Kempinski Hotels SA *v* PT Prima International Development
[2011] SGHC 171

Case Number : Originating Summons No 903 of 2008

Decision Date : 19 July 2011

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Adrian Wong, Jensen Chow and Andrea Baker (Rajah & Tann LLP) for the applicant; Nicholas Narayanan and Jeffrey Ong (Nicholas & Tan Partnership LLP) for the respondent.

Parties : Kempinski Hotels SA — PT Prima International Development

Arbitration

19 July 2011 Judgment reserved.

Judith Prakash J:

Introduction

1 Kempinski Hotels SA ("the applicant") has made three separate applications to set aside three separate awards made in arbitration proceedings between itself and PT Prima International Development ("the respondent"). The applicant was the claimant in the arbitration proceedings whilst the respondent was the defendant.

2 The present proceedings, filed by the applicant on 4 July 2008, concern the third interim award dated 20 May 2008 ("the Third Award") made by the arbitrator ("the Arbitrator" or "the Tribunal") in SIAC Arbitration No 37/2002 ("the Arbitration"). The next set of proceedings, Originating Summons No 121 of 2009 ("OS 121"), concerns the fourth interim award dated 20 October 2008 ("the Fourth Award") made by the Arbitrator while the final set of proceedings, Originating Summons No 766 of 2009 ("OS 766"), concerns the costs award dated 15 April 2009 ("the Costs Award") made by the Arbitrator.

3 To a large extent the decision that I make in the present proceedings regarding whether the Third Award ought to be set aside will govern the decisions to be made regarding the setting aside of the Fourth Award and the Costs Award. I will therefore set out the facts in detail in this judgment.

Background

The parties and the contract

4 The applicant is a company registered in Switzerland and its principal activities include the management and operation of hotels across the world. The respondent is a corporation incorporated in Indonesia. It is the owner of a hotel located in Jakarta ("the Hotel").

5 On 15 April 1994, the applicant and respondent entered into an Operating and Management Contract ("the Contract") in relation to the Hotel which obliged the applicant to, *inter alia*, market, operate and manage the Hotel. The Contract was governed by Indonesian law. The Contract was

intended to operate for a period of 20 years, with an automatic extension of a further ten years unless parties agreed otherwise. In or about June 1998, the applicant took over the operation and management of the Hotel.

6 Between November 1996 and May 2000, three decisions of the Indonesian Ministry of Tourism ("the Three Decisions") were issued. Essentially, they made it compulsory for the Contract to be carried out by a company incorporated in Indonesia (such company being hereafter sometimes called a "PMA company").

7 On 6 November 1998, a proposal was made to the applicant by Bloch & Partners, its legal counsel, in response to the first and second Decisions. The lawyers indicated that the formation of an Indonesian company was not necessary and proposed that certain amendments should be made to the Contract ("the Bloch proposal"). The Bloch proposal was forwarded by the applicant to the respondent and the respondent replied that it was agreeable to the same. No amendments were, however, effected nor did the applicant change the entity operating the Hotel to an Indonesian company.

8 Thereafter, disputes arose between the parties and, by way of a letter dated 25 October 2001, the respondent purported to give the applicant notice of material breach of the Contract on the part of the applicant. On 7 November 2001, the applicant responded refuting the allegations of the respondent. The next development was that on 6 February 2002, the respondent gave the applicant written notice purporting to terminate the Contract. As a result, the applicant was no longer able to operate the Hotel. About two months thereafter, the respondent informed the public that it had entered into a management contract with another hotel group and that the Hotel would be renamed. The applicant took the position that the respondent's decision to rename the Hotel, and any prevention of the applicant's management of the Hotel was a breach of the Contract.

The Arbitration

The First and Second Awards

9 In May 2002, the applicant commenced the arbitration proceedings. Its claim in the Arbitration was essentially for wrongful termination of the Contract by the respondent. In September 2002, the respondent lodged its Points of Defence in the Arbitration and took the position that the termination of the Contract was valid under Indonesian law. The respondent also mounted a counterclaim for alleged breaches of contract by the applicant.

10 In April 2003, the respondent sought, and was subsequently given leave, to amend its Points of Defence to include for the first time a plea of supervening illegality as a defence to the applicant's claim. The respondent took the position by this amendment that the contract had become illegal after 3 May 2000 by reason of the Three Decisions.

11 The respondent wanted the issue of illegality tried first as a preliminary issue. In response, the Arbitrator issued Procedural Order No 1 dated 8 July 2003 in which he gave the following directions:

> In this case, the preliminary issue which the Respondent claims should be tried first relates to an alleged illegality. The shaping of that issue has gone through various phases in the Respondent's pleadings. It took its final shape in the amendment that was allowed.
>
> Illegality cannot operate in the abstract. It involves questions of mixed fact and law ... Illegality is not such a preliminary issue like *res judicata*, estoppel, or an essential substantive requirement

of an action ... as would destroy the claim completely at the outset. Illegality is akin to other contractual principles that lead to the extinction or diminution of liability.

...

For these reasons, ... after the completion of the [applicant's] case, at a date yet to be fixed, the issue of illegality will be dealt with and an order made at the end of the consideration of that issue ... Further proceedings will depend on the outcome of arguments on the illegality issue.

12 The respondent filed its Points of Re-Amended Defence and Counterclaim on 18 August 2003. The respondent specifically pleaded illegality and *force majeure* as part of its defence. The applicant then filed a reply in which it maintained that the Three Decisions did not have the force of law.

13 The issue of illegality was heard in two tranches. The first hearing took place from 26 July to 28 July 2004. Thereafter, there were two rounds of written submissions by each party. The Tribunal published the First Award on 18 February 2005. By the First Award, the Tribunal held that:

(a) on the facts the applicant had understood the Decisions made in 1996 and 1997 as mandating the incorporation of a local company for the operation of the Contract. Whilst the immediate response of certain officers of the applicant was that the incorporation of a local company was necessary, the later response was not to incorporate such a company but to amend the Contract in such a manner as to indicate the lack of necessary presence in Indonesia and to continue to operate as before;

(b) there is a doctrine of supervening illegality in Indonesian contract law and the Three Decisions constituted a valid basis for the raising of the plea of supervening illegality in this case;

(c) the Three Decisions did not prevent the performance of the Contract between the parties but only prescribed a manner for the performance of the Contract;

(d) in accordance with the evidence of Mr Fred Tumbuan ("Mr Tumbuan"), the respondent's legal expert, there were steps that had to be taken to comply with the Three Decisions. The first was to incorporate a local company, obtain a tax registration number and a PMA licence from the relevant authority and the next would be to novate the Contract. Novation was necessary as the local company, being a distinct entity, had now come into the picture. The applicant had not sought to follow these steps. Hence, the continued performance of the Contract had become impossible; and

(e) the outcome was that the Contract remained valid though incapable of performance. This solution of the civil law would permit remedies to be provided to the extent of benefits that had been transferred to the party who relied on the illegality. These benefits could be claimed.

14 On 10 June 2005, the Arbitrator identified the issues that remained to be settled following the publication of the First Award ("the Remaining Issues"):

(a) given the finding [in the First Award] that the Contract in dispute is valid but is not capable of performance except in the manner prescribed in the Three Decisions, are any claims to damages arising from the Contract still available to the [applicant] under Indonesian law?

(b) if claims to damages are still available to the [applicant], what are the bases for the computation of such damages (and quantum thereof)?

(c) if claims to damages are not available to the [applicant], are there any remedies (including to a declaration) available to the [applicant]?

(d) if no remedies are available, should the claims be dismissed and an appropriate order made as to costs?

15 The respondent proposed that the Remaining Issues be dealt with by way of written submissions. The applicant objected to this proposal and instead proposed that a further hearing take place where experts from each party would be cross-examined. After considering the submissions of each party on this issue, the Arbitrator issued a Procedural Order dated 20 September 2005 agreeing with the applicant's proposal for the Remaining Issues to be dealt with by cross-examination of each party's experts ("the 2005 Procedural Order"). Cross-examination of each party's experts duly took place from 6 to 8 February 2006. Further written submissions were furnished subsequently.

