PT Central Investindo *v* Franciscus Wongso and others and another matter [2014] SGHC 190

Case Number	: Originating Summons No 510 of 2013; Summons No 317 of 2014, Originating Summons No 48 of 2014
Decision Date	: 30 September 2014
Tribunal/Court	: High Court
Coram	: Belinda Ang Saw Ean J
Counsel Name(s)	: Samuel Chacko and Angeline Soh (Legis Point LLC) for the plaintiff; Chong Yee Leong and Azmin Jailani (Allen & Gledhill LLP) for the defendant.
Parties	: PT Central Investindo — Franciscus Wongso and others

Arbitration – Arbitral Tribunal – Removal – Impartiality or independence

Arbitration – Award – Setting aside – Impartiality or independence

30 September 2014

Belinda Ang Saw Ean J:

INTRODUCTION

Originating Summons No 510 of 2013

1 Originating Summons No 510 of 2013 ("OS 501/2013") was filed on 6 June 2013 to remove the sole arbitrator in ARB 056/09/MM ("the Arbitration") administered by the Singapore International Arbitration Centre ("SIAC") under the auspices of the 2007 SIAC Rules ("the 2007 Rules"). This challenge was on the basis that there were justifiable grounds to doubt the impartiality of the sole arbitrator, Tay Yu-Jin, ("the Arbitrator").

2 The removal application was brought by PT Central Investindo ("PTCI"), the respondent in the Arbitration. The claimants in the Arbitration were the first and second defendants in OS 510/2013. The first and second defendants were Franciscus Wongso ("FW") and Chan Shih Mei ("CSM") respectively. The third defendant was Soekotjo Gunawan ("SG"). For convenience, FW and CSM are collectively referred to in this written decision as "the first two defendants".

3 When OS 510/2013 was listed for hearing on 2 September 2013, the Arbitrator had yet to issue his award. As OS 510/2013 had been part-heard on 2 September 2013, it was adjourned to a later date to be fixed. During the adjournment, the Arbitrator issued his award dated 4 October 2013 ("the Award"). This development prompted the first two defendants to raise a preliminary point at the adjourned hearing on 24 January 2014 that an order for the removal of the Arbitrator would serve no meaningful purpose now that he was *functus officio* having rendered his final award ("the utility argument"), and that the proper course was for PTCI to file a separate application to set aside the Award. Forewarned of the first two defendants' preliminary objection (*ie*, the utility argument), PTCI filed Summons No 317 of 2014 ("SUM 317/2014") on 20 January 2014 for a consequential order to set aside the Award as a matter of right. Objection was also taken by the first two defendants as to the procedural correctness of SUM 317/2014.

Originating Summons No 48 of 2014

4 Originating Summons No 48 of 2014 ("OS 48/2014") was filed on 17 January 2014. This application was intended to serve as PTCI's fall-back application should it fail in OS 510/2013 and SUM 317/2014. OS 48/2014 was first listed for hearing on 26 May 2014 together with OS 510/2013 and SUM 317/2014.

The outcome of both applications

5 In both originating summonses, Mr Samuel Chacko ("Mr Chacko") represented PTCI whilst Mr Chong Yee Leong ("Mr Chong") represented the first two defendants. The third defendant, SG, was unrepresented and he did not participate in the proceedings that came before me. Mr Chong explained that SG was joined as a party to the proceedings so that any orders made would bind him.

6 As no justifiable doubts as to the Arbitrator's impartiality was made out in the challenge under Art 13(3) read with Art 12(2) of the UNCITRAL Model Law on International Commercial Arbitration 1985 ("the Model Law") as set out in the First Schedule to the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"), OS 510/2013 was dismissed with costs to be taxed if not agreed on 26 May 2014. I made no order as to SUM 317/2014. One set of costs was ordered for OS 510/2013 and SUM 317/2014. The hearing of OS 48/2014 was adjourned to 24 July 2014.

7 OS 48/2014 was dismissed with costs fixed at $20,000 plus reasonable disbursements on 24 July 2014. PTCI has appealed against my decision in OS 48/2014. I should add that the subject matter of OS 510/2013 is not appealable by virtue of Art 13(3) of the Model Law.

OUTLINE OF GROUNDS OF DECISION

8 In this written decision, the main grounds upon which the two originating summons were argued will be dealt with in turn: OS 510/2013 followed by OS 48/2014. It may appear be unorthodox to discuss the subsidiary issues at the end, but I chose to organise my written decision in this way simply because the application to set aside the Award in OS 48/2014 under Art 34 of the Model Law was said to depend upon the same matters on which the application in OS 510/2013 to challenge the Arbitrator under Art 13(3) read with Art 12(2) was made.

9 The first part of this written decision, Part 1, will therefore deal with PTCI's application in OS 510/2013 to remove the Arbitrator on the basis that there were justifiable grounds to doubt his impartiality. This will be followed in Part 2 by PTCI's application in OS 48/2014 to set aside the Award under Art 34 of the Model Law. Finally, I will discuss by way of *obiter* the subsidiary points that were raised in OS 510/2013 and SUM 317/2014.

PART 1: OS 510/2013

Removal of the Arbitrator under Art 13(3) read with Art 12(2) of the Model Law

10 Article 12(2) reads:

> **Article 12. Grounds for challenge**
>
> …
>
> (2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable

> doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

11 The question for determination in the present case was whether circumstances existed that gave rise to justifiable doubt with respect to the Arbitrator's impartiality.

12 At the heart of the application in OS 510/2013 was a set of critical communication exchanges in the context of the first two defendants' proposed "fresh" claims relating to 200 tower sites that led to the Arbitrator's so-called directions on 1 and 5 April 2013 ("the April directions"). PTCI's complaint or objection was that the circumstances leading to the April directions and the April directions themselves showed the Arbitrator to be guilty of partiality and that justified his removal as an arbitrator. The main query was whether those circumstances, *inter alia*, disclosed evidence of apparent bias or partiality, thereby impinging on the Arbitrator's ability to arrive at a fair and just conclusion in the Arbitration.

13 The Arbitrator's exchanges in April 2013 and the April directions seemed to me to fall short of triggering Art 12(2)'s operation. It was even further removed from demonstrating justifiable doubts as to the Arbitrator's impartiality. As Rix J observed in *Laker Airway Inc v FLS Aerospace Ltd and another* [2000] 1 WLR 113 at 117 (the Judge's observations were made in the context of an application under s 24 of the Arbitration Act 1996 (c23) (UK) ("UK Arbitration Act") but they are nonetheless apposite here):

> Arbitration is a consensual process and therefore it is perhaps particularly unfortunate that one party should feel any apprehension about the impartiality of an arbitrator. Nevertheless, arbitration would be impossible if one party could require an arbitrator to retire by making unjustified allegation about impartiality or bias. The circumstances in which an arbitrator can be removed are therefore defined in section 24 of the [UK Arbitration] Act. …

14 Like s 24 of the UK Arbitration Act, the test in Art 12(2) is an objective one. The court must find that circumstances exist that justifies one doubting the Arbitrator's impartiality. Rix J's application of the test (at 117) is as follows:

> … An unjustifiable or perhaps unreasonable doubt is not sufficient: it is not enough honestly to say that one has lost confidence in the arbitrator's impartiality. On the other hand, doubts, if justifiable, are sufficient: it is not necessary to prove actual bias.

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

16 It was common ground between the parties that the test to be applied for determining apparent bias is the "reasonable suspicion test" as set out by Sundaresh Menon JC (as he then was) in *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 at [75]–[76] ("*Re Shankar*") and earlier by Chao Hick Tin JC (as he then was) in *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd and another* [1988] 1 SLR(R) 483 at [71]–[72]. The "reasonable suspicion test" was applied by the Court

of Appeal to judges in court proceedings in *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 1 SLR(R) 791 and *Tang Liang Hong v Lee Kuan Yew and another and other appeals* [1997] 3 SLR(R) 576. There was no dispute that the same test would apply in court proceedings as well as in cases involving arbitrators.

17 The test of apparent bias formulated in Australia is the same except that the Australian High Court changed the statement of principle "reasonable suspicion" to the phrase "reasonable apprehension" to avoid unintended nuances of meaning with the word "suspicion" (see *Livesey v New South Wales Bar Association* [1983] 151 CLR 288 at 294).

18 Applying the reasonable suspicion test to the present case, the relevant enquiry was whether a reasonable and fair-minded person with knowledge of all the relevant facts would entertain a reasonable suspicion that the circumstances leading to the April directions and the April directions themselves might result in the arbitral proceedings against PTCI being affected by apparent bias if the Arbitrator was not removed. The mere fact that PTCI had lost confidence in the Arbitrator would not be justification for his removal (see *Yee Hong Pte Ltd v Powen Electrical Engineering Pte Ltd* [2005] 3 SLR(R) 512 at [48]).

19 Put simply, a two-stage inquiry is undertaken. First, the applicant has to establish the factual circumstances that would have a bearing on the suggestion that the tribunal was or might be seen to be partial. The second inquiry is to then ask whether a hypothetical fair-minded and informed observer would view those circumstances as bearing on the tribunal's impartiality in the resolution of the dispute before it. In the present case, the main complaint was that the Arbitrator's April directions gave rise to justifiable doubts as to the Arbitrator's impartiality.

20 Having set out the relevant principles of law, I now turn to the relevant chronology of the events that transpired.

A chronology of events leading to PTCI's invitation to the Arbitrator to withdraw as arbitrator

October 2009 to 20 May 2011

21 For background purposes, I start with the underlying arbitral proceedings, the parties thereto and the progress of the Arbitration up to 20 May 2011.

22 PTCI is a company incorporated in Indonesia. It was at all material times in the business of leasing telecommunication towers. On 2 September 2007, PTCI entered into an Arranger Fee Agreement ("the Arranger Agreement") with the first two defendants under which PTCI appointed the first two defendants to secure PT Natrindo Telepon Seluler ("NTS") as a customer to lease its telecommunication towers ("NTS Project"). The Arranger Agreement stipulated that the first two defendants were entitled to an arranger fee pursuant to them securing the NTS Project ("the Arranger Fees").

23 SG, the second respondent in the Arbitration and the third defendant named in the present proceedings, was a key representative of PTCI involved in concluding the NTS Project and the Arranger Agreement. He was also a personal guarantor of PTCI for the Arranger Agreement.

24 The first two defendants contended that it was through their efforts that PTCI successfully secured the NTS Project in the form of a Preliminary Agreement that was entered into between NTS and PTCI ("the Preliminary Agreement"). Despite numerous demands and reminders, PTCI failed to make payment of the Arranger Fees to the first two defendants of approximately S$250,000 for the

157 telecommunication towers leased by NTS.

25 It is not necessary for me to mention in further detail the substantive dispute that was referred to the Arbitrator. Suffice to say that the Arbitrator was appointed pursuant to the arbitration clause in the Arranger Agreement on 23 July 2009, and that, between October 2009 and March 2011, the parties filed their respective pleadings, witness statements, and hearing memorials.

26 The substantive hearing in the Arbitration took place over a course of three days from 12 April 2011 to 14 April 2011. At the end of the hearing, the Arbitrator issued directions for the filing of the parties' respective Post- Hearing Memorials and Post-Hearing Reply Memorials. They were duly filed on 6 May 2011 and 20 May 2011 respectively. At that time, there was no indication from the Arbitrator as to when he would issue his award. Over time, the first two defendants grew impatient and their counsel in the Arbitration, Mr Chin Loi Sin ("Mr Chin"), began writing to the Arbitrator, intermittently, to inquire when the parties might expect an award. It was not until 30 November 2012 that the Arbitrator responded with his apology and requested that he be updated on developments. Prior to that, there was an e-mail from the Arbitrator on 27 January 2012 stating that he would let parties know if he required further submissions, but he gave no indication as to when his award would be ready.

November 2012 to 1 April 2013

27 I now turn to the period in time when the Arbitrator sought updates as to the quantum of damages and made consequential directions on supplemental submissions.

