

[note: 16] 2nd Joint Affidavit of Peter Grans Gontha and 4 others filed on 12/9/11, paras 11 and 12.

[note: 17] FM's Skeleton Arguments, para 28.

[note: 18] FM's Skeleton Arguments, para 29.

[note: 19] English translation of the ZPO: http://www.trans-lex.org/600550> (accessed 20 October 2012)

[note: 20] English translation of the Code de Procedure Civile:<:http://www2. publicationsduquebec. gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_25/C25_A.HTM >(accessed 20 October 2012)

[note: 21] Transcript of Arguments dated 25/7/12, p 41

[note: 22] Transcript of Arguments dated 25/7/12, p 41.

[note: 23] FM's Skeleton Arguments, para 42.

[note: 24] Paper available online http://www.justice.gov.za/alraesa/conferences/2005sa/papers/s5_ faria2.pdf(accessed 20 October 2012).

[note: 25] UNCITRAL website http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985 Model_arbitration_status.html (accessed 20 October 2012).

[note: 26] Transcript of Arguments dated 25/7/12, p 41.

[note: 27] Plaintiffs' Further Submissions, para 39(a).

[note: 28] Plaintiffs' Bundle of Affidavits, Vol 9, p 4721.

[note: 29] Plaintiffs' Bundle of affidavits, Vol 5, pp 2370 and 2371, paras 5 and 6(1).

[note: 30] *Ibid.*, p 2366, para 8.

[note: 31] *Ibid.*, p 2371, para 6(1).

[note: 32] Plaintiffs' Bundle of Affidavits, Vol 9, p 4721.

[note: 33] Defendant's Bundle of Affidavits, Vol 4, p 4857, para 10.

[note: 34] *Ibid.*, p 4862, para 1.

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