16 The Arbitrator published the Second Award on 12 December 2006. Broadly, the Arbitrator held that as there were alternative modes of performing the Contract that were consistent with the Three Decisions, any obstacles posed by the Three Decisions to the performance of the Contract by the applicant were not irresistible or absolute. In this regard, it was held that, based on evidence given by the applicant's legal expert, Professor Mariam Darus ("Prof Darus"), it was still possible for the applicant to carry out the Contract in compliance with the Three Decisions. Arising from this possibility of lawful performance of the Contract, the Arbitrator held that the possibility of damages was still available to the applicant in the event that it was successful in showing that the Contract had been wrongfully terminated. He said:

46. Question One: Given the finding that the Contract is valid but is not capable of performance except in the manner prescribed in the Decisions, are any claims to damages arising from the Contract still available to the [applicant] under Indonesian law?

The answer that must be given is that there are alternative methods of performance which would be consistent with the three Decisions. Given that the Contract is valid, recourse to these alternative methods of performance is viable. Their existence rules out *force majeure*. Failure to give effect to them raises the possibility of a remedy by way of damages. Thus, claims for damages arising from the Contract are still available to the [applicant] under Indonesian Law.

The Third Award

17 According to the respondent, in about March 2007 it learned that the applicant had, prior to the publication of the Second Award, entered into a contract ("the new management venture") to provide hotel management services in respect of another hotel which was located within a one mile vicinity of the Hotel. On 28 March 2007, the respondent's solicitors wrote to the Arbitrator to seek "clarifications" of the First and Second Awards in the light of this information. As a result, on 10 April 2007, a conference was held to decide how the Arbitration was to proceed. At this conference, the respondent referred to para 9 of its letter of 28 March:

9. In connection with the clarifications sought in paragraphs 6 to 8 above, it has also recently come to light that the [applicant] had in fact applied for, and obtained, a PMA licence from the BKPM in relation to the establishment of a local company by the name of PT Kempinski Indonesia. Furthermore, it has also come to light that the purpose of the [applicant's] incorporation of PT Kempinski Indonesia is to provide hotel management services for a hotel by the name of Hotel Indonesia Kempinski Jakarta. Hotel Indonesia Kempinski Jakarta is located on the same street and within a 1 mile vicinity of the [respondent's] hotel. These are all highly material facts which the

[applicant] had in bad faith failed to disclose at any time during the course of the Arbitration. In this regard, the [respondent] now [seeks] further clarification on the following issues:

9.1 Given that the [applicant has] now applied for a PMA license to carry out hotel management services when [it] had previously denied that [it was] under any such obligation, coupled with the [applicant's] previous submissions in support of [its] contention, the [respondent seeks] clarification on whether the [applicant's] actions are in breach of [its] active duty of good faith, such active duty being the bedrock and foundation of the Indonesian law of contract. This is especially so bearing in mind the Tribunal's findings in the [First Award] that the [applicant] had deliberately avoided incorporating a local company and obtaining a PMA license to provide hotel management services to the [respondent] so as to avoid having to pay tax to the Indonesian authorities ...

18 The Arbitrator then directed the applicant to provide specific disclosure of the following information:

(a) when negotiations were commenced regarding the new management venture;

(b) when the BKPM licence to form a PMA company was given to the applicant to establish the new management venture;

(c) when the PMA company was formed; and

(d) whether the new management venture prevented novation of the Contract or performance of the Contract by means of either of the two other possible ways identified in the Second Award.

19 The applicant issued its response to these queries on 24 May 2007. The respondent was not satisfied with this response and sought specific discovery of the documents relating to these matters. On 11 July 2007, the Arbitrator made an order directing the applicant to disclose certain information relating to the new management venture. On 3 September 2007, the Arbitrator ordered that the information be produced by 7 September 2007 failing which the Arbitrator would ask parties to address him on the adverse inferences that could be drawn from such failure and the consequences of such inferences. The next day, 4 September 2007, the applicant put in its response to the order for disclosure. Therein, it stated that the new management venture was irrelevant to the issue of liability in respect of the respondent's termination of the Contract. In the same letter, the applicant sought directions for the further conduct of the Arbitration.

20 On 14 September 2007, the Arbitrator issued a document entitled "SIAC Arbitration [37/2002], Directions" ("the 14 September letter"). In this document, the Arbitrator noted that in respect of the questions he had posed on 10 April 2007, question (a) remained unanswered, the answer given to question (b) was "around September 2006" but the Tribunal's order that the applicant disclose when it had made the application for the licence to form a PMA company had not been satisfied. Regarding question (c), the PMA company was said to be "still in formation". In respect of question (d), the Tribunal had to draw the inference that the new management venture precluded the performance of the Contract between the parties in the possible ways that were identified in the Second Award. The Arbitrator then made the following observations and direction:

1. It is to be taken that specific performance can no longer be a remedy in these proceedings.

...

3. The Tribunal has not asked for the production of the contractual terms of the new contract. The existence of the new venture is admitted. It is assumed, unless the contrary is established, that the new venture is a hotel management venture and that it conflicts with the performance of the Contract with the Respondent in the manner consistent with Indonesian law contained in the Regulations ...

4. The Tribunal was persuaded by the expert produced by the [applicant] that the Contract still remained performable because methods of performance were still open. It is evident that they are not any more. The Tribunal believes that the Contract has ended through the operation of law as a result of the methods of legal performance being no longer possible.

5. If there is a remedy available, it is only by way of damages. The issues that remain relate to (1) whether a remedy by way of damages is available and what the effect of the ending of the Contract through the operation of the law on this issue is (2) if damages are available, how the damages are to be calculated, having regard to the fact that the Contract is no longer in existence. (3) if damages are available, what counterclaims and defences still remain.

6. The parties must also address what adverse inferences could be drawn from the failure of the [applicant] to provide the information by the Tribunal relating to the questions posed on 10 April, 2007.

In the light of the above, the Tribunal invites the parties to address the Tribunal as to the disposition of the dispute. It is not necessary to hear expert evidence as the law has now been sufficiently canvassed. Parties could address the Tribunal through written submissions. The submissions should be made on or before 12th October 2007.

21 Both sides tendered their written submissions on 26 October 2007. By letter dated 14 December 2007 ("the 14 December letter"), the Arbitrator informed the parties that he had reached certain decisions which were being communicated to them so that further responses could be made or issues identified on which hearings could be held. The Arbitrator indicated that the issue then was to determine the effect of the new management venture of the applicant on the conclusion that there was a possibility of the performance of the Contract by the three methods that were indicated in the Second Award. The Arbitrator considered these three methods and said:

10. As a result, a holding that the new contract closes the possibility of performance in any of the three ways left seems inevitable. It has not been disclosed when the negotiations for the new venture began. But it is evident that on or before 28th April 2006, the three possibilities of performance ceased. The result is arrived at on the basis of existing expert evidence. The [applicant] disputes this conclusion. To do so effectively, it must be demonstrated that the three ways of performance are still possible, despite the new contract. If the parties agree to provide further expert evidence on this question, this would be heard.

11. The possibility of specific performance has diminished to a vanishing point and need not be considered further. The issue of damages, at the least for the period between 2002 and April, 2006 still remains... Under the circumstances the issue remains on what grounds a claim for damages is maintainable. It is necessary to settle this issue. Unless there is agreement on the issue that is raised in para 10, this will remain the issue on which the arbitrator would wish further submissions to be heard ... [such] submissions could be sent to the arbitrator before 1st February, 2008.

22 The applicant tendered its further submissions on 1 February 2008. On 17 March 2008, the Arbitrator invited parties to tender further opinions from their respective legal experts on the following issues:

> 1. Having regard to the fact that the [applicant] has entered into a new management contract in the vicinity of the hotel that was the subject of the contract between the [applicant] and the [respondent], is the conduct of the parties to [the] dispute after 6 February 2002 relevant to the issues that have been raised in this Arbitration.
>
> 2. The opinions must have regard to the second interim award and the methods of performance open to the [applicant] mentioned therein as well as those discussed in the existing opinions of the experts.