28 On 30 November 2012, the Arbitrator apologised for the delay and inquired counsel from both sides as to whether the parties had any further submissions on any points which they wanted to update the Arbitrator on. He wrote: [note: 1]

> … I am conscious of the delay and offer my apologies for it. A telephone conference is not required at this time.
>
> However, given the time that has elapsed, do the Claimants or the First Respondent have any further submission on any points to update the Tribunal before I render an award?
>
> In particular:
>
> (i) the Claimants have any further evidence to adduce in support of their claims for Arranger Fees? and
>
> (ii) can Mr Chin and Mr Chacko please address me on what are the applicable interest rates that should apply (if relevant) to (a) any Arranger Fees due but unpaid under the ARA, and (b) any amounts unpaid post-award?

29 On 3 December 2012, Mr Chin, on behalf of the first two defendants, informed the Arbitrator that there was something the claimants in the Arbitration would like to address him on.

30 PTCI was displeased with the first two defendants' attempt to "reopen" the arbitral proceedings. On 31 December 2012, Legis Point LLC ("Legis Point") put the Arbitrator on notice of PTCI's objections to the first two defendants' attempt to introduce additional submissions or claims: [note: 2]

3. We are instructed to place on record our client[s'] objections to the Tribunal hearing any further submissions of the parties and/or admitting any further evidence by the Claimants at this late stage given that the hearing of the arbitration had long concluded on 14 April 2011.

4. We have our client[s'] instructions to place on record our clients' strong objections to the Tribunal inviting the Claimants to submit further evidence to buttress what is obviously a baseless claim.

5. We expressly reserve all our client[s'] rights.

31 On 1 January 2013, the Arbitrator clarified as follows: [note: 3]

… I have not given any party *carte blanche* to make completely new submissions. I asked for an update on damages given the time that has elapsed and given that an issue that had arisen in the case was the First Respondent's default in complying with the Tribunal's directions on document production.

32 The first two defendants filed their supplemental memorial ("the CSS") on 29 January 2013 to update the Arbitrator on the matters that had transpired since the Post-Hearing Memorials and Post-Hearing Reply Memorials were filed: [note: 4]

(a) On 28 November 2012, the Indonesian Supreme Court held that the SIAC was the competent authority to hear the dispute between the parties ("the Indonesian SC decision"). This ruling arose from PTCI's original action commenced in the Indonesian courts where it, amongst other things, sought for the Agreement to be declared invalid.

(b) The first two defendants brought to the Arbitrator's attention the contradictory positions taken by PTCI in the Arbitration and the Indonesian court proceedings.

(c) The first two defendants submitted that in view of the Indonesian SC decision, PTCI should pay the costs incurred by the first two defendants in those proceedings.

(d) The first two defendants provided an update on the quantum of the claim for Arranger Fees.

33 Upon receiving the CSS, on 30 January 2013, the Arbitrator invited the PTCI to respond to the matters raised therein. The deadline given was two weeks. PTCI felt it was too short and applied for an extension of time on 8 February 2013, [note: 5] arguing inequality since the first two defendants had taken two months from the receipt of the Arbitrator's e-mail dated 30 November 2012 to file the CSS and that more than 21 months had elapsed since the conclusion of the hearing on 14 April 2011. The Arbitrator agreed to give more time on 13 February 2013, and gave 29 March 2013 as the new deadline. [note: 6] PTCI filed its supplemental submissions on 1 April 2013.

Purported fresh claim dated 1 April 2013 and the exchanges relating thereto

34 One then comes to the critical exchanges in the context of the first two defendants' proposed "fresh" claim and the events leading to the filing of OS 510/2013 on 6 June 2013.

35 Mr Chin wrote to the Arbitrator on 1 April 2013 at around 2.17pm to give notice of a possible "fresh" claim in the Arbitration. He requested that the Arbitrator "order [PTCI] to confirm whether [it]

had sold 200 of its tower sites and to disclose the details pertaining to this transaction." Mr Chin claimed that if the transaction was "true and was completed", it would constitute a "fundamental breach" of the Arranger Agreement for the reasons stated in his e-mail. [note: 7]

36 The Arbitrator wrote to Legis Point on the same day at 8.06pm as follows: [note: 8]

> 1. [PTCI] is directed to confirm or clarify the Claimants' factual assertions … by close of business on Wednesday, April 3, 2013.
>
> 2. [PTCI] is directed to respond to the Claimants' prayer 6 by close of business on Wednesday, April 3, 2013.

This e-mail is hereinafter referred to as "the 1 April direction". The relevant portion of the claimants' "prayer 6" of the e-mail dated 1 April 2013 read as follows: [note: 9]

> 6) If the transaction is true and was completed, this would constitute a fundamental breach of the Arranger Fee Agreement…

37 PTCI did not reply by the stipulated date, namely, 3 April 2013. On 5 April 2013, the Arbitrator wrote again to Mr Chacko's assistant, Ms Angeline Soh, extending the original deadline to the morning of 8 April 2013, a Monday. The Arbitrator wrote: [note: 10]

> I refer to my directions of April 1, 2013 below.
>
> I have not received any response from [PTCI's] counsel. Please respond by Monday morning, failing which, adverse inference *may* be drawn on the facts asserted by the Claimants' counsel.
>
> [emphasis added]

38 Notably, the Arbitrator in the same e-mail directed counsel for the first two defendants as claimants in the Arbitration to address him on his powers if they wanted to have their "fresh" claim heard in the Arbitration: [note: 11]

> With regard to the Claimants' reservation of rights to bring further claims premised on these new facts, please refer to the 2007 SIAC Rules and applicable law, and address me on my powers in the event that you are seeking to have these claims heard in this arbitration.

This e-mail is hereinafter referred to as "the 5 April direction". Collectively, the instructions given above will be referred to as "the April directions".

PTCI challenged the Arbitrator's impartiality

Invitation to withdraw as Arbitrator on 12 April 2013

39 PTCI was unhappy and the basis of its concern arose primarily out of the April directions. On 12 April 2013, PTCI through Legis Point invited the Arbitrator to withdraw as arbitrator in the Arbitration. Legis Point wrote: [note: 12]

> 1. We refer to your emails of 1 April 2013 and 5 April 2013.

2. We note from your email of 1 April 2013 that you had issued the following directions (the "Directions") without affording our clients an opportunity to address you on the Claimants' allegations as set out in their solicitor's email of 1 April 2013 (the "Claimants' Email"):-

….

3. We further note that you had indicated in your email of 5 April 2013 that adverse inferences may be drawn on the facts asserted by the Claimants in the event the 1st Respondent fails to respond by the morning of 8 April 2013.

4. Our instructions are to place the following on record: -

(a) You had issued the Directions within 6 hours upon receipt of the Claimants' Email without hearing or considering [PTCI's] position on the same;

(b) The Claimants' Email set out matters which were not pleaded and which have not been referred to arbitration and consequently do not fall within the jurisdiction of the Tribunal; and

(c) The allegations raised in the Claimants' Email relate to alleged events which occurred long after the oral hearing of this arbitration concluded on 14 April 2011 and after parties had filed their Post Hearing Memorials and Reply Memorials respectively on 6 May 2011 and 20 May 2011 as directed.

5. Our client is further of the view that as the allegations raised in the Claimants' Email do not even relate to matters pleaded in the arbitration and/or which fall within the jurisdiction of the Tribunal, the Directions are completely unnecessary and indeed outside the powers of the Tribunal.

6. The fact that you would issue such Directions within 6 hours of being requested to do so by the Claimant, without affording our client an opportunity to be heard on the matter, and further threatened to draw adverse inference against our client in respect of allegations made by the Claimant, which are neither pleaded, relevant or within the scope of your jurisdiction, is of grave concern to our client.

7. Our client takes the view that such conduct, apart from being a serious breach of natural justice, also evidences an intent and actual action on your part to enter the arena and actively assist the Claimant in the claims that they have made and intend to make.

8. Our client's views in this regard are fortified by your previous conduct as set out in our email of 31 December 2012.

9. Our client is also deeply concerned by the protracted and dilatory manner in which you have conducted this arbitration. The Directions that you have purported to issue is yet another example of the manner in which you have acted to prolong and protract this arbitration unnecessarily and to the prejudice of our client. …

10. Our client is of the view that your aforesaid conduct, when viewed objectively, is such that there is a real likelihood that you cannot and will not be able to fairly determine the relevant issues in this arbitration. Our client has lost all confidence in your ability to act fairly and impartially and has justifiable doubts as to your impartiality and independence.

11. In light of the above, our instructions are to make the appropriate application to have you removed as the arbitrator in this arbitration. We will shortly be filing and serving on you our client's Notice of Challenge.

12. Meanwhile, we are instructed to invite you to withdraw from your office as arbitrator in this arbitration.

13. We expressly reserve all our client's rights.

Application to SIAC to remove the Arbitrator

40 A formal Notice of Challenge was filed on 15 April 2013 with the SIAC to challenge the appointment of the Arbitrator. The challenge was on broadly the same grounds as that stated in Legis Point's letter dated 12 April 2013.

41 In light of PTCI's challenge, the first two defendants decided not to complicate matters, and by Mr Chin's e-mail dated 15 April 2013, they withdrew their application to include the proposed "fresh" claim in the Arbitration, but reserved their rights to refer the "fresh" claim to a separate arbitration.

42 The Arbitrator replied on 17 April 2013. He clarified that the 5 April directions "sought and provided [PTCI] with opportunities to respond to the new matters raised by [the first two defendants]." He also added that "no rulings or determinations were made". [note: 13] The Arbitrator explained that: [note: 14]

> Despite the fact that the First Respondent's counsel had just filed a written submission on the same date as the Claimants' application (namely, April 1, 2013), I received absolutely no response from the First Respondent's counsel to my directions. Notably, I received no request for extension of time to respond and no objections on grounds of jurisdiction or reservation of rights.
>
> Two days after the deadline that I had directed had passed, without any response from the First Respondent's counsel, I sent an email reminder on April 5, 2013 to the First Respondent to respond, giving a further deadline of April 8. On April 8, I again received no response from the First Respondent or its counsel, much less any substantive response to my questions.
>
> …
>
> … As I have explained, my directions merely granted the First Respondent an opportunity of response. I had not prejudged any questions of jurisdiction nor made any determinations. … I did not in fact draw any [adverse] inferences or make any determinations on the issues arising. … Moreover, now that the Claimants have withdrawn their application for directions, the issue may be moot in any event.
>
> …
>
> If there are no further submissions, I will shortly declare the proceedings closed and render an award in accordance with the 2007 SIAC Rules.

The outcome of application to SIAC to remove the Arbitrator

43 PTCI's challenge filed with the SIAC was dismissed by the Chairman of SIAC on 9 May 2013. Dissatisfied with the Chairman's dismissal, PTCI filed OS 510/2013 pursuant to Art 13(3) of the Model

Law and O69A r 2(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

Application under Art 13(3) of the Model Law

44 OS 510/2013 was filed on 6 June 2013, and it was served on the Arbitrator on 11 June 2013.

45 It is trite that Art 12(2) provides that an arbitrator may be challenged if circumstances that "give rise to justifiable doubts as to that arbitrator's impartiality or independence" exist. Article 13 sets out the procedure for challenging an arbitrator. Article 13(3) provides that the challenged arbitrator is entitled to continue with the arbitration and to render an award pending the removal application – the supervising court has no power under the Model Law to intervene to restrain the arbitrator from continuing with the arbitral proceedings: *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush and another* [2004] 2 SLR(R) 14 at [37].

46 The Arbitrator issued the Award on 4 October 2013 before the determination of the removal application. The Award was not in PTCI's favour. It was thus hardly surprising that PTCI wished to press on with the removal application at the adjourned hearing.