23 The applicant's expert, Prof Darus, issued two opinions, the first on 25 April 2008 and the second on 7 May 2008. The respondent submitted one opinion from Mr Tumbuan on 29 April 2008. On 9 May 2008, the Arbitrator wrote to the parties. This letter ("the May 2008 Letter") is important and must therefore be quoted in full. It reads:

> 1. The arbitration has now reached a difficult phase with the supplementary opinion put in by Professor Darus indicating a possible change of positions.
>
> 2. As the Tribunal has pointed out previously, the second interim award was based largely on the opinion which she stated confirming the first award and on the evidence she gave before the Tribunal. She did not query the correctness of that award but maintained that the contract can be performed in one of three ways.
>
> 3. The Tribunal had asked for answers to two specific questions. There was a delay in the submission of the opinion of the [respondent's] expert.
>
> 4. The supplementary opinion was intended to rectify the situation created by the late submission of the opinion of the [respondent's] expert. Instead, it seeks to change the first award and has five other opinions attached. These opinions were not solicited by the Tribunal.
>
> 5. Under the circumstances, the parties must decide how to proceed with the arbitration.
>
> 6. In the absence of any agreement, the Tribunal will make an order on the issues that have been raised as to the effect of the new contract of the [applicant].
>
> 7. As to the delay in the Arbitration, parties fixed all time schedules by agreement. The Tribunal held proceedings when parties agreed to hold them. This was a pattern that was established.
>
> 8. As to the 180 days in Indonesian law, Indonesian law is not the procedural law that applies.
>
> 9. The Tribunal has the next 60 days (with five days blocked out) free. If the parties are mindful, they can make progress in the arbitration during this period.

24 On 20 May 2008, the Arbitrator published the Third Award in which he held that:

> (a) the new management venture made on 26th April 2006 was inconsistent with the obligations under the Contract in dispute;

(b) as a result, the methods of performance that remained open after the Three Decisions were no longer possible; and

(c) the possibility of damages for the period between the date of the alleged termination of the Contract and 26 April 2006 still remained.

The Tribunal directed the parties to file submissions on damages.

25 The respondent duly filed the relevant submissions. The applicant did not do so within the specified time. Instead, on 4 July 2008, it filed these proceedings to set aside the Third Award.

The Fourth and Fifth Awards

26 On 11 July 2008, the respondent requested that the Arbitrator proceed to make his final determination on the issue of damages between the date of termination of the Contract and 26 April 2006. The applicant then asked for an extension of time to file its submissions and these were eventually filed on 18 July 2008. These submissions did not, however, contain any argument on damages. On 20 October 2008, the Arbitrator issued the Fourth Award and held that, on the facts, no steps were taken to make performance of the Contract lawful. As such, any actual award of damages would be contrary to the public policy of Indonesia and therefore an award of damages to the applicant was not possible on legal grounds.

27 After the issue of the Fourth Award, the Tribunal requested the parties to make submissions on costs. On 15 April 2009, the Arbitrator issued the Costs Award.

The Issues before the Court

28 Although, technically, these proceedings relate only to the applicant's application to set aside the Third Award, I will in this judgment for convenience and ease of dealing with and deciding on the various arguments also consider the applications to set aside the Fourth Award and the Costs Award.

29 On the submissions made before me in relation to all three applications, the following issues arise for my consideration:

(a) whether the Tribunal lacked the jurisdiction to issue the Third and Fourth Awards because the matters determined in those awards had already been determined in the First and Second Awards;

(b) whether, even if the Tribunal was *functus officio* when the awards were issued, the applicant had waived its right to object to the awards on this ground;

(c) whether the awards should be set aside on the basis that the respondent should have been barred by issue estoppel from raising the new management venture in the arbitral proceedings after the Second Award was made;

(d) whether the Third, Fourth and Costs Awards should be set aside on the basis that they dealt with an issue that had not been formally pleaded; and

(e) whether there was a breach of natural justice on the part of the Tribunal.

Functus Officio

30 Both parties accepted that the law governing the procedure and jurisdiction of the Tribunal was Singapore law. In *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue) ("*Halsbury's*"), the concept of partial *functus officio* was described in the following terms:

> A valid award once made is final and binding and enforceable against the party against whom it is made. ... The arbitrator has not power to re-visit the issues decided and cannot vary, amend, correct, review, add to or revoke the award. ... *In the case of an interim award the arbitrator becomes functus in respect of issues disposed in the interim award although not functus officio in relation* [to] *such matters as may remain outstanding for determination in the arbitration*.
>
> [emphasis added]

31 These principles are based mainly on s 19B of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the Act"). The relevant sub-sections of the Act state:

> **19A**. —(1) Unless otherwise agreed by the parties, the arbitral tribunal may make more than one award at different points in time during the arbitration proceedings on different aspects of the matters to be determined.
>
> (2) The arbitral tribunal may, in particular, make an award relating to —
>
> (a) an issue affecting the whole claim; or
>
> (b) a part only of the claim, counter-claim or cross-claim, which is submitted to it for decision.
>
> (3) If the arbitral tribunal makes an award under this section, it shall specify in its award, the issue, or claim or part of a claim, which is the subject-matter of the award.
>
> **19B**. —(1) An award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties and on any persons claiming through or under them and may be relied upon by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction.
>
> (2) Except as provided in Articles 33 and 34 (4) of the Model Law, upon an award being made, including an award made in accordance with section 19A, the arbitral tribunal shall not vary, amend, correct, review, add to or revoke the award.

Further, s 2(1) defines "award" in the following terms:

> "award" means a decision of the arbitral tribunal *on the substance of the dispute* and includes *any interim, interlocutory or partial award* ...

[emphasis added]

In other words, a final and binding award within the meaning of s 19B must be a decision "on the substance of the dispute", and may include an interim or partial award. The fact that a partial award may nonetheless be final and binding within s 19B(1) is underscored by s 19A.

32 Reading ss 2(1), 19A and 19B of the Act together, it is clear that an award which is made in relation to only some of the issues in the arbitral proceedings is nonetheless "final and binding" in the s 19B sense. Once such an award is made, the arbitrator then becomes *functus officio* only in relation to those issues.

33 The applicant based its submission that the Arbitrator was *functus officio* in relation to the Third and subsequent awards by reference to the issue of supervening illegality. It pointed out that the supervening illegality issue had been raised as a defence eight months after the commencement of the Arbitration. The respondent's pleaded case on this issue was that the Three Decisions made it illegal for the Contract to be performed after 3 May 2000. This was tried as a preliminary issue and, in the First Award, the Tribunal had held that the Contract was valid but incapable of performance. The First Award did not, however, dispose of the supervening illegality issue.

34 The applicant submitted that parties had subsequently agreed that the supervening illegality issue would be disposed of if the Remaining Issues (see [14] above) were answered. In the Second Award, the Tribunal addressed the Remaining Issues and held that the possibility of a claim for damages was still available to the applicant. This finding, the applicant argued, disposed of the preliminary issue of supervening illegality in its favour. Given the finality of the First and Second Awards on this issue pursuant to s 19B of the Act, the validity of the Contract and the possibility of damages arising from the respondent's alleged breach of the Contract could no longer be disputed by the respondent.

35 At no time was the new management venture mentioned in the respondent's pleaded case or validly raised as an issue before the Tribunal during the two tranches of hearings leading up to the First and Second Awards on the supervening illegality issue. By raising the issue of the new management venture for the first time in its letter of 28 March 2007, the respondent was seeking to raise new matters after the Second Award had fully determined the supervening illegality issue. The applicant submitted that this was legally impermissible as the Tribunal was *functus officio* in relation to that issue and had no jurisdiction to consider the matters raised in the 28 March 2007 letter.

36 As s 2(1) of the Act makes clear, an award must be "on the substance of the dispute" before it acquires the qualities prescribed by s 19B. First, therefore, it is necessary to analyse the First and Second Awards to determine the disputes which were resolved in substance. Next, it will be necessary to analyse the Third, Fourth and Costs Awards to determine whether the disputes resolved in those awards are the same as the disputes resolved in the First and Second Awards.

37 In the First Award, the Tribunal held, *inter alia*, that the Contract remained valid but had become incapable of performance in the manner stipulated by the Contract as a result of the Three Decisions. However, the Tribunal postulated that the Contract could still be legally performed if appropriate steps were taken to comply with the Three Decisions.

38 In essence, what the Second Award decided was that the Three Decisions *did not exclude the possibility of damages* being awarded to the applicant because there were three alternative methods of performance of the Contract. The Tribunal clearly drew a distinction between, on the one hand, the *availability* of *future claims* of damages, which was decided in the Second Award, and, on the

other hand, the applicant's legal *entitlement* to damages, which was not decided in the Second Award and which *could not be decided* at that stage without proof of breach and loss. Several paragraphs in the Second Award make this clear.

39 In the Third Award, the Tribunal went on to decide that the availability of a future claim of damages which remained despite the Three Decisions was now extinguished by the fact that the applicant had entered into the new management venture. The correctness of this decision as a matter of evidence or of law is not in issue here; nor can it be. What matters is that the Tribunal decided that the applicant's potential right to damages was extinguished. This decision was distinct from its earlier decision that the right to damages was not extinguished *due to the Three Decisions*. The Second Award cannot be read to mean that the Tribunal was deciding that the right to damages would remain regardless of whatever occurred after the date of the Award; all it was asked to decide was whether the potential right to damages *still remained* in the light of the Three Decisions.

40 The Fourth Award decided issues which were distinct from those decided in the Second and Third Awards. There is no jurisdictional conflict between the Third and Fourth Awards because the Third Award did not decide whether the possibility of damages between the date of termination of the Contract and the date on which the applicant entered into the new management venture remained open.

41 Further, the issues decided in the Second Award are distinct from those decided in the Fourth Award. As explained above at [37], what was decided in the Second Award was that the *availability* of a *claim* to damages was not excluded by the Three Decisions. The Fourth Award essentially held that the availability of a claim to damages during that period was in fact excluded due to the operation of Indonesian public policy.

42 The submissions that the applicant made to the effect that the Second Award had fully determined the supervening illegality issue and that despite the Tribunal's findings in the First and Second Awards that the Contract was valid and that damages were available to the applicant, the Tribunal had gone on in the Third and Fourth Awards to reject both of those findings, were an incorrect characterisation of the awards because the applicant incorrectly equated the availability of a claim to damages with the legal entitlement to damages (which is dependent upon proof of breach).

43 Therefore, the matters determined in the First and Second Awards were distinct from those determined in the Third and Fourth Awards, and consequently the Tribunal was not *functus officio*.

44 No question of jurisdiction arises in respect of the Costs Award as the First and Second Awards did not deal with the issue of costs at all.

45 As stated above (at [34]), the applicant also relied on an alleged agreement or understanding between the parties. After the First Award was made, the parties agreed that the Arbitration would proceed by considering four issues which were put to the Tribunal. These four issues were decided in the Second Award. The applicant said that the parties had agreed that the supervening illegality issue would be disposed of if those four issues were decided. In this respect, the applicant referred me to two paragraphs in the Second Award:

> 11. Faced with this finding of the Tribunal [in the First Award], the parties met to decide how the arbitration should proceed further. *The parties agreed that the way to dispose of the matter was to require the Tribunal to state four issues to be decided...* The parties agreed on four issues.

12. [The Tribunal listed the four issues] ... *Parties are in agreement that the illegality issue will be disposed of if these questions were answered ...*

[emphasis added]

The applicant submitted that the above paragraphs indicated that the Tribunal was aware of this agreement between the parties.

46 To my mind, however, there is insufficient evidence of a binding agreement in the terms asserted by the applicant. It is unclear whether the common, objective intention of the parties was truly that the Arbitrator should proceed to determine the substantive issue of liability after these four issues were decided. The matter to be disposed of could easily be the issue of the effect of the Three Decisions on the Contract (and, consequently, the possibility of a claim to damages), which is not the same as the issue of the effect of subsequent events on the Contract. No additional evidence was provided by the applicant for its contention (apart from an email dated 10 June 2005 from the Tribunal, which is also inconclusive). There was, in particular, no document emanating from the respondent that showed that it had agreed to what the applicant argued for.

Waiver

47 The respondent submitted that even if the Tribunal was *functus* in relation to the issues decided in the Third and Fourth Awards, the applicant had waived its right to object when it actively made submissions in response to the clarifications sought by the respondent. As I have found that the Tribunal was not *functus*, I do not have to decide this issue. Although I express no concluded view on this matter, it appears to me that if the Tribunal was *functus* it would not have been possible for the applicant to confer jurisdiction on it simply by participating in the submissions. There would have to be an affirmative agreement between the parties on the issue of jurisdiction for the same to be conferred again on the Arbitrator after he had been rendered *functus*, especially because this would involve reopening issues that, by definition, had already been definitively decided. Also, from the beginning (in this context I am referring to the 10 April 2007 conference), the applicant had put forward the position that the issue of availability of future profits had been irreversibly decided in the Second Award and that therefore the next step in the Arbitration was to proceed with factual evidence so that a decision could be made on whether the respondent had lawfully terminated the Contract. There is therefore some doubt as to whether on the facts a waiver could be established.

Issue Estoppel

48 The argument relating to issue estoppel was a variant of the argument relating to jurisdiction. The applicant submitted that the respondent was barred by issue estoppel from introducing the issue of the new management venture during the Arbitration and after the Second Award was made. Relying on *Halsbury's* at para 20.118, it contended that issue estoppel also operates against the raising of issues which were not but which ought to have been raised in earlier proceedings. It also cited the judgment of Lord Denning MR in *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 at 640C-G which states:

> But within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again... [E]ach party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even accident (which would or might have decided the issue in his

favour), he may find himself shut out from raising that point again, at any rate in any case where the self-same issue arises in the same or subsequent proceedings. But this is not an inflexible rule. It can be departed from in special circumstances ...

Like principles apply to arbitration ...

49 The applicant argued that the respondent was barred from raising the issue of the applicant's new management venture (whether in the letter of 28 March 2007 or any time thereafter) because the First and Second Awards had disposed of the issue of supervening illegality and were binding on the Tribunal as well as the parties. The respondent was also obliged to raise the issue of the new management venture before the Second Award was made. As this was not done, the respondent was barred by issue estoppel from introducing this issue through the back door via the letter of 28 March 2007.

50 For the reasons that I have given in relation to my rejection of the *functus officio* argument, the issues decided in the First and Second Awards were distinct from those decided in the Third and Fourth Awards. Even if they were not distinct, the only issue in the Second Award which could possibly be the basis for the issue estoppel would be a determination by the Tribunal that there was no fact which could terminate the possibility of the three methods of performance. There was no such determination in the Second Award as the Tribunal was only asked to decide the legal availability of a future claim to damages. Therefore, no issue estoppel could have arisen in this regard.

51 In any event, the applicant did not put forward any basis existing in the Act which would allow the Court to set aside an arbitral award because the arbitrator had made a mistake in law and allowed a party to belatedly raise an issue that had not, but should have, been raised during earlier proceedings. The Court's power under the Act to set aside an award is a limited one and cannot be exercised on the basis that the arbitrator has made a mistake of law.

Failure to Plead

52 The applicant submitted that the respondent did not plead the issue of the new management venture and that therefore this did not form part of the arbitral reference.

53 The respondent responded that the applicant's argument on lack of jurisdiction due to inadequate pleading could not stand because:

(1) there is no rule in arbitration that limits the jurisdiction of the Tribunal to the pleadings;

(2) the rules of pleading in arbitration are much more flexible than the rules of pleading in court and do not require every single relevant fact to be stated;

(3) in any event, under the doctrine of competence-competence, the arbitrator is free to determine his own jurisdiction and had the power to consider the new management venture under the Third Award since he considered it to be within his jurisdiction; and

(4) in fact, if one reads the respondent's Points of Re-Amended Defence and Counterclaim dated 18 August 2003 at para 43C, it is wide enough to cover the Tribunal's consideration of the

new management venture.

54 In relation to the first point, the respondent said that the jurisdiction of the Tribunal is determined by the scope of the arbitration agreement and not by the pleadings. The arbitration agreement in this case was of the widest possible construction and would cover the relevant facts of the new management venture in relation to the continuing availability (or otherwise) of a claim to damages. I cannot accept this argument. The purpose of the arbitration agreement here, as in other cases, was to bind parties to submit the disputes arising under the Contract to determination by arbitration. It did not imply that parties would be free at any time during the proceedings to raise material and unpleaded points without having first made an application to amend their pleadings.

55 It is relevant in this connection that under Art 34(2)(a)(iii) of the Model Law (set out in the First Schedule to the Act), one of the grounds on which an arbitration award may be set aside is where the matters decided by the Tribunal were beyond the scope of the submission to arbitration. To determine whether matters in an award were within or outside the scope of the submission to arbitration, a reference to the pleadings would usually have to be made. It is therefore incorrect for the respondent to argue that jurisdiction in a particular reference was not limited to the pleadings or that there was no rule of pleading that requires all material facts to be stated and specifically pleaded as would be required in court litigation. An arbitrator must be guided by the pleadings when considering what it is that has been placed before him for decision by the parties. Pleadings are an essential component of a procedurally fair hearing both before a court and before a tribunal. I was therefore surprised that the respondent argued that it was not required to plead material facts because this dispute was being adjudicated by an arbitrator.