Mr Chong's submissions on the utility argument

47 It was argued by Mr Chong at the adjourned hearing on 24 January 2014 that there was no utility in continuing with the challenge because the Arbitrator had become *functus officio* upon issuance of his final and binding award (see s 19B(2) of the IAA). Mr Chong pressed the point that Art 13 was directed at the removal of an arbitrator. Bearing in mind the absence of any general or residual power provided in Art 13(3), the court could not make a declaratory order on the effect of the removal on the Award. He took the position that PTCI should instead proceed to file an application to set aside the Award under Art 34 of the Model and/or s 24 of the IAA.

Mr Chacko's submissions on the utility argument

48 In contrast, Mr Chacko maintained that there was utility in continuing with the application. He argued that the Arbitrator's partiality was borne out by the adverse Award issued before the determination of OS 510/2013.

Discussion and decision on the utility argument

49 I disagreed with Mr Chong. Instead, I agreed with Mr Chacko that OS 510/2013 (which was part-heard) would not, *ipso facto*, be rendered otiose by the Award. In my view, even though an award had been rendered in the circumstances of this case, a decision in OS 510/2013 had for the following reasons legal, procedural and practical utility.

50 Firstly, the hearing of the challenge can continue as the intention is to disqualify for past breach and to, prospectively, ensure impartiality in the making of the award that was rendered pending the conclusion of OS 510/2013.

51 Secondly, a decision on an Art 13 challenge is likely to have an effect on any subsequent setting aside application brought under s 24(b) of IAA and Art 34(2)(*a*)(ii), Art 34(2)(*a*)(iv) and Art 34(2)(*b*)(ii). I shall deal with the three separate grounds of setting aside and their relation to the requirement of impartiality or independence further below at [111] to [148]. Suffice to say for now that the requirement of impartiality or independence constitutes one of the two pillars of natural justice and any breach thereof may lead to a setting aside of the award under s 24(*b*) of the IAA.

52 Want of impartiality and independence in an arbitral process may also give rise to public policy concerns, and a violation of public policy of Singapore is another ground for setting aside an award under Art 34(2)(*b*)(ii) of the Model Law. Additionally, it is said that an arbitrator's impartiality and independence is mandatory under the Model Law and this is implicit in Art 12(2) of the Model Law: Howard M Holtzmann and Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation Publishers, 1989) ("*Holtzmann & Neuhaus*") at p 409. Apart from the Model Law, the arbitrator's impartiality and independence in this case is embodied in Rule 9 of the 2007 Rules to form part of the parties' agreed arbitral procedure. For instance, Rule 9.3 reads:

> 9.3 … Any arbitrator, whether or not nominated by the parties, conducting an arbitration under these Rules shall be and remain at all times *independent and impartial*. … [emphasis added]

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

53 Thirdly, a decision made under an Art 13 challenge is not appealable whether the challenge is allowed or dismissed (see Art 13(3)). In the event that the challenge is dismissed, a setting aside application that is based on the same grounds raised in the Art 13 challenge will, at the very least, give rise to objections like issue estoppel and abuse of process.

54 I note that during the drafting of the Model Law, Norway raised the objection that "an appeal against the court decision should not be precluded, at least not in the case where the court did not agree with the challenge": *Analytical Compilation of Comments by Governments and International Organizations on the Draft Text of a Model Law on International Commercial Arbitration* (A/CN.9/263, 19 March 1985) ("*Analytical Compilation of Comments*") at pp 25–26. In response to this concern, Mr Herrmann from the International Trade Law Branch explained that the reasons behind giving the court's decision a final and unrepeatable character was that this would minimise delay: *Summary Records for the 314th Meeting on the UNCITRAL Model Law on International Commercial Arbitration* (A/CN.9/SR.314, 7 June 1985) at para 27. In fact, the entire procedure under Art 13(3) was adopted as a result of "the fear of considerable delay and dilatory tactics, of disruption and of additional costs": Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 3rd Ed, 2010) ("*Peter Binder*") at para 3–078.

55 A court decision that is not appealable may well sieve out and limit subsequent setting aside applications with the concomitant advantage and benefit of curtailing delays, dilatory tactics, disruption and additional costs regardless of whether the court dismisses the challenge before or after the rendering of an award. This also aligns with our courts' pro-arbitration policy that seeks to avoid "indeterminate challenges" and "indeterminate costs": see *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [62]. To relate back to Mr Chong's utility argument, these points demonstrate that a decision on a challenge of an arbitrator made after an award is rendered is not devoid of utility.

56 I now turn to the converse scenario where the Art 13 challenge is upheld. The decision is equally non-appealable. From the viewpoint of the successful applicant, this non-appealable decision has given him a procedural advantage when time comes to set aside the award: the applicant only needs to furnish proof of the court order to support his setting aside application.

57 The procedural advantage under discussion here is quite different from the situation discussed

i n *PT First Media TBK (formerly known as PT Broadband Multimedia TBK v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 ("*PT First Media*") at [128]. "Instant court control" and "delayed court control" were expressions coined in *PT First Media*: at [130]. This distinction is helpful when considering the choice of remedies under Art 13 and Art 34. Article 13 is directed at the tribunal whereas Art 34 is against the award. "Instant court control" over pending arbitral proceedings should not give way to "delayed court control" over the award when one party had invoked his choice of remedies under Art 13 and the matter was still pending when the award had been issued.

58 Fourthly, even though the Arbitrator may be *functus officio*, the making of an award merely terminates the arbitral proceedings pursuant to Art 32(1) of the Model Law. It does not terminate the arbitration agreement. Subsequent arbitral proceedings conducted pursuant to the arbitration agreement may take place. For example, the first two defendants may decide to pursue the "fresh" claim raised in Mr Chin's letter to the Arbitrator dated 1 April 2013 in a separate arbitration (see [35] and [41]). If I were to have made a finding that the Arbitrator should have been removed in OS 510/2013 because of justifiable doubt as to his impartiality or independence (or even for the reason that he lacked the qualifications agreed to by the parties), such an order, regardless of its effect on the award rendered by the Arbitrator, would have had the practical effect of barring the Arbitrator from sitting in future arbitrations between the parties under their arbitration agreement. In addition, if the Award was subsequently set aside for grounds not raised in the challenge of the Arbitrator, there also remained the possibility that "Situation 1" identified by the High Court in *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2014] 1 SLR 1221 at [47] might have occurred where parties had the option of recommencing arbitral proceedings. In such circumstances, a removal order would also have the practical effect of barring the Arbitrator from sitting in the recommenced arbitration.

59 Before I move on to deal with the merits of OS 510/2013 proper, I have to address a related matter that concerns challenges against an arbitrator heard at different points in time. Notably, the nature of the challenged arbitrator's conduct necessary to warrant a finding of justifiable doubt as to impartiality will be particular to each case. Hence, any associated level of disquiet about the conduct cannot rise or fall depending on the extent of the arbitration already undertaken and the extent of the disruption that would be caused if a removal of the arbitrator is ordered. These are matters that should not influence the objective test that is to be applied. This is the view of the High Court of New Zealand in *Todd Taranaki Limited and Another v Energy Infrastructure Limited and Another* [2007] NZHC 1516 at [26] which I adopt. Gary Born in *International Commercial Arbitration* vol 2 (Kluwer Law International, 2nd Ed, 2014) at pp 1822–1823) ("*International Commercial Arbitration* vol 2") accepts that one standard of impartiality applies even at different stages of the arbitral process. His conclusion at the end of the commentary cautioned that there would be a risk that real analysis would be foregone if analysis of whether there are justifiable doubts as to an arbitrator's impartiality or independence is influenced by the "stage of the arbitral proceedings". His apposite closing remarks are as follows (at p 1823):

> … Accordingly, while the procedural posture of the arbitral proceedings can be relevant to decisions regarding the impartiality and independence of arbitrators, it should not be permitted to pre-empt an objective, careful analysis of partiality or bias.

Removal of the Arbitrator on Art 12(2) grounds

PTCI's criticisms of the Arbitrator

60 PTCI argued that in terms of Art 12(2), there were justifiable doubts as to the arbitrator's impartiality. Whilst Mr Chacko's submissions covered events that preceded the April directions, his real

focus and complaints of impartiality were based on the critical exchanges of communications relating to the first two defendants' proposed "fresh" claim and the lead up to the events relevant to OS 510/2013. In the context of the critical issue of impartiality, the Arbitration had already been undertaken and the extent of the adverse consequences must arguably be related to the Arbitrator's ability to come to an impartial conclusion on the substantive issues with the issuance of his award. As Lord Denning MR put it in *Modern Engineering (Bristol) Ltd v C Miskin & Son Ltd* [1981] 1 Lloyd's Rep 135 at 138, it was not a question as to the fitness of the arbitrator to conduct the proceedings but rather whether the arbitrator's "conduct was such as to destroy the confidence of the parties, or either of them in his ability to come to a fair and just conclusion.

61 PTCI raised several separate grounds of complaint against the Arbitrator, and I was invited to consider their cumulative effect. The specific complaints or objections were that:

(a) There had been a delay in rendering the award up to the time the Arbitrator issued the 1 April direction. [note: 15]

(b) The Arbitrator had initially given a short timeline of two weeks to PTCI for it to file a response to the CSS filed by the first two defendants on 29 January 2013. It was only after PTCI drew the Arbitrator's attention to the fact that the first two defendants took two months to file the CSS that the Arbitrator extended a similar timeline to them. [note: 16]

(c) The Arbitrator had given an unreasonable timeline of one day to PTCI to respond to the "fresh" claim that the first two defendants sought to admit on 1 April 2013. [note: 17] The direction was issued without giving PTCI a reasonable opportunity to be heard and formed part of the core of PTCI's challenge. [note: 18]

(d) The Arbitrator had threatened to draw adverse inferences on the facts asserted by the first two defendants in the "fresh" claim by way of the 5 April direction. [note: 19]

62 Mr Chacko's contention was that the above complaints or objections against the Arbitrator demonstrated his failure to treat the parties equally and his ignoring PTCI's right to be heard. Mr Chacko explained that the parties' reference to the Arbitrator was on the issue of whether the Arranger Agreement was valid and enforceable. The issue of whether there was a fundamental breach was not part of the reference and allowing the first two defendants to raise the issue of fundamental breach in April 2013 without hearing PTCI suggested apparent bias on the Arbitrator's part: on an objective view, the Arbitrator was assisting the first two defendants in formulating new claims.

Mr Chong's contentions

63 According to Mr Chong, who represented the first two defendants, PTCI's reliance on the Arbitrator's delay and lack of response before the 1 April direction was misplaced. Besides, those specific complaints or objections in [61] above would not give rise to justifiable doubts as to the Arbitrator's impartiality. [note: 20] The proper application was for his appointment to be terminated under Art 14 of the Model Law rather than to seek his removal under Art 13 read with Art 12(2).

64 Mr Chong relied on the Singapore High Court decision of *Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 633 ("*Kempinski (HC)*") [note: 21] which, in the context of a challenge made against the tribunal's impartiality under s 24(*b*) of the IAA, held that the arbitrator in that case did not enter into the fray by raising inquiries relevant to the proceedings: at [70].

Similarly, in the present case, the 1 April direction was meant for PTCI to respond to the first two defendants' application to admit a "fresh" claim. [note: 22] In any case, just as it was held by the Court of Appeal in *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 ("*Kempinski (CA)*") at [60], the Arbitrator in the present case had the power to conduct enquiries as may appear to be necessary or expedient under Rule 24.1(e) of the 2007 Rules. Furthermore, the Arbitrator had not made any ruling on the application to admit the potential "fresh" claim.

65 Mr Chong further argued that the 5 April direction on the possible drawing of adverse inference was similar to *Kempinski (HC)*. In that case, Judith Prakash J held that the direction on possible adverse inferences was a direct result of the applicant's repeated breach of the tribunal's order for disclosure. Likewise, in the present case, PTCI deliberately chose to remain silent for 11 days after the 1 April direction. [note: 23] Even so, the arbitrator did not *in fact* draw any adverse inferences against PTCI.