56 *Singapore Arbitration Legislation Annotated* by Merkin and Hjalmarsson (Informa, 2009) ("*Merkin and Hjalmarsson*") states at p 38:

> Where an arbitration is conducted on the basis of Model Law, art. 23, the arbitrator is bound to decide the case in accordance with the parties' pleadings, and he is not entitled to go beyond the pleadings and decide on points on which the parties have not given evidence and have not made submissions.

The above statement was adopted from *Ng Chin Siau v How Kim Chuan* [2007] 2 SLR(R) 789, a decision that I made in the context of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Arbitration Act"). The fact that it was incorporated in a text on the Model Law and the Act shows that the principles enunciated in that case are accepted as applying equally to international arbitration under the Act. In that case, I emphasized that abiding by the rule as to the pleading of material facts was essential in arbitration proceedings where the right of appeal was severely limited.

57 It is also relevant in this case that, as the applicant pointed out, the Tribunal as well as the parties proceeded on the basis of the pleadings filed during the arbitration. The fact that the respondent recognised that it had to plead the supervening illegality issue before the same could be heard by the Tribunal as a preliminary issue, showed that all persons engaged in the arbitration proceeded on the basis that the Tribunal could only determine issues that had been pleaded. The Arbitrator himself placed emphasis on the importance of the pleadings at para 46 of the Second Award where he stated:

> "[s]ubject to any defences *which arise from the pleadings* ... the normal basis for damages [recoverable by the applicant] would be loss of profits. ..." [emphasis added]

58 The respondent's third point, that under the doctrine of competence-competence, the

Arbitrator is free to determine his own jurisdiction and had the power to consider the new management venture because he considered it to be within his jurisdiction, is a non-starter. An arbitrator's ability to determine his own jurisdiction does not make all such decisions as to jurisdiction final and binding. A court can still reverse an affirmative decision on jurisdiction if it considers that the arbitrator was mistaken on the issue. Apart from the common law principles, this power is also contained in Art 16(3) of the Model Law.

59 That leaves the last point raised by the respondent which was that its Points of Re-Amended Defence and Counterclaim were wide enough to cover the new management venture. It is therefore necessary to consider para 43C of this pleading which the respondent relies on in this regard. This paragraph reads:

> 43C The [respondent] will also contend that by reason of:-
>
> (a) [the First Decision]; and
>
> (b) [the Second Decision]
>
> The [applicant was] legally obliged to have carried out their duties under the Contract after 3 May 2000 through an Indonesian (PMA) company.
>
> In breach of these Decisions, the [applicant] did not do so. Accordingly, under Article 1335 of the ICC, it became illegal for the Contract to be performed by the [applicant] after that date. In the circumstances, the Contract became unenforceable *after that date* and the [applicant] *are therefore not entitled to the reliefs claimed*.
>
> Alternatively, the Contract had become illegal and incapable of performance after 3 May 2000 and Article 1245 of the ICC applies accordingly.
>
> Article 1245 ICC
>
> "No compensation of costs, damages and interest takes place, if the obligor is, due to force majeure or uncontrollable situation, hindered from giving or doing something, which he was obliged, or has done something, which he was prohibited to do."
>
> ...
>
> [emphasis added]

60 In essence, the respondent had claimed in the italicised portion of its Points of Re-amended Defence and Counterclaim, that the Contract had become unenforceable and/or incapable of performance after 3 May 2000 because of the supervening illegality. This pleading was filed in August 2003 at which point the new management venture had not been entered. It was not in the contemplation of the respondent at that time, therefore, that the impossibility of performing the Contract could possibly be due to conflicting contractual obligations voluntarily undertaken by the applicant with a third party. The respondent was saying only that the Contract could not be performed because it had been rendered illegal by the Three Decisions or because of the *force majeure* consequence of the Three Decisions. At that time, the respondent considered the supervening illegality issue to be a total answer to the applicant's claim. It was not necessary therefore to consider other points which might make it impossible for the applicant to perform the Contract. The necessity of doing this only arose when the Arbitrator found, based on Prof Darus'

evidence, that there were still three possible ways of performing the Contract despite the Three Decisions. Para 43C of the Points of Re-Amended Defence and Counterclaim thus does not, was not intended to, and cannot, cover the issue of the effect of the new management venture on the possibility of performing the Contract. A related point, *ie*, the extent to which the applicant's possible future claim to damages was restricted or adversely affected by the new management venture, was also not covered by this pleading.

61 The correct course for the respondent to have taken when it found out about the new management venture in 2006 or 2007 was to have applied to amend its pleading to include the allegation that the existence of the new management venture was a fact which made it impossible for the applicant to perform the Contract and therefore to claim damages as from the date the new management venture came into existence. Such an amended pleading would have allowed the applicant to amend its own pleading in order to set out the possible grounds on which it could contend that the new management venture would not have such an effect. The Arbitrator would then have been able to take evidence on the new management venture and the impact it had on the Contract and would have been able to establish the facts necessary to come to a decision as to whether or not the existence of the new management venture made it impossible for the applicant to perform the Contract and/or claim damages.

62 Instead of doing that, the respondent raised the new management venture in its letter of 28 March 2007 in which it asked for "clarifications" on the Second Award. In para 9.1 of this letter which is quoted at [17] above, the respondent asked for clarification on whether the applicant's application for a PMA licence to carry on the new management venture was in breach of its active duty of good faith. In para 9.4 of the same letter, the respondent went on to ask for clarification whether the applicant was entitled after its own repudiation of the Contract (*ie*, by entering into the new management venture) to prospectively perform the Contract by rectifying its prior and existing breaches of the Three Decisions.

63 In my judgment, the respondent was not truly asking for clarification on the Second Award by making these queries. Instead, it was raising new issues for the Tribunal's determination. Indeed, in a later written submission to the court, the respondent conceded that the wrong nomenclature had been used in the 28 March 2007 letter and that these matters were not matters of clarification. Under the Act, there is only a limited residual power for a tribunal to correct or interpret an arbitral award after it has been issued. Under Art 33 of the Model Law, a party to an arbitration may ask the tribunal to correct in an award "any errors in computation, any clerical or typographical errors or any errors of similar nature". It is further provided that if the parties agree, then one party may ask the tribunal to interpret a specific point or part of the award. The two queries raised by the respondent in the 28 March 2007 letter (at [62]) did not fall into either of these categories. The Arbitrator could either have ignored the request or pointed out the error. Instead, unfortunately, he took up the points and this eventually resulted in the Third Award. The issues raised required proper investigation and a determination of the factual matrix. That this was not done was one consequence of the issues being raised as "clarifications" and not in the form of an amended pleading which would have served to identify properly to the applicant the case that it had to meet and reply to, and which would have enabled it to put in the necessary response and evidence.

64 In the result, the Third Award must be set aside on the ground that failure to plead the new management venture resulted in the Tribunal making a decision that was beyond the scope of the matters submitted to it. I will now consider the remaining challenges to the Third Award as my decision on these matters would affect the future handling of the Arbitration.

Breach of natural justice

65 Under s 24(b) of the Act, the High Court is empowered to set aside an award on the basis that a breach of the rules of natural justice had occurred in connection with the making of the award and as a result thereof the rights of any party had been prejudiced. As is well known, the concept of natural justice comprises two rules. The first is that the adjudicator must be disinterested and unbiased and the second is that the parties must be given adequate notice and opportunity to be heard (see *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [43] ("*Soh Beng Tee*")). In this case, the applicant alleges that breaches of both rules occurred during the arbitration proceedings.

Apparent bias

66 The first allegation made by the applicant is that the Arbitrator was not disinterested and unbiased because he gave the appearance of having a closed mind and also acted in such a way as to give rise to an impression of apparent bias. In this respect, the applicant cited *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 ("*Re Shankar*") for the test to establish the existence of apparent bias. In that case, Sundaresh Menon JC stated (at [91]) that the test was whether "there are circumstances which would give rise to a reasonable suspicion or apprehension in a fair-minded reasonable person with knowledge of the relevant facts that the tribunal was biased".