Discussion of and decision on OS 510/2013

66 For the reasons set out below, justifiable doubts were not made out in terms of Art 12(2), and PTCI's application for an order that the Arbitrator be removed in OS 510/2013 was dismissed accordingly.

PTCI's complaints did not show that the Arbitrator was biased

67 Whilst Mr Chacko invited this court to take the individual complaints of bias together, the main thrust of his criticism actually related to the purported "fresh" claim raised by the first two defendants on 1 April 2013 and the April directions. It was on the complaints in (c) and (d) of [61] above that Chacko mounted PTCI's case as to the Arbitrator's apparent bias. His contentions were that the April directions and the threat to draw adverse inferences against PTCI had been made without affording PTCI an opportunity to be heard and that the Arbitrator's omissions were "an unmitigated and fundamental breach of the rules of natural justice". [note: 24]

68 The complaints in (a) and (b) of [61] above were raised in the context of the Arbitrator's delay in issuing his award and for allegedly "unilaterally inviting the first two defendants to buttress their case long after submissions were made". If anything, undue delay by itself would not suggest any form of partiality or biasness against PTCI, for *both* parties were equally affected by the delay before 30 November 2012. There was nothing to the point that the Arbitrator had "invited" the first two defendants on 30 November 2012 to adduce further evidence to buttress their claim in an attempt to assuage their unhappiness and ameliorate the delay on the Arbitrator's part. [note: 25] Besides, I agreed in principle with Mr Chong that any allegation of a failure to conduct proceedings properly or with reasonable despatch should fall within Art 14 of the Model Law.

69 I rejected Mr Chacko's criticisms of the Arbitrator since the matters (*ie*, the complaints in (c) and (d) of [61] above) related to and fell within the realm of the case management powers of the tribunal and as such was within the discretion of the Arbitrator to make (see *Grand Pacific Holdings Ltd v Pacific China Holdings (in liq)* (No 1) [2012] 4 HKLRD 1 ("*Grand Pacific*"). In general terms, there could be no logical reason to differentiate between the proactive case management powers of a judge under our Rules of Court and the proactive case management powers of an arbitrator. The parties here had given the Arbitrator wide and flexible procedural powers by agreeing to the 2007 Rules. Rule 15.2, which obliges the Arbitrator to achieve efficiency and speed in the arbitral process, provides as follows:

> The Tribunal shall conduct the arbitration in such manner as it considers appropriate to ensure the fair, expeditious, economical and final determination of the dispute.

70 Mr Chong's arguments touched on case management, a matter that was entirely within the purview and discretion of the Arbitrator (see *Grand Pacific* at [68]). In contrast, PTCI's assertion that it was denied an opportunity to be heard (before the 1 April direction was made and sent to Legis Point) was a bare assertion. It had not shown that it was possible to persuade the Arbitrator not to issue the 1 April direction if prior notice had been given to PTCI. Put another way, PTCI was unable to show that the April directions had not been case management issues. Besides, as case management directions, the April directions were fair and reasonable. They did not manifest any objective lack of impartiality in the conduct of the arbitral proceedings.

71 In any case, the gravamen of PTCI's complaint – the April directions – did not give rise to any semblance of biasness or manifest any objective lack of impartiality in the conduct of the arbitral proceedings when considering the train of events from 1 April 2012 leading up to the 5 April direction as a whole. In reality, they were nothing more than the Arbitrator's attempt to seek information and his second communication took on a sterner tone to convey his impatience and irritation with PTCI's silence. The complaint was in respect of what may be described as a "stand-alone" procedural matter, and the application to remove the Arbitrator was extreme in the circumstances. Having regard to the overall objective of arbitral proceedings, the supervising court should accord a reasonable margin of appreciation to arbitrators in the discharge of their functions. That said, this instant case is not a borderline case; it was *plainly* not a case where the Arbitrator had gone wrong in his conduct of the arbitration such that he should be removed.

PTCI's complaints about the 1 April direction

72 As mentioned at [36], the Arbitrator directed PTCI to "confirm or clarify" the first two defendants' factual assertions, namely, that PTCI had sold 200 of its tower sites to NTS. PTCI's argument was that in making this direction, the Arbitrator did not give PTCI a reasonable opportunity to be heard.

73 I was unable to accept this contention. As stated, firstly, it was within the Arbitrator's case management discretion to issue the 1 April direction. Secondly, the 1 April direction did not prevent PTCI from presenting its position on the matters alleged in Mr Chin's e-mail. Through the 1 April direction, the Arbitrator was giving PTCI an opportunity to be heard and PTCI was invited to communicate in writing its position on the matters alleged. As Mr Chong correctly submitted, the 1 April direction was precisely intended to allow for PTCI to respond to the first two defendants' assertion of a "fresh" claim. [note: 26]

74 The 1 April direction was in effect an "inquiry" into the matter raised by Mr Chin. The Arbitrator was clearly still in the midst of inquiring into the first two defendants' letter dated 1 April 2013, and had not decided on the matter. Reading the 1 April e-mail objectively, no impression could be conveyed that the Arbitrator had prejudged any questions of jurisdiction nor made any determinations. The Arbitrator had merely been urging PTCI to respond to the allegations made by the first two defendants. In this regard, I also noted that PTCI's lawyers had not written to the Arbitrator to take exception to the 1 April direction any time before the 5 April direction or 12 April 2013 for that matter.

PTCI's complaints about the 5 April direction

75 The 5 April direction came after PTCI missed the deadline of 3 April 2013. The Arbitrator had

waited until the morning of 5 April 2013 before writing to PTCI's lawyers to present the latter's position. Through the 5 April direction, he was continuing to give PTCI an opportunity to be heard.

76 I disagreed with Mr Chacko that the 5 April direction gave rise to justifiable doubt as to the Arbitrator's impartiality. It was well within the Arbitrator's case management powers to draw adverse inferences when faced with a party that ignored his case management decisions. His choice of words was careful, as set out at [37] above. I note that the Arbitrator did not state that he would necessarily draw any adverse inferences; he used the word "may" in his e-mail. That could not reflect partiality on the arbitrator's part.

77 As Art 19 of the Model Law stipulates, an arbitrator may conduct the arbitration in such manner as he considers appropriate, including in relation to determining the admissibility, relevance, materiality and weight of any evidence. Mr Chong relied on Rule 24.1(e) of the 2007 Rules which states that:

> 24.1 In addition and not in derogation of the powers conferred by any applicable law of the arbitration, the Tribunal shall have the power to:
>
> …
>
> e. conduct such enquires as may appear to the Tribunal to be necessary or expedient.

78 In addition, Rule 24.1(o) of the 2007 Rules confers the following power to the arbitrator such that he is allowed to:

> o. proceed with the arbitration notwithstanding the *failure or refusal of any party to comply* with these Rules, or *with the Tribunal's orders or directions* or to attend any meeting or hearing, *and to impose such sanctions as the Tribunal deems appropriate* … [emphasis added]

Rule 24.1(o) illustrates the point that a party's failure to comply with an arbitrator's directions is sufficient reason for the Arbitrator to draw adverse inferences against him. This was the conclusion reached by Prakash J in *Kempinski (HC)* (upheld in *Kempinski (CA)* at [56]–[59]). Even though Rule 24.1(o) was not examined in that case, Prakash J held at [71]–[73] that the tribunal's direction on the possible drawing of adverse inferences could not be faulted because of repeated breaches of its order for disclosure.

PTCI's complaints about the unreasonable timelines

79 PTCI maintained that the one day timeline to respond to the 1 April direction was unreasonable. It was inaccurate to say that only one day was given to them to respond. While it was true that the Arbitrator directed PTCI to respond by 3 April 2013, he had waited until 5 April 2013 before sending the e-mail with the direction that he may possibly draw adverse inferences should they continued to remain silent by 8 April 2013. In effect, the Arbitrator had given them seven days to comply with the 1 April direction.

80 As stated above at [18], the reasonable observer is an "informed" individual who takes into account all relevant facts before arriving at a conclusion. In the overall circumstances, the amount of time given to PTCI to comply with the Arbitrator's direction, in the present case, could not be said to have led a reasonable observer to doubt his impartiality.

Conclusion for Part 1

81 For the reasons stated, OS 510/2013 was dismissed. Consequently, there was no need to make any order sought in relation to PTCI's application in SUM 317/2014 for a consequential order to have the Award set aside in the event of a successful challenge in OS 510/2013.

PART 2: OS 48/2014

Application to set aside the Award

82 The application in OS 48/2014 was initially said to have depended upon the same matters on which the application in OS 510/2013 to remove the Arbitrator under Art 13(3) read with Art 12(2) was made. The background facts, narrated in [21] to [43] above, provided the necessary context for this application in OS 48/2014. The criticisms of the Arbitrator can be found at [61]–[65] above and the grounds of my decision in OS 510/2013 can be found at [66]–[81] above.

83 PTCI's application to set aside the Award was as follows:

(a) The Arbitrator was in breach of natural justice in connection with the making of the Award within the meaning of s 24(*b*) of IAA.

(b) The Arbitration was not conducted in accordance the agreement of the parties within the meaning of Art 34(2)(*a*)(iv).

(c) The Award was contrary to Singapore's public policy within the meaning of Art 34(2)(*b*)(ii). It was contended that the Award rendered in breach of natural justice on the ground of apparent bias would necessarily conflict with Singapore's public policy.

The Award

84 It is now a convenient juncture to set out the relevant paragraphs of the Award. Most of the paragraphs were referred to by counsel on both sides. The dispute turned on whether the Preliminary Agreement was concluded by 31 August 2007 or on or after 12 September 2007.

85 As noted earlier, the first two defendants were the "Claimants" in the Arbitration. PTCI was the "First Respondent" and SG was the "Second Respondent". The Arbitration proceeded in default against SG.

86 The relevant paragraphs of the Award read as follows: [note: 27]

VI. The Tribunal's Findings

…

212. … The summary of facts below includes facts determined by me after hearing and considering all the evidence in this arbitration.

Summary of Facts [note: 28]

213. This dispute arises essentially from the Claimants' claims to payment of Arranger Fees (or commission) in return for their assistance rendered to the First Respondent PTCI to procure for PTCI lucrative telecommunication tower contracts from a new client, PT Natrindo Telepon Seluler ("NTS"). The ARA (*ie*, Arranger Fee Agreement) is the contract which sets out the terms under

which the Claimants would be entitled to payment of Arranger Fees from PTCI.

…

222. Under the ARA, the Claimants were to assist PTCI with getting NTS as a customer and, if successful, to assist PTCI with concluding contracts with NTS. The ARA specified three particular contracts that were to be concluded as part of the NTS deal or NTS Project (as defined in the ARA). These agreements were a Preliminary Agreement, a Build Operate and Lease Agreement and a Sale and Leaseback Agreement. The Preliminary Agreement was the precursor agreement to the negotiation and execution of the latter two agreements. Upon the signing of the Preliminary Agreement between NTS and PTCI, NTS would have been treated as PTCI's customer. Hence, the obligation of the Claimants under the ARA was understood to be to help PTCI procure the Preliminary Agreement and then conclude the latter two agreements (defined in the ARA collectively as the Final Agreement).

…

224. It was not in dispute that PTCI ultimately did successfully procure NTS as a customer and did enter into the relevant agreements with NTS. However, PTCI refused to pay the Claimants any Arranger Fees under the ARA.

225. PTCI's main justification for not paying Arranger Fees was that the Claimants had done nothing to deserve payment. In other words, the First Respondent believed that it had gotten NTS as a customer through its own efforts. The Claimants accused the First Respondent of merely seeking to resile from its obligations under the ARA.

226. … On behalf of the First Respondent, [Triandy Gunawan] essentially contended that he had already procured NTS as a client for PTCI *before* the ARA was signed.

227. The main support that PTCI put forward for this contention was the assertion that the Preliminary Agreement between PTCI and NTS was concluded by August 31, 2007, two days before the ARA was executed with the Claimants.

228. Triandy Gunawan's evidence was that the Preliminary Agreement with NTS was already a "done deal" by mid-August 2007 even though the agreement had not been signed by both parties. PTCI also tried to justify this argument by referring to work orders from NTS which referred to a Preliminary Agreement dated August 31, 2007.

229. Notwithstanding what the work orders stated, the Preliminary Agreement between NTS and PTCI was in fact dated September 12, 2007. In the Sale and Leaseback Agreement between NTS and PTCI, reference was also made to the Preliminary Agreement dated September 12, 2007. Faced with conflicting evidence as to when the Preliminary Agreement was in fact entered into between NTS and PTCI, I concluded that the Preliminary Agreement was more likely to have been entered into on or after September 12, 2007 as stated on the Preliminary Agreement.

230. I considered it rather far-fetched that the First and Second Respondents would have rushed to execute the ARA with the Claimants on September 2, 2007 if indeed the First Respondent had already concluded a binding Preliminary Agreement with NTS by mid-August 2007 or by August 31, 2007. If the First Respondent was to be believed, NTS would already have been a customer of PTCI by September 2, 2007 and there would have been no need to procure the Claimants' services through the ARA. When this point was put to Triandy Gunawan during cross-

examination, he claimed that the ARA was entered into after a Preliminary Agreement had been concluded between NTS and PTCI because the ARA only concerned *additional* contracts with NTS (not covered by the Preliminary Agreement) that the Claimants had said they could procure for PTCI. I found this contention by Triandy Gunawan to be inherently unconvincing and his overall credibility to be weak.

231. The First Respondent also argued that the Claimants did not provide substantial advice and assistance with regard to concluding relevant contracts with NTS. Again, I found this to be unconvincing against the evidence which showed the Respondents regularly reaching out to the Second Claimant for advice and comments in relation to dealing with NTS. What I found material was the fact that the First Respondent contemporaneously saw the need to refer to the Claimants for advice and such advice was in fact adopted by the First Respondent in its dealings with NTS. In short, the Claimants did assist the First Respondent with procuring NTS as a customer and concluding the necessary contracts with NTS.

232. Under the ARA, the Arranger Fees were to be calculated on the basis of the number of telecommunication towers contracted with NTS. PTCI earned rental fees as well as operations and maintenance fees from the NTS for each tower site. Thus, the Arranger Fees were to be ascertained on the basis of a stipulated commission multiplied by the relevant number of towers.

…

3. Merits – Claims against PTCI (First Respondent)

…

Tribunal's Overview [note: 29]

…

357. There was common ground between the parties that if the Preliminary Agreement had been entered into before the ARA, the Claimants would not be entitled to their arranger fees because the Claimants could not have been the "effective cause" of PTCI getting NTS as a customer.

The First Respondent's Position [note: 30]

…

360. The First Respondent put forward written and oral evidence to support its contentions that the Preliminary Agreement had been concluded by August 31, 2007.

…

The Claimants' Position [note: 31]

…

363. The Claimants challenged the evidence put forward by the First Respondent to support the assertion that the Preliminary Agreement was concluded by August 31, 2007.

…

The Tribunal's Findings [note: 32]

366. Having considered the arguments of the parties and the written and oral evidence submitted by the Claimants and First Respondent in relation to when the Preliminary Agreement was entered into, I can only conclude that the Preliminary Agreement was entered into on or after its date of execution, September 12, 2007.

367. I base my findings on the following reasons. First, on its face, the Preliminary Agreement was dated September 12, 2007 by the parties to it – namely, NTS and PTCI. If the agreement was indeed reached by mid-August or by August 31, 2007, and this date was important to PTCI, I would have expected PTCI to ensure that the date of the agreement was accurately stated.

368. Second, the Sale and Leaseback Agreement dated July 7, 2008 between NTS and PTCI (part of the Final Agreement referred to in the ARA) also confirmed and referred to the Preliminary Agreement as being dated September 12, 2007.

369. In considering the written and oral evidence of Triandy Gunawan, President Director of PTCI, I found it incredulous that PTCI would rush to enter into an Arranger Fee Agreement (on the terms stipulated therein) with the Claimants on September 2, 2007 if it was indeed the case that, just days before (i.e. August 31, 2007 as asserted by PTCI), PTCI had already procured NTS as a customer on its own merits.

370. Given that the execution of the Preliminary Agreement between PTCI and NTS has been treated by the parties in this arbitration as the first step in establishing that NTS has been obtained or procured as a customer for PTCI, it would have made no sense for PTCI to sign the ARA with the Claimants in which the very NTS Project that the Claimants were to procure for PTCI included signing a Preliminary Agreement with NTS.

371. The First Respondent tried to finesse its argument by contending that it entered into the ARA with the Claimants so that the Claimants could procure additional contracts with NTS for PTCI. However, I did not find this argument or Triandy Gunawan's evidence on this point convincing.

372. Moreover, I considered the timing of the entry into the ARA to be relevant circumstantial evidence. The First Respondent and the Claimants signed the ARA on September 2, 2007, which was a Sunday. If PTCI had indeed reached final agreement with NTS on the Preliminary Agreement on August 31, 2007 (Friday), why would there have been any motivation for the First Respondent to sign the ARA with the Claimants two days later on Sunday?

373. Triandy Gunawan, President Director of PTCI and a signatory of the ARA, acknowledged when giving oral evidence that the ARA was signed in a hurry. The Second Claimant, Chan Shih Mei, testified that the reason for the Respondents being in a hurry to sign the ARA was, among other things, because they were worried that the NTS Project deal with NTS would not close. The Second Claimant, who was pregnant at the time, was also about to leave Indonesia for the United States to deliver her baby there. Thus, I heard and I accept the evidence that the ARA was prepared with haste and signed just before the Second Claimant departed Jakarta. Thereafter, as the Claimant which principally gave behind the scenes advice to the Respondents on the negotiations with NTS as a potential customer, the Second Claimant was based in the United States.

374. I also considered evidence from the parties regarding the nature of the advice that the

Second Claimant rendered to the Respondents in relation to the NTS Project both before and after entry into the ARA.

375. Taking the Claimants' and First Respondent's submissions into account, I conclude that the Claimants did indeed assist the First Respondent with procuring NTS as a customer insofar as the Claimants were an "effective cause" of PTCI being able to execute the Preliminary Agreement with NTS shortly after the ARA was entered into. Thus, I find that the first aspect of the Claimants' obligations under the ARA were satisfied.

376. With regard to the second aspect of the Claimants' obligations under the ARA – namely, the obligation to assist the Respondents with concluding the relevant agreements that constituted the NTS Project (namely, the Preliminary Agreement, BOL Agreement and Sale and Leaseback Agreement) – on the evidence before me, I find that the Claimants did in fact render assistance to the Respondents to conclude the relevant contracts with NTS.

377. First, it is not in dispute that the relevant contracts (namely, the Preliminary Agreement, the BOL Agreement and the Sale and Leaseback Agreement) were executed by PTCI and NTS, I have already explained why I have found that the Claimants were an effective cause of the Preliminary Agreement being executed.

378. In relation to the BOL Agreement and the Sale and Leaseback Agreement, I find that the Claimants were required by the ARA to "help" the Respondents conclude the agreements. There is no further detail set out in the ARA on the nature or extent of the "help" that had to be rendered.

379. As a matter of fact, having heard and considered the written and oral evidence put before me by the parties, I find that the Second Claimant did offer advice and assistance over a prolonged period of time leading up to the signing of both agreements. Some of this advice related to commenting on draft agreements. Other advice related to explanations about the commercial pricing for the agreements based on her past experience working as a Director in NTS.

380. In relation to the First Respondent's contentions that this advice was commonsensical or simplistic such that it cannot be said to amount to assistance in concluding the contracts, I find these arguments unconvincing. First, the contention is made on highsight. What I consider to be more significant is the fact that the Respondents saw it fit to enter into the ARA with the Claimants, in the first place, and then subsequently draw on the Second Claimant's expertise and experience during the period when the contracts had not been executed with NTS (namely, at the relevant times in 2007 to 2008).

381. If indeed the advice of the Second Claimant was simplistic and unhelpful, the evidential record would not show the Respondents being in regular contact with the Second Claimant over the deal. It would have been open to the Respondents at any time to distance themselves from the Claimants and not share the information relating to the NTS Project if the Respondents felt that they did not require the Claimants' assistance.

382. I also find that the ARA did not establish any thresholds for levels of assistance. The ARA does not require a qualitative or quantitative assessment of the amount of assistance to be rendered or how it should be rendered. In any event, I consider that the assistance given by the Claimants was indeed substantial and treated contemporaneously by the Respondents as sufficiently helpful as to warrant regular contact and requests for assistance.

383. Accordingly, I find that the Claimants have also satisfied the second limb of their obligations to "help" the First Respondent conclude the relevant contracts with NTS.

…

The Claimants' Relief Sought [note: 33]

429. In the Claimants' Statement of Case dated October 6, 2009, the Claimants set out their requested relief as follows:

(a)…

…

(i) "An order the [PTCI] and [SG] bear all costs (including solicitors-client cost) incurred by [FW] and [CSM] in respect of this arbitration.

…

The Tribunal's Findings

…

447. In relation to the Claimants' Prayer (i), I find that the arbitration clause in the ARA expressly provides that the losing party in this arbitration shall pay "*any*" costs and expenses incurred in connection with the arbitration. In light of my findings and determinations on the merits, the Claimants have prevailed substantially in most of their claims on the merits. The Claimants have only lost in relation to their case on jurisdiction against the Second Respondent. In contrast, the First Respondent has failed in its defence on the merits. I am therefore entitled to hold that the First Respondent is the losing party in this arbitration and shall pay all of the costs and expenses incurred in connection with the arbitration.

Breach of natural justice

87 I now turn to PTCI's allegation that natural justice had been breached. Choo Han Teck JC (as he then was) held in *John Holland Pty Ltd (formerly known as John Holland Construction & Engineering Pty Ltd) v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 at [18] ("*John Holland*") (whose analysis at [18] was affirmed by the Court of Appeal in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [29]) that a party applying to set aside an award on grounds of breach of natural justice under s24 (*b*) of the IAA must identify:

(a) the relevant rule of natural justice;

(b) how that rule was breached;

(c) how the breach was connected to the making of the award; and

(d) how the breach prejudiced the applicant's right.

88 Mr Chacko in his written submissions identified the rule and breach as follows: (a) a denial of PTCI's fundamental right to be heard; and (b) the Arbitrator's apparent bias. However, in oral

submissions, his position shifted: he referred to the Arbitrator's apparent bias and his failure to deal with key submissions and PTCI's evidence in the Arbitration, contending that the failure to consider PTCI's evidence was tantamount to not hearing PTCI and was also evidence of apparent bias.

Apparent bias

89 Mr Chacko explained that he was confining his arguments on apparent bias to events that occurred after OS 510/2013 was filed. However, he submitted that this court should evaluate the events after OS 510/2013 in light of the following background facts:

(a) the Arbitrator made the April directions without hearing PTCI;

(b) the Arbitrator threatened to drew adverse inferences against PTCI when there was no basis to do so; and

(c) the "fresh" claim was outside of the jurisdiction of the Arbitrator and he was acting outside of his jurisdiction when he dealt with Mr Chin's e-mail of 1 April 2013.

90 OS 510/2013 was dismissed on the merits of the application rather than on Mr Chong's preliminary objection in the form of the utility argument (see [47] to [58] above). Simply put, Mr Chacko's attempt to recycle and weave the background facts and PTCI's criticisms of the Arbitrator (see [82] above for the paragraphs) into his arguments to set aside the Award would contradict the outcome of OS 510/2013, in which I decided that the circumstances relied upon by PTCI did not give rise to justifiable doubts of apparent bias on the part of the Arbitrator to warrant his removal as arbitrator. I found the April directions to be case management decisions (see [69] to [80] above) and also found that the two April directions did not manifest the Arbitrator's intention to admit the "fresh" claim. Eventually, Mr Chin's idea of raising the "fresh" claim in the Arbitration was dropped.