67 The applicant also relied on *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd and another* [1988] 1 SLR(R) 483 ("*Turner*") as being on all fours with the present case. In *Turner*, an application was made under the Arbitration Act to remove the arbitrator on the ground of misconduct. The main complaints against the arbitrator were that he had evinced a closed mind on the issue and had entered into the fray. The court held that there was a reasonable likelihood of bias which warranted his removal. Chao Hick Tin JC (as he then was) set out the role of an arbitrator in the following terms:

> 65 Parties are entitled to expect from an arbitrator *complete impartiality and indifference* ...
>
> ...
>
> 78 There can be no doubt that an arbitrator must always act judicially with a *detached mind* and with patience. *He must not at any time descend into the arena* or take an adversarial role. *His response and words used must always be measured and circumspect*.
>
> [Applicant's emphasis]

68 In this case, the applicant's complaint of apparent bias was made in relation to two main issues:

(a) the Tribunal's entry into the fray when it asked the applicant for information on the new management venture and requested the parties to make submissions on possible adverse inferences; and

(b) the fact that the Tribunal made certain conclusions on matters of Indonesian law without expert evidence on those matters being adduced.

Entry into the fray

69 In relation to the first issue, what the applicant relied on was correspondence dated 11 July 2007 and 3 September 2007 from the Arbitrator to the parties. In the first letter, the Tribunal formally requested that the applicant should produce information relating to the new management venture. In the second letter, the Tribunal imposed a deadline of 7 September 2007 for the production of the information and informed the parties that if the information was not produced by that date, it would ask them to address it on the adverse inferences that could be drawn from such failure and the consequences of such inferences.

70 The applicant's submission that this correspondence evinced the Tribunal's entry into the fray is not supported by the facts. The Tribunal did not conduct its own investigation: the existence of the new management venture was first raised by the respondent in the letter of 28 March 2007 which I have referred to several times before. In that letter, the respondent informed the Tribunal that the applicant had entered into this new venture and requested consideration by the Arbitrator on how the actions of the applicant affected the findings in the Second Award. As I have said, in my view, the Arbitrator should not have dealt with this request but that does not mean that in doing so the Arbitrator was entering into the fray. The Arbitrator's actions thereafter were in response to what he considered to be a legitimate manner of raising a matter that was of obvious relevance to the proceedings. The Arbitrator did not initiate the inquiry or take the initiative in any questionable way.

71 As for the direction on possible adverse inferences, it was in fact a direct result of the applicant's repeated breach of the Tribunal's order for disclosure. Examining the evidence in chronological order, the respondent made a formal application for specific discovery of information and documents relating to the new management venture on 2 July 2007. The Tribunal then made a formal request for information on 11 July 2007. In the formal request, the Tribunal noted that by its letter of 24 May 2007 the applicant admitted that it was involved in the new management venture and had formed a PMA company to manage it. The Tribunal requested certain pieces of information and documents from the applicant as they could have been relevant to determine the continuing validity of the Contract as well as the issue of damages. By the time of this request on 11 July 2007, the applicant had already failed to provide the information which was requested during the conference held on 10 April 2007. The Tribunal requested that the applicant should produce the information by 17 August 2007 or indicate its reasons for not doing so. The applicant did not meet this deadline. That failure resulted in the letter of 3 September 2007 imposing the new deadline of 7 September 2007 and raising the possibility of an adverse inference being drawn.

72 In other words, the applicant repeatedly failed to provide the information that was requested by the Tribunal: (a) after the conference on 10 April; (b) after the 11 July letter; and (c) after the 3 September letter. The only information that was provided by the applicant was the first page of the new management venture contract which was produced on 4 September 2007.

73 Furthermore, the Tribunal did make allowance for any reasonable justifications which the applicant could have had for its failure to provide the information. In the 11 July 2007 letter, it asked the applicant to provide reasons for its failure. The applicant did not do so.

74 I acknowledge that while the applicant did not provide any information in response to the requests (apart from the first page of the new contract), it had consistently protested that the new management venture was irrelevant: it did so in its letters of 24 May and 4 September 2007. However, no weight can be attached to these protests for the purpose of the natural justice inquiry. The complaint of the Tribunal entering into the fray is essentially one based on procedural fairness; it is not one of substance. The relevance or otherwise of the new management venture is a matter of substance.

75 Viewed as a whole, I find it difficult to conclude that there was a breach of natural justice in this regard. While it is true that the Tribunal "must not at any time descend into the arena" (per Chao JC in *Turner*), it is far from clear that this was the case. The reason for the Tribunal's request for further information and the mention of possible adverse inferences was the fact that it believed that the new management venture was relevant to the issues that it had to determine. The applicant was given the opportunity to explain its failure to disclose but chose not to do so. Also, even if the applicant had given the requested information, that in itself would not lead to bias or prejudging of the issue. The information that had been provided would merely have formed part of the evidence.

76 Looking at the course of events as a whole and having considered all the correspondence that passed between the parties and the Tribunal, I have concluded that a reasonable person would not, on this evidence, perceive the Tribunal as having been biased.

The Tribunal's conclusions on matters of Indonesian law

77 The main thrust of the applicant's contention on this issue is that the Tribunal reached certain conclusions on matters of Indonesian law in two letters sent in 2007, the 14 September letter and the 14 December letter, without the benefit of expert evidence. These letters allegedly demonstrate apparent bias on the part of the Tribunal because they indicate a closed mind on those matters of Indonesian law.

78 The statements in the two letters with which the applicant takes issue can essentially be condensed into the following proposition: that the new management venture removed the possibility of performance of the Contract by any of the three alternative methods which previously existed. By the time that the Tribunal made those statements, the Tribunal had already had the benefit of two tranches of hearings and had seen each party's experts and listened to their responses to questions in cross-examination. The Tribunal had also received from both parties numerous submissions on the effect of Indonesian law.

79 The applicant submitted that the important point was that the Tribunal did not hear expert evidence which was tested by cross-examination on the implications of the new management venture. The issue of the new management venture was only raised for the first time on 28 March 2007, which was after the two hearings had ended. Before the issue of cross-examination is considered, it will be necessary first to determine whether or not there was expert evidence before the Tribunal which *could* have justified its statements in the two letters.

80 The following statements in *Soh Beng Tee* provide a useful guide:

> 65 ...
>
> (a) ... An arbitrator should not base his decision(s) on matters not submitted or argued before him. ...
>
> ...
>
> (e) It is almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute... The arbitrator, however, is not bound to adopt an either/or approach. He is perfectly entitled to embrace a middle path (even without apprising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him ...

81 In the 14 September letter, the Tribunal stated that it "was persuaded by the expert produced

by the [applicant] that the Contract *still* remained performable *because methods of performance were still open...*". This was in fact the crucial piece of evidence produced by Prof Darus during the events leading up to the Second Award. By necessary implication, there was evidence before the Tribunal which *could* show that the Contract would *not* remain performable if the three methods of performance were no longer open. The question then is: was there evidence which could show that the new management venture had the result of closing off all three methods of performance?

82 It is clear from the letters that, in the Arbitrator's opinion, there was such evidence. In the Second Award, which is not subject to challenge by the applicant, the Tribunal discusses the three methods of performance in some detail: novation at para 39-41, a tripartite agreement at para 42, and Art 18 of the Contract at para 43-45. The two letters in which the Tribunal expressed some views on Indonesian law were sent not more than a year after the Second Award. In the 14 December letter, the Tribunal specifically said that the three methods were identified after expert evidence and that the experts had also indicated views on how the three methods would work. In the Tribunal's opinion this evidence dispensed with the need for further expert testimony on this particular issue. If the Arbitrator was in error in deciding that there was sufficient evidence before him to conclude that the new venture had closed off the three alternative methods of performance, that was an error of substance and not of procedure. In my view, the Arbitrator did not have a closed mind since he had reached his conclusions on the basis of submissions and evidence. He was also willing to consider further evidence on issues arising from those decisions.

83 I must, however, record some reservations about the writing of the 14 December letter. The Arbitrator was plain in his expression in that letter. He stated that he had reached certain decisions on the basis of the parties' submissions and that he was stating his views so that further responses could be made or issues identified on which hearings could be held. The Tribunal specifically stated that the 14 December 2007 letter was not an award. In my judgment, the Arbitrator fell into error in issuing this letter. This holding is not made because I think that the Arbitrator displayed a closed mind. It is made because the Arbitrator was making decisions which were beyond the scope of the existing pleadings and without the benefit of additional evidence which may have been adduced had both parties submitted proper pleadings on the issue of the new management venture. In my opinion, the letter was also sent out in error because the Arbitrator's decisions on legal issues should only have been made in the course of an award or in the course of exercising the powers specifically given by the Act, the Model Law and the Rules of the Singapore International Arbitration Centre ("the SIAC Rules") which governed the Arbitration.