91 Mr Chacko's other submission was that the findings in the Award had shown that the Arbitrator had "conducted the Arbitration with a closed mind and in a biased manner'. [note: 34] He argued that this court was now free to revisit the issue of apparent bias based on new facts derived from the Award. This was because the new facts showed that the Arbitrator had failed to consider the weight of evidence and that failure was the product of the Arbitrator's "closed mind" and conduct of the Arbitration in a "biased manner". [note: 35] Therefore, the Award was "wholly at odds with the established evidence" in that the Arbitrator had ignored PTCI's evidence (see *TMM (Division Maritime SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM*") at [59(*b*)(iii)]).

92 Mr Chacko also complained that the Arbitrator had not explained why he disregarded PTCI's evidence, which was as follows:

(a) an Authorised Work Order ("AWO") No NTS-CMD/CI/AWO-00037/XI/08 which referred to a "Cooperation Agreement dated 30 June 2007" between NTS and PTCI; [note: 36]

(b) Minutes of Meeting dated 23 August 2007 stating, *inter alia*, that the "Preliminary Agreement was unanimously agreed" between PTCI and NTS and that "signing of the Agreement is estimated to be in the first week of September"; [note: 37]

(c) a specified list of tower sites initialled by Henry Santoso on 31 August 2007 as well as the six AWOs which referred to a "Preliminary Agreement dated 31 August 2007" between PTCI and NTS; [note: 38] and

(d) a Letter dated 22 March 2011 from NTS confirming, inter alia, that PTCI and NTS had entered into a "binding agreement" by 31 August 2007, the terms of which are stipulated in the Preliminary Agreement. [note: 39]

93 I agreed with Mr Chong that Mr Chacko's arguments were baseless. The claim for commission in the Arbitration turned on whether the Preliminary Agreement had been concluded on or after 31 August 2007. The documentary evidence and the Arbitrator's treatment and evaluation of PTCI's evidence had been set out in the Award. The Arbitrator had decided that the relevant date was 12 September 2007 and not 31 August 2007, the date which PTCI had argued for and the relevant paragraphs of the Award can be seen at [86] above.

94 Mr Chong contended that this case was different from *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 ("*Front Row*") and that Mr Chacko's reliance on *Front Row* was misplaced. The decision reached in the Award was perfectly explicable as paras 230–232 of the Award had set out the Arbitrator's reasons for rejecting PTCI's evidence and paras 366– 374 had provided extensive reasons why the Preliminary Agreement was only concluded on 12 September 2007. Mr Chong also referred me to several paragraphs in *TMM*, namely, [89], [90], [94] and [96], to show that Mr Chacko's reliance on *Front Row* and the criticism of the Arbitrator were non-starters, and that the language used in those paragraphs actually favoured the Arbitrator.

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

96 Another instance of apparent bias raised by Mr Chacko was the costs orders made in the Award. The Arbitrator had ordered costs against PTCI on the basis that the Arranger Agreement had provided that the losing party was to bear all costs and expense of the Arbitration. PTCI's complaint was that the first two defendants should not have been awarded costs in respect of their claim against SG. This was because they had failed in their case against him on jurisdiction. In order words, the Arbitrator was wrong to have awarded the first two defendants full costs of the Arbitration against PTCI. Mr Chacko identified this costs order as an instance of the Arbitrator's apparent bias against PTCI.

97 I find that there was no merit in this assertion. The Arbitrator has addressed his mind to the issue. He had explained in his Award why PTCI was the losing party at para 447 of the Award: at [86] above. Notably, this court cannot interfere even if there has been an error of law and/or fact on the part of the Arbitrator.

98 Finally, Mr Chacko referred to the power of attorney provision in the Award arguing that it was not a matter that was sought in the Arbitration, and was again another instance of the Arbitrator's apparent bias. Paragraph 475 of the Award reads: [note: 40]

IX. REGISTRATION OF AWARD - POWER OF ATTORNEY

475. The Arbitral Tribunal hereby authorises all of the parties to this arbitration, or any of them, with power of substitution, to act in place of and on behalf of this Arbitral Tribunal to effect registration of this Award with the Clerk of the District Court of Central Jakarta, or with any other

court necessary for the purpose of registration or enforcement thereof, in accordance with the provisions of Indonesian Law No.30 of 1999 on Arbitration and Alternative Dispute Resolution.

99 There was nothing to this argument and it was a desperate point made in an unmeritorious attempt to find fault with the Arbitrator. There was nothing insidious in the provision of a power attorney in the Award which had been included to facilitate registration or enforcement of the Award in Indonesia. Such a provision was administrative in nature and would be included as a matter of course in any awards intended for registration or enforcement in Indonesia.

Right to be heard

100 Another rule of natural justice that was alleged to have been breached was PTCI's right to be heard. Mr Chacko submitted that the Arbitrator had failed to consider PTCI's evidence and that was tantamount to not hearing PTCI. Mr Chacko referred to *Front Row* for the proposition that there would be a breach of natural justice if the tribunal disregards the submissions and arguments made by the parties on the issues without considering the merits thereof: at [37].

101 I had earlier concluded that the criticism directed at the Arbitrator's allowing of the first two defendants' claim for Arranger Fees against the weight of the evidence was unfounded. [note: 41] The Arbitrator had found that the Preliminary Agreement was entered into after the Arranger Agreement. The finding was one of mixed fact and law–a finding as to when the Preliminary Agreement was entered into to give it legal binding and enforceable effect–and it was not open to curial intervention under Art 34(2)(*a*)(ii) of Model Law or s 24(b) of the IAA. I repeat that it is trite law that under the IAA, an error of law or erroneous finding of fact made in an arbitral award is not capable of establishing a ground for the award to be set aside (see *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [57] and recently in *BLC and others v BLB and another* [2014] SGCA 40 at [102]).

Arguments on Art 34(2)(a)(iv)

102 Lastly, Mr Chacko argued that the arbitral procedures had not been complied with. This point harked back to the pre-award matters that had now been overtaken by the outcome of OS 510/2013 (see [81] above).

Arguments on Art 34(2)(b)(ii)

103 PTCI's argument under Art 34(2)(*b*)(ii) of the Model Law was that the Award, being rendered in beach of natural justice by reason of the apparent bias of the Arbitrator, would conflict with Singapore's public policy. However, Art 34(2)(*b*)(ii) did not arise for determination since apparent bias was not made out. Besides, error of law or of facts, *per se*, would not engage the public policy of Singapore under Art 34(2)(*b*)(ii).

Conclusion for Part 2

104 For the reasons above, I found that there was really no basis to challenge the Award under s 24 of the IAA or Art 34 of the Model Law. Accordingly, OS 48/2014 was dismissed with costs fixed at $20,000 plus reasonable disbursements.

PART 3: SUM 317/2014

105 This section deals with PTCI's application in SUM 317/2014 for consequential orders in the

event of a successful challenge to remove the Arbitrator. Having concluded that PTCI's application to remove the Arbitrator was without merit, my observations on the matter (without deciding the matters that were raised) are *obiter* in respect of the supervising court's powers. The question that arose was: Would disqualification by removal have the consequential effect of annulling or setting aside the final award? Put another way, Mr Chacko's argument was that the supervising court has the residual power to annul or set aside a final award following a successful application brought under Art 13(3) read with Art 12(2).This interesting issue was argued at some length by counsel and I decided to express some views on the matter.

Mr Chacko's submissions

106 Mr Chacko submitted that the supervising court's power to grant consequential relief which included the annulment or setting aside of the award was ancillary to the court's primary power to remove an arbitrator. Three arguments were advanced in support of his proposition.

107 Firstly, it was argued that a contrary proposition would lead to an absurd outcome. Mr Chacko elaborated that an arbitrator manifesting apparent bias could stymie the challenge by issuing his award before a decision was made on the removal application.

108 Secondly, PTCI's case was premised on unfairness. An award had been issued in the midst of the hearing of the application to remove the arbitrator and the applicant should not be deprived of the advantage of proceeding with the challenge under Art 13(3) where the test of apparent bias in Art 12(2) is said to be less stringent than the requirements set by s 24(*b*) of the IAA and the grounds prescribed by Art 34(2) of the Model Law. The latter provisions, as both parties accepted, are arguably more difficult to establish when compared to the "justifiable doubts as to impartiality or independence" ground required to trigger Art 12(2). If the consequential order annulling or invaliding the award was not made available, PTCI would be denied of a remedy that it otherwise would have had but for the issuance of the award in the interim period.

109 Thirdly, Mr Chacko submitted that it could not have been the intention of the drafters of the Model Law to advance the interests of the party opposing the challenge at the expense of the party mounting the challenge. The drafters had tried to reach a middle ground in balancing the tension between (1) preventing undue delay to arbitral proceedings by unmeritorious challenges and (2) preserving the right of a party to challenge an arbitrator. That balance would be disturbed.

Mr Chong's submissions

110 In contrast, Mr Chong's arguments were as follows. Article 13(3) of the Model Law did not allow an applicant to seek a consequential order to set aside the Award. The Model Law framework did not provide for any residual powers to the supervisory court, as stated under Art 5 of the Model law. Additionally, Art 34(1) provides that the grounds to set aside an arbitral award in Art 34(2) are exclusive grounds. He cited *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*LW Infrastructure (CA)"*) as authority for his proposition.

Discussion and observations

111 It is expedient to repeat the context of the question for discussion. There was a challenge under Art 13(3), and the challenged arbitrator issued his award prior to a determination of the pending application. If the challenge was successful, did the supervisory court have the power to make a consequential order to declare the award invalid or to set it aside following the removal of the arbitrator? Articles 12 and 13 are silent on this question and neither is the removal of an arbitrator

listed as a ground to set aside an award under Art 34(2). Research by counsel indicated that the point in issue remains unresolved. Mr Chong's submission was that the supervising court does not have the general or residual power to grant any relief other than those prescribed by the Model Law, and that the relief provided in Art 13 is limited.

112 It is uncontroversial under the Model Law framework that the grounds under Art 34(2) are also limited. This position was reaffirmed by the Court of Appeal in *PT First Media* at [66]:

> 66 Indeed the *Analytical Commentary* [*on Draft Text of a Model Law on International Commercial Arbitration* (A/CN.9/264, 25 March 1985)] deliberately couples the term "recourse" with attacks on the award so as to create a clear distinction from remedies which act as defences to enforcement (*ibid*):
>
> > 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*** . *Article 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)). …
> >
> > [emphasis in original]

113 PTCI accepted that removal of an arbitrator was not a ground listed in Art 34 to set aside the award. According to Mr Chacko, this situation lends support to his contention that an exception should be carved out for Art 13 in that it was the drafters' intention that the removal of the arbitrator would have the consequential effect of rendering the award a nullity. He pointed to the legislative history of the Model Law to support this contention.

Did the drafters intend a successful challenge under Art 13(3) to be an additional ground for setting aside an award?

114 During the drafting stages of the Model Law, a ground for annulment of an arbitral award after a successful challenge under Art 13 was included in the second draft of Art 34 (originally Art 41 in the second draft) as seen from *Draft Articles 37 to 41 on Recognition and Enforcement of Award and Recourse* (A/CN.9/WG.II/WP.42, 25 January 1983) ("*Draft Articles 37 to 41*") at p 94. However, it was taken out along the way and it was not in the final text.

115 The final decision as to whether it would be retained as a ground to set aside an award under Art 34, however, hinged upon the outcome of a separate debate on Art 13. Footnote 28 accompanying Draft Art 41(2) reads as follows:

> The decision on whether [this ground is] to be retained depends on the final decision of the Working Group on court review of a challenge (see revised draft of article X [Art 13 in the final text] in WP. 40 [an earlier edition of the Second Draft].

116 Article 13 is the procedure for challenging an arbitrator's impartiality and independence. The only provision that occasioned considerable and continued debate throughout both the Working Group's and the Commission's consideration of Art 13 was para 3, which governs the scope of court intervention in deciding challenges (see *Holtzmann & Neuhaus* at p 407). A number of alternatives were considered for the most appropriate procedure to adopt for a party dissatisfied with an

unsuccessful challenge heard by an arbitral tribunal or any prescribed panel according to the agreed arbitral procedure pursuant to paras 1 to 2 of Art 13 to seek court review.

117 By the completion of the third draft of Art 13 (originally Art X in the third draft, the Working Group had whittled down the various suggestions to two broad alternatives as seen in *Redrafted Articles I to XII on Scope of Application, General Provisions, Arbitration Agreement and the Courts, and Composition of Arbitral Tribunal* (A/CN.9/WG.II/WP/45, 13 June 1983) at p 186. The first alternative allows the challenging party, upon an unsuccessful challenge, to "pursue his objections before a court only in an action for setting aside the arbitral award." The second alternative allows the challenging party to, within 15 days of an unsuccessful challenge, request a decision from the court and that while a decision is pending, the arbitral tribunal may continue the arbitral proceedings.

118 Divergent views were expressed concerning both alternatives in the *Report of the Working Group on the Work of its Sixth Session* (A/CN.9/245, 22 September 1983) ("*Report of the Working Group on its Sixth Session*") at paras 209–211. Proponents of the first alternative argued that it would prevent dilatory tactics, although it was also recognised by some that the revised version of the second alternative (which allows the arbitral tribunal to continue arbitral proceedings pending the court's decision on the challenge) alleviated the concerns. At one stage, it was suggested that the second alternative should be adopted but without its last part which allowed the arbitral tribunal to continue the proceedings while the question of challenge was pending a court decision.

119 Finally, the Working Group, recognising the concerns of both camps, decided to adopt "a compromise solution". It provided for court intervention during the arbitral proceedings, but with three features designed to minimise the risk and adverse effects of dilatory tactics. The three features as noted in the *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* (A/CN.9/264, 25 March 1985) ("*Analytical Commentary*") at p 33 are:

> … The first element is the short period of time of fifteen days for requesting the Court to overrule the negative decision of the arbitral tribunal or any other body agreed upon by the parties. The second feature is that the decision by the Court shall be final; in addition to excluding appeal … The third feature is that the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings while the request is pending with the Court; it would certainly do so, if it regards the challenge as totally unfounded and serving merely dilatory purposes.

120 Returning to Art 34(2), the adoption of the second alternative to Art 13(3) paved the way for the removal of an arbitrator on grounds that that mirrored Art 12(2) ("the proposed ground"). According to the drafters, this ground under Art 34(2) (original Art XXX) in the third draft) would "not be necessary" if the Working Group were to decide "in favour of the second alternative set forth in [Art 13(3)]" (*Revised Draft Articles XXV to XXX Third Draft* (A/CN.9/WG.II/WP.46) (13 June 1983), Section K at footnote 14). The same was said in the *Report of the Working Group on I*nternational *C*ontract *P*ractices on the *W*ork of its *S*ixth *S*ession (A/CN.9/245, 29 August 1983–9 September 1983) at para 152, where it had been noted that this ground "was not needed if the Working Group would adopt the second alternative in [Art 13(3)]."

121 There was little in the Working Group's report on setting aside of the award following the removal of the arbitrator in the sequential likeness of the present case. One could arguably read and interpret the eventual framework adopted by the Working Group in three ways:

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

(b) The second is that the drafters did not quite anticipate the present scenario where an award would be rendered before the court's decision on the challenge. Given the fifteen-day and thirty-day timelines contained in Art 13(2) and Art 13(3) respectively, challenges against the arbitrator would in all likelihood be during the early stages of arbitral proceedings, and that there is a lacuna in the Model Law as result of the failure to contemplate the occurrence of a situation such as that in the present case.

(c) The third is that the removal of an arbitrator allows for the setting aside of an award under one of the grounds set out in Art 34(2).

122 I do not think that the second interpretation of the eventual framework adopted by the working Group is correct. Even after the adoption of the second alternative to Art 13(3), concerns were voiced as to the fact that the continuation of arbitral proceedings, despite a pending challenge of an arbitrator before the court, "could cause unnecessary waste of time and costs if the court later sustained the challenge" (*Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session* (A/40/17, 21 August 1985) ("*Eighteenth Session UN Report*") at para 123). This showed that parties were contemplating challenges that took a long time to resolve such that they might even possibly be resolved only after the rendering of an award. The choice is therefore between the first and the third interpretation.

123 With Art 13(3) being silent on the issue of setting aside an award following a successful removal of the challenged arbitrator, and having regard to the terms of Art 5, it would appear that the supervising court has no consequential powers to annul the award and that a separate application to set aside the award based on Art 34 grounds must be filed. Article 5 provides as follows:

> In matters governed by this [Model Law], no court shall intervene except where so provided in this [Model Law].

124 The purpose of Art 5 in achieving certainty as to the extent of maximum judicial intervention was stated in the *Eighteenth Session UN Report* at para 63:

> … [I]t was pointed out that resort to intervention by a court during the arbitral proceedings was often used only as a delaying tactic and was more often a source of abuse of the arbitral proceedings than it was a protection against abuse. The purpose of article 5 was to achieve certainty as to the maximum extent of judicial intervention, including assistance, in international commercial arbitrations, by compelling the drafters to list in the (model) law on international commercial arbitration all instances of court intervention. Thus, if a need was felt for adding another such situation, it should be expressed in the model law. …

125 Similar remarks were made in the *Analytical Commentary* at p 18:

> … [Art 5] merely requires that any instance of court intervention be listed in the model law. *Its effect would, thus, be to exclude any general or residual powers given to the courts in a domestic system which are not listed in the model law.* The resulting certainty of the parties and the arbitrators about the instances in which court supervision or assistance is to be expected seems beneficial to international commercial arbitration. [emphasis added]

126 As stated, the purpose of Art 5 was explained and given judicial effect by our Court of Appeal in *PT First Media* (see [112] above) and in *L W Infrastructure (CA)* at [35]–[38].

127 In *L W Infrastructure (CA)*, the following pronouncements were made by the Court of Appeal at

[36], [38] and [39]:

> 36 The effect of Art 5 of the Model Law is to confine the power of the court to intervene in an arbitration to those instances which are provided for in the Model Law and to "exclude any general or residual powers" arising from sources other than the Model Law (see H M Holtzmann & J E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation Publishers, 1989) ("*Holtzmann & Neuhaus*") at p 216). The *raison d'être* of Art 5 of the Model Law is not to promote hostility towards judicial intervention but to "satisfy the need for certainty as to when court action is permissible" (*ibid*).
>
> …
>
> 38 In our view, having regard to the need for a broadly consistent approach to the interpretation of the Act and the Model Law, s 47 of the Act should be construed in a manner that is consistent with the intent underlying Art 5 of the Model Law. Section 47 of the Act states that the court shall not have jurisdiction to interfere with an arbitral award except where so provided in the Act. The certainty which is sought to be achieved by this provision would be significantly undermined if the courts retained a concurrent "supervisory jurisdiction" over arbitral proceedings or awards that could be exercised by the grant of declaratory orders not expressly provided for in the Act.
>
> 39 In short, in situations expressly regulated by the Act, the courts should only intervene where so provided in the Act (see Aron Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law and Taxation Publishers, 1990) at p 32; see also *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush* [2004] 2 SLR(R) 14 at [23]).

128 As a result of Art 5, it must be accepted that the first interpretation that an award is automatically rendered a nullity by an upholding of a challenge under Art 13(3) cannot be adopted. Furthermore, as between the first and third interpretation, the third interpretation finds support in the relevant sections of the *travaux préparatoires* case authorities and academic commentaries. Therefore, there appears to be no legal basis for PTCI's assertion of a residual discretion to set aside an award outside of Art 34. I now turn to consider the viability of the third interpretation.

The arbitrator's apparent bias or partiality as a ground for setting aside an award is subsumed under existing grounds under Art 34(2)

129 The third possibility finds support in the relevant sections of the *travaux préparatoires*, case authorities and academic commentaries. Therefore, there appears to be no legal basis for PTCI's assertion of a residual discretion to set aside an award outside of Art 34.

130 At the conclusion of the fifth draft, and the Working Group decided by then to exclude "removal of arbitrator" (*ie*, the proposed ground) under Art 34 in favour of adopting "a compromise solution" in Art 13(3) (see *Report of the Working Group on International Contract Practices on the Work of its Seventh Session* (A/CN.9/246, 6 March 1984), the possibility that a party may still challenge the arbitrator's impartiality or independence under Art 34(2) was brought to the drafters' attention by Norway as stated in the *Analytical Compilation of Comments* at p 24 as follows ("Norway's Comment"):

> Norway is of the view that if a party does not raise an objection in the period of time provided for in paragraph (2), he should be precluded from raising it not only during the arbitral proceedings

but also under articles 34(2)(a)(iv) and 36(1)(a)(iv) and that this should be clearly expressed either in article 13 or in articles 34 and 36.

131 Norway's Comment was not taken up by the drafters; the drafters' decision not to include the proposed ground was not a mere oversight. Despite exclusion of the proposed ground, recourse to set aside an award based on the lack of impartiality or independence remains available under Art 34(2). As Gary Born put it in *International Commercial Arbitration vol 3* (Kluwer Law International, 2nd Ed, 2014) ("*International Commercial Arbitration vol 3*") at pp 3277-3278):

> Even in the absence of express statutory authority, national courts and commentators have frequently concluded that claims of an arbitrator's lack of independence or impartiality are *impliedly included within the general provisions of Article 34(2)* or equivalent annulment provisions of other national laws [citing a number of European cases]. The impartiality of the arbitral tribunal is central to the arbitral process, and awards by partial or biased arbitrators can be annulled in most jurisdictions. [emphasis added]

132 Mr Born also opines in *International Commercial Arbitration: Law and Practice* (Kluwer Law International, 2012) at p 130 that the Model Law framework preserves a party's right to challenge an arbitrator's impartiality or independence *after the delivery of the arbitral award* by way of an application under Art 34(2)(*a*)(iv) or Art 34(2)(*b*)(ii):

> Most arbitration statutes impose requirements of impartiality on arbitrators. The Model Law is representative, with Article 12(2) providing that: "An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence …" Article 12(2) imposes a substantive standard of impartiality and independence, which all members of the tribunal must satisfy and which provides a basis for challenging an arbitrator or proposed arbitrator. In addition, Articles 34(2)(a)(iv) and 36(1)(a)(iv) of the Model Law provide for annulment or non-recognition of awards, based upon an arbitrator's lack of independence or impartiality under the law of the arbitral seat, while Articles 34(2)(b)(ii) and 36(1)(b)(ii) provide for annulment or non-recognition of the award, based on a violation of the forum's public policy (which often include minimum standards of impartiality and independence).

133 With specific regard to Art 34(2)(*a*)(iv), this ground for setting aside is regarded as a catch-all provision for procedural defects under the arbitration agreement or under the Model Law (see *Peter Binder* at para 7–021). Article 34(2)(*a*)(iv) states as follows:

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

134 I am of the opinion that a challenge to an arbitrator's impartiality or independence is a ground for setting aside under Art 34(2)(*a*)(iv). In fact Norway's Comment is a strong pointer that it was taken to be the case that justifiable doubt as to an arbitrator's impartiality or independence is not only a ground to challenge an arbitrator under Art 13(3) read with Art 12(2) but also a ground for

setting aside under Art 34(2)(*a*)(iv) as well. As stated at [52] above, this is likely to be because of the fact that the requirement of impartiality or independence amounts to a mandatory provision implied under Art 12(2) the breach of which is "not in accordance with this Law".