84 One other point arises. The SIAC Rules provide that any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence (r 10.1). The applicant did not seek to challenge the Arbitrator's impartiality immediately after the issue of the 14 December letter. This may be some indication that at the time the applicant did not consider that that letter, whether taken alone or in conjunction with the 14 September letter, showed a closed mind on the part of the Tribunal. The SIAC Rules also provide that a challenge must be issued within 14 days after the relevant circumstances become known to the challenger. It seems to me, although I do not express a concluded view since this point was not argued before me, that the applicant's failure to challenge the Arbitrator's impartiality in late 2007 or early 2008 should preclude the argument that is now being made on the basis of the letters.

Cross-examination in relation to the letters

85 In connection with the letters, the applicant also argued that procedurally the Tribunal had acted unfairly because it had not allowed cross-examination of the expert witnesses prior to making the decisions in the 14 December letter. It submitted that the Arbitration had always been proceeded

with by way of cross-examination of witnesses followed by submissions. This was supported by the 2005 Procedural Order in which the Tribunal specifically ordered that the Arbitration proceed by way of cross-examination of expert witnesses. The following excerpt from the order is especially pertinent:

> Cross examination, can, of course, be dispensed with if the parties agree that this is not necessary. They may dispense with the need for any oral hearing as well. But, if one of the parties requires that there be cross-examination of an expert witness, it is best to permit it, particularly when this has been the course adopted previously in the arbitration. *The integrity of an award may be affected, if this were not done*.
>
> [emphasis added]

86 When the respondent suggested witness-conferencing instead of cross-examination of experts during the second tranche of hearing despite the 2005 Procedural Order, the Tribunal stated that "It is best that the procedure not be varied from the one used at the last hearing on illegality. Parties had agreed upon that procedure after discussion. Parties may vary the procedure by agreement...". The applicant relied on this letter, together with the 2005 Procedural Order, as support for the legitimacy of its expectation regarding cross-examination.

87 The applicant also cited Art 24(1) of the Model Law and r 22.1 of the SIAC Rules which provide:

> Art 24 Model Law:
>
> Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings... However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.
>
> Rule 22.1 of the SIAC Rules:
>
> Unless the parties have agreed on a documents-only arbitration, the Tribunal shall, if either party so requests, hold a hearing for the presentation of evidence by witnesses, including expert witnesses, or for oral submissions.

88 The applicant made repeated requests for cross-examination of the respondent's witnesses. Essentially, the present issue is as follows: given that both parties' experts had already been cross-examined during the proceedings leading up to the Second Award, does the applicant's legitimate expectation extend to *further* cross-examination on the specific issue of the relevance and effect of the new management venture?

89 The difficulty for the applicant in the present case is that the 2005 Procedural Order, Art 24 of the Model Law and r 22.1 of the SIAC Rules do not seem to be applicable directly, due to the fact that cross-examination had been carried out, albeit not specifically in respect of the new management venture. It seems to me that there is no reason why the principle expressed in those rules should apply such that the applicant's legitimate expectation would extend to further cross-examination on a specific issue that had not been pleaded. There was no point in asking for cross-examination on a matter which was not in the pleadings and in respect of which, therefore, the cross-examination would have been unfocussed and not properly directed.

90 In any case, the evidence that the Tribunal relied on in coming to the decisions in the letters consisted partly of admissions and partly of evidence that had been taken during the two hearings

(and this included evidence elicited on the cross-examination of the experts). It is therefore my view that the Tribunal's refusal to allow further cross-examination could not give rise to an appearance on bias on its part.

Failure to allow cross-examination of witnesses

91 The applicant also raised the issue of lack of cross-examination in support of its contention that the Tribunal did not give it an opportunity to be heard. This is distinct from its challenge on the basis of apparent bias.

92 The absence of cross-examination before the 14 September letter and 14 December letter relates specifically to the issue of the new management venture. The applicant's complaint, however, refers also to events which occurred after the two letters but before the Third Award was issued.

93 When the applicant raised its defence of waiver on 3 March 2008, it submitted to the Tribunal that it would be necessary to cross-examine the respondent's witnesses regarding the Bloch proposal. This request was ignored. Two weeks later, the Tribunal instead asked the parties to tender expert opinions as to whether the conduct of the parties (having regard to the new management venture), after the alleged wrongful termination of the Contract, was relevant to the issues raised in the Arbitration. In particular, it specified that the opinions "must have regard to the second interim award and the methods of performance open to the [applicant] mentioned therein as well as those discussed in the existing opinions".

94 The first opinion from each expert was submitted in April 2008. The applicant's expert submitted a supplementary opinion on or about 7 May 2008. The applicant's complaint, therefore, cannot be that it was not given the chance to present its case or that it was not able to respond. Its complaint in relation to the period between the two letters and the Third Award is therefore similar to its complaint of apparent bias in relation to the two letters: that it was not able to cross-examine the respondent's expert.

95 In addition to its reliance on the 2005 Procedural Order, the provisions of the Model Law and the SIAC Rules, and the 28 September 2005 letter (as discussed earlier at [86]), the applicant also relied on para 9 of the May 2008 letter (at [23]). This letter provides no assistance to the applicant as it does not refer to cross-examination at all, whether implicitly or explicitly. In fact, it expressly states that the Tribunal would issue the Third Award if the parties could not reach an agreement *as to the progress of the arbitration;* there was no representation that the sixty days would be left open for cross-examination.

96 It is my view, however, that the Tribunal should have, at the least, have asked the parties whether they wished to cross-examine each other's expert on the new opinions submitted before it proceeded to issue the Third Award. The 2005 Procedural Order, the Tribunal's insistence on cross-examination in the 28 September 2005 letter, and the vigorous cross-examination of the experts that had previously taken place would have combined to create an expectation that new expert evidence would not be accepted or rejected without giving the experts the opportunity to defend their views on cross-examination. The respondent put in an argument that, by this stage, the arbitration was akin to a documents-only arbitration. I cannot accept that argument. There was a great deal of correspondence (in fact, far too much), but that did not change the essential nature of the Arbitration especially as the applicant kept emphasizing its desire to proceed to a hearing on the facts and to cross-examine the factual witnesses.

97 One of the requirements for an award to be set aside on the ground of breach of natural justice

is that such breach must cause prejudice to the rights of the party challenging the award. In this case, in one sense, the breach caused prejudice to the applicant's rights because the Arbitrator in the Third Award rejected Prof Darus' opinions in relation to this issue: he considered that they conflicted with evidence that she had previously given and that he had accepted. Prof Darus was not given the opportunity to even attempt to reconcile the apparent conflict between her previous and her current evidence. Nor was the applicant able to attempt, by cross-examination, to wring any concessions from Mr Tumbuan on his conflicting opinion. On the other hand, since the breach occurred in the context of an award that was outside the submission to arbitration, even if cross-examination had been allowed the award would still have been invalid. The parties in fact saved costs by not conducting cross-examination. On balance, therefore, I hold that in the circumstances the failure to invite parties to cross-examine each other's experts could not have prejudiced their rights.

Failure to consider defences raised by applicant

98 On 1 February 2008, the applicant submitted that the defence of substantial non-performance was the basis for its legitimate entry into the new management venture. This defence was also put forward by Prof Darus on 25 April 2008. The applicant raised the separate defence of waiver on 3 March 2008 based on the respondent's apparent acceptance of the Bloch proposal (made after the first two of the Three Decisions were issued).

99 The respondent's expert, Mr Tumbuan, did not deal with the defences raised by the applicant. Instead, he dealt only with the effect of the new management venture on the three methods of performance.

100 A supplementary opinion of Prof Darus was sent to the Tribunal on or about 7 May 2008. It purported to clarify matters of Indonesian law for the Tribunal in relation to the First Award. This supplementary opinion was supported by several opinions of other legal experts.

101 The applicant submitted before me that the failure of the Tribunal to consider its submissions on the defences in itself constitutes a breach of natural justice. In support of its contention, the applicant relied on the recent case of *Front Row Investment Holding (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 ("*Front Row*"). In that case, the arbitrator concluded in his award that the applicants had abandoned two of the three alleged misrepresentations pleaded despite the fact that reference was made to all three alleged misrepresentations in the applicants' opening and closing submissions. Andrew Ang J set aside the arbitral award on the ground of a breach of natural justice. The following statements were made:

> 31 [A] court or tribunal will be in breach of natural justice if in the course of reaching its decision, it disregarded the submissions and arguments made by the parties on the issues (without considering the merits thereof) ...
>
> 32 As the Court of Appeal noted in *Soh Beng Tee* ...
>
> > Parties to arbitration have, in general, a right to be heard effectively on every issue that may be relevant to the resolution of a dispute ...
>
> ...
>
> 35 The failure to allow a party to address the tribunal on a key issue is the corollary to allowing the submissions but then ignoring it altogether whether deliberately or otherwise. In both cases, the mischief is precisely the same: *a party is denied the opportunity to address its position to*

the judicial mind ...