135 Furthermore, in addition to Art 34(2)(*b*)(ii) where public policy is being invoked to set aside an award, lack of impartiality or independence on the part of an arbitrator is a recognised ground for setting aside an award under Art 34(2)(*b*)(ii) (see *Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium (Singapore) Pte Ltd* [2014] 1 SLR 814 at [41] where I had observed that lack of impartiality and independence of the tribunal that would certainly shock the conscience and be clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed member of the public).

The setting aside of an award

136 I now turn to situation at hand: where the arbitrator was removed under Art 13(3) on Art 12(2) grounds of justifiable doubt as to impartiality or independence and an order is sought to set aside the arbitrator's award by reason of his removal. The question that arose before me was whether the setting aside would be subject to the more stringent requirements of Art 34(2). The answer in principle is probably in the affirmative but from an evidential point of view, the task of satisfying the requirements of Art 34(2)(*a*)(iv) or Art 34(2)(*b*)(ii) may not be so difficult in application. The proof that the applicant has to furnish is the court order to remove the arbitrator. The setting aside application can be said to depend on the removal order, and the opposing party will not be allowed to go behind the decision which is non-appealable.

137 I start with the dichotomy between an application to remove an arbitrator and an application to set aside an award. Mr Born observed in *International Commercial Arbitration vol 2* (at pp 1823–1824):

> … Importantly … it is clear that the standards applicable for removal of an arbitrator for lack of independence or impartiality are materially different from the standards applicable to annulment or non-recognition of an award because of arbitrator bias or partiality. *That is apparent from the text of both national arbitration legislation and the New York Convention: neither the annulment nor non-recognition provisions of these instruments contain the standards of impartiality or independence set forth in Article 12 of the UNCITRAL Model Law and equivalent provisions of national arbitration legislation.*
>
> The same result is compelled by the structure and purposes of both the Convention and national arbitration legislation. The removal of an arbitrator from the tribunal, during the course of the arbitral proceedings, as one element of an arbitral institution's or national court's supervisory authority, is a fundamentally different action than the annulment or non-recognition of an award, after the arbitration has concluded. *The latter action involves much more significant costs, in terms of delays and costs (to rerun the entire arbitration) and possibilities for national court interference with the objectives of the parties' agreement to arbitrate.*
>
> As a consequence, as discussed below, courts have applied significantly different standards to issues of arbitrator impartiality and independence in the context of annulment and non-recognition proceedings than in proceedings to remove an arbitrator. *That includes both less demanding standards of arbitrator impartiality and independence, than those applicable under Article 12(2) of the UNCITRAL Model Law and similar legislation, and requirements for showings that the arbitrator's bias had a material effect on the arbitral proceeding and its outcome.*

[emphasis added]

138 Mr Born then states in *International Commercial Arbitration vol 3* at p 3279:

> … [T]here are important differences in the standards that are applicable, respectively, to interlocutory removal of an arbitrator and annulment of an award.
>
> In particular, an arbitrator can be removed based on "justifiable doubts" regarding his or her independence or impartiality – a standard that does not require establishing that it is more likely than not that the arbitrator is biased or partial or that the arbitral tribunal's decisions are or would be materially affected by that bias. *In contrast, annulment of an award cannot be based upon "doubts" about (or "risks" of) arbitrator bias*, but instead requires a showing, by a preponderance of the evidence, that an arbitrator was in fact biased or lacked the requisite independence. Moreover, in contrast to interlocutory challenges to arbitrators, annulment of an award requires a showing of materiality and prejudicial effects of the arbitrator's bias on the arbitral process – which can provide a substantial obstacle to annulment of an award, based on one arbitrator's asserted lack of impartiality, made after a lengthy and otherwise satisfactory arbitral process.
>
> [emphasis added]

139 I have several comments in relation to the passages quoted above.

140 Firstly, Mr Born's commentaries envisage either a challenge against the arbitrator or against the award, not both. His commentaries highlight the differences between an Art 13(3) challenge and an Art 34(2) application to set aside an award. Specifically, an Art 13 challenge is directed at the tribunal before an award is rendered and as Robert Merkin and Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (Informa 2009 Ed) ("*Merkin*") remarked (at p 89):

> The only means of challenging arbitral proceedings during their currency and before an award has been issued is by way of an application to remove the arbitrator. It is not possible to challenge an arbitrator under Model Law, s 34 or under s24, prior to the making of an award.

141 The distinction in the two tests is maintained especially where only one challenge is mounted and not both.

142 Even if Mr Born's commentaries cover both applications in a situation like the present case, the differences highlighted in the passages above may not be so significant because the statement of principle, *ie*, a justificable doubt as to biasness, in the context of our legal jurisprudence, is equivalent to the statement of principle, "reasonable suspicion" as to biasness, which is the test to determine apparent bias (see [16] above). A justifiable doubt as to biasness can legitimately be framed as a reasonable suspicion as to bias. From this perspective, the reasonable suspicion test is applied to determine apparent bias in an application made under Art 13(3) and Art 34(2).

143 My second comment relates to the matter of proof. Art 34(2) requires the applicant to furnish proof of the grounds relied upon to set aside an award. Where there is a court decision to remove the arbitrator, and the applicant wishes to rely on Art 32(2)(*a*)(iv) to set aside the award, the applicant need only furnish proof of the court order. Viewed in this light, the ground to set aside would be the removal order (which is non-appealable) that confirms that the arbitrator is, at the very least, marred with apparent bias. The application to set aside under Art 34(2)(*a*)(iv) could then be said to depend on the removal order that *ipso facto* signifies either a violation of a mandatory provision under Model

Law (in this case, Art 12(2) for want of impartiality) or, in other words, actual, imputed or apparent bias or breach of an important procedural rule, in this case Rule 9 of the 2007 Rules.

144 It is accepted that not every violation of arbitral procedures will lead to an order to set aside: the violation must have been substantive if on the same grounds the court ordered the arbitrator's removal. In this connection, the court's discretionary power to set aside is likely to be exercised in the absence of compelling evidence to the contrary. However, if the order to remove the arbitrator was obtained by illegal means, the applicant would have failed to submit proof in the sense that the document purporting to evidence the ground in Art 34(2)(*a*)(iv) was invalid.

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

146 As it was put in *Re Shanker* at [103]:

> Once a court has found that matters have been established which could give rise to a reasonable suspicion of bias, it would not be appropriate then to examine if it is to be isolated and treated as immaterial.

147 Similarly, the Supreme Court of Canada in *R v S (RD)* [1997] 3 SCR 484, a decision which Mr Chacko referred to, held (at 526) that:

> [I]f a reasonable apprehension of bias arises, it colours the entire proceedings and it cannot be cured by the correctness of the subsequent decision.

148 The same comments on application can be made if a party using the same grounds challenges an arbitrator's impartiality or independence after the delivery of the arbitral award under Art 34(2)(*b*)(ii). Whilst prejudice is expressly stipulated in s 24(*b*) of the IAA, the inquiry in relation to prejudice is whether the breach of natural justice was "technical and inconsequential" (see *L W Infrastructure (CA)* at [54]).

149 Finally, I come to PTCI's argument that "[a]n arbitrator who has shown apparent bias could avoid the consequences … by issuing an award before any challenge under Art 13(3) of the Model law is disposed of to avoid having himself removed". A challenged arbitrator is given the option to continue with the arbitral proceedings and render an award. I had to assume that Mr Chacko was making a different point. If he had in mind an arbitrator who had manifested apparent bias and then disingenuously proceeded to rush out an award for illicit reasons, that arbitrator would *prima facie* have allowed his biasness to infect the award rendered. Accordingly, it was not difficult to foresee that in principle the higher standard stated by Mr Born for setting aside the award would be satisfied as well. However, I refrain from commenting any further on this issue as the present facts did not concern the scenario postulated by PTCI. Suffice to say that it took about five months for the Award to be issued from the time the challenge was filed with the SIAC in May 2013.

OVERALL RESULT

150 PTCI's application in OS 510/2013 was dismissed for the reasons set out in Part 1. I made no order as to SUM 317/2014. I ordered one set of costs to be taxed if not agreed in respect of OS

510/2013 and SUM 317/2014 to be paid by PTCI to the first two defendants.

151 For the reasons set out in Part 2, OS 48/2014 was dismissed with costs fixed at $20,000 plus reasonable disbursements.

[note: 1] CSM's 1st Affidavit dated 18 July 2013, page 150.

[note: 2] CSM's 1st Affidavit dated 18 July 2013, page 161.

[note: 3] CSM's 1st Affidavit dated 18 July 2013, page 166.

[note: 4] CSM's 1st Affidavit dated 18 July 2013, page 172.

[note: 5] CSM's 1st Affidavit dated 18 July 2013, page 185.

[note: 6] CSM's 1st Affidavit dated 18 July 2013, page 189.

[note: 7] CSM's 1st Affidavit dated 18 July 2013, page 203.

[note: 8] CSM's 1st Affidavit dated 18 July 2013, page 206.

[note: 9] CSM's 1st Affidavit dated 18 July 2013, page 206.

[note: 10] CSM's 1st Affidavit dated 18 July 2013, page 208.

[note: 11] CSM's 1st Affidavit dated 18 July 2013, page 208.

[note: 12] CSM's 1st Affidavit dated 18 July 2013, pages 212 to 213.

[note: 13] CSM's 1st affidavit dated 18 July 2013, page 235.

[note: 14] CSM's 1st affidavit dated 18 July 2013, page 253.

[note: 15] Plaintiff's Further Submissions dated 4 October 2013, para 35.

[note: 16] Plaintiff's Further Submissions dated 4 October 2013, para 15.

[note: 17] Plaintiff's Further Submissions dated 4 October 2013, para 7.

[note: 18] Notes of Arguments dated 2 September 2013, p 6.

[note: 19] Plaintiff's Further Submissions dated 4 October 2013, paras 8-9.

[note: 20] Defendants' Submissions dated 24 Jan 2014, p 114.

[note: 21] Defendants' Submissions dated 24 Jan 2014, p 84.

[note: 22] Defendants' Submissions dated 24 Jan 2014, page 93.

[note: 23] Defendants' Submissions dated 24 Jan 2014, page 99.

[note: 24] Plaintiff's Amended Further Submissions dated 4 October 2013, para 9.

[note: 25] Plaintiff's Amended Further Submissions dated 4 October 2013, paras 5 & 11.

[note: 26] Defendants' Submissions dated 24 Jan 2014, paras 163 and 165.

[note: 27] Triandy Gunawan's 1st Affidavit filed in OS 48/2014, Tab 1.

[note: 28] Triandy Gunawan's 1st Affidavit filed in OS 48/2014, Tab 1 at pp 49 to 52.

[note: 29] Triandy Gunawan's 1st Affidavit filed in OS 48/2014, Tab 1 p 74.

[note: 30] Triandy Gunawan's 1st Affidavit filed in OS 48/2014, Tab 1 p 74.

[note: 31] Triandy Gunawan's 1st Affidavit filed in OS 48/2014, Tab 1 p 75.

[note: 32] Triandy Gunawan's 1st Affidavit filed in OS 48/2014, Tab 1 p 75.

[note: 33] Triandy Gunawan's 1st Affidavit filed in OS 48/2014, Tab 1 p 85.

[note: 34] Plaintiff's Written Submissions dated 22 May 2014, para 28.

[note: 35] Plaintiff's Written Submissions dated 22 May 2014, para 28.

[note: 36] Triandy Gunawan's 2nd Affidavit in OS 48/2014, p 32.

[note: 37] Triandy Gunawan's 2nd Affidavit in OS 48/2014, p 139.

[note: 38] Triandy Gunawan's 2nd Affidavit in OS 48/2014, pp 159-183.

[note: 39] Triandy Gunawan's 2nd Affidavit in OS 48/2014, p 140.

[note: 40] Triandy Gunawan's 1st Affidavit in OS 48/2014, Tab 1, page 96.

[note: 41] Plaintiff's Written Submissions dated 22 May 2014, para 28.