[emphasis added]

102 In my opinion, however, the case does not assist the applicant. Andrew Ang J could not have meant that each point in the submissions of both parties must be expressly addressed by the tribunal in its awards. Rather, what the Judge meant was that both parties should be given the opportunity to *address the tribunal* and that the tribunal should at least consider those submissions (rather than ignoring them outright).

103 At para 49 of Professor Darus' opinion of 25 April 2008, she stated that "the [applicant's] entry into the new [management] venture is ... legally irrelevant under Indonesian law *and has no effect on the quantum of damages to be awarded* to the [applicant]".

104 In the Third Award, the Tribunal stated that "*the New Management Contract ... is inconsistent* with the obligations under the contract in dispute [and] *as a result the methods of performance that remained open* after the Three Decisions *are no longer possible*". It went on to state that "the possibility of damages for the period between the date of the alleged termination of the management contract and 26th April, 2006 still remains."

105 By necessary implication, the Tribunal must have considered and rejected Prof Darus' opinion because it concluded that the *effect* of the new management venture was to remove the possibility of damages. This is supported by the fact that the Tribunal expressly refers to Prof Darus' opinion at several points throughout the Third Award, at paras 10, 11, 12, 13, 14, 15 and 21. In fact, the Tribunal expressly rejects Prof Darus' supplementary opinion of 7 May 2008 at paras 9, 19, 20 and 21.

106 As for the defence of waiver, the respondent submitted that this argument had already been raised and dismissed by the Tribunal in the Second Award. In the Second Award, the Tribunal stated:

> The Waiver Argument of the [applicant]
>
> 20. ... Whether or not there is a force majeure which made the performance of the obligation illegal or impossible is the issue that is involved in the present stage of the proceedings. The waiver argument is not helpful in resolving this issue. It presupposes an illegality, which must be accepted by the [applicant] or proved by the respondent. Though the waiver argument was put up by the [applicant], merely raising the argument does not amount to the acceptance of illegality. On the respondent's part, the issue would be whether any illegality can be established. *The issue of waiver is, therefore, not discussed any further*." [emphasis added]

107 Although the excerpt cited by the respondent does not mean that the issue of waiver has been definitively determined for all purposes (including for the substantive hearing in the future, if any), it is quite clear that the Tribunal had already considered and dismissed the issue of waiver *in relation to the hearing on the issue of illegality*. The applicant's assertion that the waiver defence was not determined by the Tribunal is an inaccurate interpretation of the Second Award. Therefore, the applicant's complaint on the failure to consider its submissions on waiver is baseless. In any event, the defence of waiver is ultimately irrelevant to the issues decided in the Third and Fourth Awards: the rights which were allegedly being waived were those of the respondent, whereas the Third and Fourth Awards decided that the rights *of the applicant* to a possible claim in damages were extinguished.

108 The applicant was given the opportunity to make its submissions on the two defences before

the Third Award was made, and those submissions were considered by the Tribunal. The only avenue left to the applicant in relation to this allegation is that the Tribunal did not explicitly deal with the two defences in any of the Awards. In response, the respondent relied on the case of *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 in support of the proposition that I endorsed in that case that "natural justice requires that the parties should be heard; it does not require that they be given responses on all submissions made".

109 Apart from *Front Row*, the applicant also relied on the English case of *Hanjin Shipping Co Ltd v Schiffahrtgeselleschaft "Lesum" mbH & Co KG*, unreported, 5 November 1996 ("*Hanjin Shipping*"). There, the applicants alleged that the arbitrators failed to consider one of many submissions made based on contributory negligence. Notwithstanding that the arbitrators expressly stated in their reasons for the award that they had given "very careful consideration" to "all" the matters put before them in the course of the hearing but had not dealt with those matters found to be irrelevant, Langley J held that there was at least a "real possibility" that the applicants' submissions on contributory negligence had been overlooked, and set aside the award on that basis.

1 1 0 *Hanjin Shipping* does not provide any assistance to the applicant. It is clear that Langley J justified his decision on the grounds of the overall context of the case. This is evidenced by the following excerpt from the judgment:

> ... On one reading... it can be said that [the arbitrators] were intending to reject all the [applicants'] submissions... However, read *in the context of the reasons as a whole and their structure* and the submissions made to me I remain unsure that that was the case... [emphasis added]

In the present instance, the overall context of the Second and Third Awards indicates that the Tribunal did consider the applicant's submissions on the two defences.

111 The applicant pointed out that the respondent's expert, Mr Tumbuan, did not deal with the defences of substantial non-performance and waiver in his opinion of 29 April 2008 which was given after Prof Darus' opinion on 25 April 2008. The applicant asserted that "Darus' opinion was unchallenged on the [defence of substantial non-performance] point ... and the respondent also had no response to the waiver argument." By implication, the applicant suggests that it would be a breach of natural justice for the Tribunal to reject the applicant's arguments without the existence of countervailing arguments by the respondent. This argument is misplaced and is completely out of line with the ethos of arbitration. There was no breach of natural justice in relation to the way in which the Tribunal handled the two defences. In this respect, *Soh Beng Tee* at [65] shows that the Tribunal was well within its powers:

> It is almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute. They may expect the arbitrator to select one of these alternative approaches. *The arbitrator, however, is not bound to adopt an either/or approach... Similarly, an arbitrator is entitled – indeed, it is his obligation – to come to his own conclusions or inferences from the primary facts placed before him...* [emphasis added]

The Fourth and Costs Awards

112 I have held above that the Third Award must be set aside. The applicant submitted that if this course was taken, then the Fourth Award had also to be set aside. The respondent disagreed. It argued that the Third and Fourth Awards could stand on their own even if one of them was set aside. It said that the Third Award concludes that the applicant is not legally entitled to damages from 26

April 2006 onwards whilst the Fourth Award concludes that no award of damages can be made for the period between termination and 26 April 2006 because any award of damages will be contrary to public policy. The awards, therefore, are not founded upon each other in such a way as to require that if one is set aside, the other must be as well.

113 I do not accept the respondent's argument. As the applicant contended, the Tribunal's finding that an award of damages would be contrary to public policy was based on his earlier finding that the Contract was in violation of the Three Decisions and the opinion that no effort appeared to have been made to effect the changes that would have made performance lawful (at para 62 of the Fourth Award). This opinion was not based on any pleaded case nor had evidence been admitted in relation to this issue. The Fourth Award must therefore be set aside as well.

114 The Costs Award must also be set aside since it relates, *inter alia*, to the costs of the two awards that have been set aside.

The effect of setting aside the awards

115 The parties agreed that the effect of setting aside an arbitral award is, generally, that the arbitrator is not *functus officio* in respect of the issues determined in that award and that the arbitration would be revived accordingly. Where the parties differ is in relation to who should conduct the resumed proceedings. The applicant submitted that in this case the Arbitration should proceed before a freshly constituted tribunal whilst the respondent took the position that the Arbitrator should continue to conduct the proceedings.

1 1 6 *Merkin and Hjalmarsson* state the following at p 118 of their text in relation to the consequences of setting aside an award:

> The remedy where an application is upheld is the setting aside of the award. However, the court may as an alternative remit the award to the same arbitrators for further consideration (art. 34(4)). If the court is of the view that *the arbitrators are unfit to continue the hearing*, the correct approach is the setting aside of the award and the appointment of a fresh tribunal. If the court decides to remit the matter to the arbitrators, it is a matter for them to decide how to proceed.
>
> [emphasis added]

There is no direct case authority on the point but it is sensible to remit the matter back to the same arbitrator as long as he has not been disqualified from hearing the proceedings for any reason.

117 In this case, I have found that there was no evidence of apparent bias on the part of the Tribunal. Accordingly, there is no reason for me to order that the Arbitration continues before a fresh tribunal. The Arbitrator is fully apprised of this complicated case and is therefore eminently suited to continue to conduct the proceedings. In the continued proceedings, it may be advisable that the Arbitrator not enter into or entertain lengthy correspondence from the parties raising issues and points of law on matters that are not the subject of any pending application before the Arbitrator.

Conclusion

118 For the reasons given above, this application is allowed with costs.