IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 132

HC/OS No 731 of 2017
(HC/SUM No 3315 of 2017)
(HC/SUM No 5596 of 2017)

Between

Man Diesel & Turbo SE

… *Plaintiff*

And

I.M. Skaugen Marine Services Pte Ltd

… *Defendant*

JUDGMENT

[Arbitration] — [Refusal of enforcement] — [Adjournment of enforcement proceedings] — [Security] — [Foreign award] — [Foreign law]

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Man Diesel Turbo SE
v
I.M. Skaugen Marine Services Pte Ltd

[2018] SGHC 132

High Court — Originating Summons No 731 of 2017 (Summons No 3315 of 2017)(Summons No 5596 of 2017)
Belinda Ang Saw Ean J
22, 24, 25, 30 January 2018

28 May 2018 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 By an *ex parte* order dated 28 June 2017 ("the *ex parte* Leave Order"), the plaintiff, Man Diesel & Turbo SE, obtained leave of court to enforce a final award dated 4 April 2017 made in the Danish Institute of Arbitration Case No. E-2230 ("the DIA Final Award") by a duly constituted three-member tribunal ("the Tribunal") against the defendant, I.M. Skaugen Marine Services Pte Ltd. The *ex parte* Leave Order was made pursuant to s 29 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") and O 69A of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

2 The DIA Final Award was decided in favour of the plaintiff by a majority of the three-member tribunal. It is not disputed that Danish law governs

both the underlying contracts and the arbitration agreement, and the DIA Final Award is a Denmark-seated award.

3 There are now before this court the following applications:

(a) The defendant's application in Summons No 3315 of 2017 ("SUM 3315") is to challenge enforcement of the DIA Final Award pursuant to s 31(2)(*c*) and s 31(4)(*b*) of the IAA, and if refusal to enforce the DIA Final Award is successful, to have the *ex parte* Leave Order set aside as a consequence.

(b) An alternative prayer in SUM 3315 seeks an order to "stay and/or adjourn" the enforcement of the DIA Final Award referred to in the Order of Court dated 28 June 2017 (*ie*, *ex parte* Leave Order) pending the determination of the defendant's application filed in the City Court of Copenhagen ("the Danish Court") to set aside the DIA Final Award.

(c) The plaintiff's cross-application in Summons No 5596 of 2017 ("SUM 5596") is for an order that the defendant furnishes the plaintiff with security amounting to the sums due under the DIA Final Award if this court considers it proper to adjourn the enforcement of the DIA Final Award pending the outcome of the defendant's application to set aside the DIA Final Award in the Danish court.

4 Besides the grounds under s 31 of the IAA identified in [3(a)] above—*ie*, that the defendant had been unable to properly present its case in the DIA Arbitration Case No. E-2230 ("the DIA Arbitration") and that the enforcement of the DIA Final Award would be contrary to public policy on the basis of allegations of fraud committed by the plaintiff on the Tribunal in procuring the

DIA Final Award—the defendant separately complains that the terms of the *ex parte* Leave Order do not mirror the terms of the DIA Final Award. The plaintiff is therefore enforcing the DIA Final Award beyond the face of its terms. It follows that the *ex parte* Leave Order is in excess of the terms of the DIA Final Award and should be set aside for this reason.

5 Another variant of the excess-of-terms argument in the defendant's written submissions is that the *ex parte* Leave Order permits payment of the propellers before delivery and that would be tantamount to re-writing the terms of the Propellers Contract (see [109] below), which provided for payment to be made upon delivery, and a re-writing of the contractual terms was not part of the DIA Final Award. Pausing here, the defendant's re-writing-of-the-contractual-terms argument is misplaced. I agree with the plaintiff's counsel, Mr Danny Ong ("Mr Ong"), that the proper formulation of the issue is whether or not by virtue of the DIA Final Award, the defendant is immediately and unconditionally liable to pay the plaintiff the net sum of EUR 1,964,585.91 and DKK 191,827.28 plus interest accruing thereon. The defendant's counsel, Mr Lawrence Teh ("Mr Teh"), maintains that the obligation to pay is conditional upon the plaintiff first delivering Propellers 3 and 4.

6 In respect of the Danish setting aside application, this court was told that the defendant has applied to transfer the said application filed in the City Court of Copenhagen (referred to as the Danish Court in [3(b)] above) to the High Court of Eastern Denmark. The transfer application is being contested by the plaintiff. I am informed that if the application to set aside is heard in the High Court of Eastern Denmark, a party who is dissatisfied with the outcome may take the matter further on appeal.

7 The twin issues of the *bona fides* and prospective merits of the defendant's setting aside application is relevant to the two applications before this court. On the one hand, Mr Teh argues that the defendant has a strong case in the setting aside proceedings in the Danish Court and as such the enforcement of the DIA Final Award ought to be stayed and/or adjourned without security. In contrast, Mr Ong disagrees; highlighting, no least, that the defendant is re-arguing matters that had already been considered and decided upon by the Tribunal. Mr Ong argues that the defendant's challenge to the *ex parte* Leave Order by way of its application to refuse enforcement of the DIA Final Award is patently unmeritorious and that the defendant is unjustifiably stonewalling the plaintiff's recovery efforts. Mr Ong thus urges this court to dismiss SUM 3315, affirm the *ex parte* Leave Order and to grant an immediate enforcement of the DIA Final Award as a judgment. Alternatively, if this court is minded to adjourn the enforcement proceedings, Mr Ong asks for security to be furnished in the terms set out in SUM 5596.

Background to the DIA Arbitration

8 The plaintiff is a German company under the Volkswagen group of companies. It is in the business of providing engines and turbomachinery for marine and stationary applications. The defendant is a Singaporean subsidiary of I.M. Skaugen SE (formerly, I.M. Skaugen ASA) ("Skaugen Norway"), a Norwegian company whose core business involves the operation of a fleet of liquefied natural and petroleum gas carriers ("LNPG carriers").

9 The DIA Final Award is one of the many disputes between the parties and their affiliates that spawned multiple proceedings across various jurisdictions. The defendant has recounted several proceedings in its written submissions. I will only make reference to them where necessary.

10 In a nutshell, the DIA Arbitration was commenced by the plaintiff to compel the defendant to fulfil its outstanding contractual obligations under the sale and purchase agreements for four 2-stroke marine diesel engines ("the Engines Contract") and propellers ("the Propellers Contract"). The Engines Contract (concluded on 12 January 2007) and the Propellers Contract (concluded on 10 May 2007) are collectively referred to herein as "the Contracts". The contracting parties to the Contracts were initially Man Diesel A/S ("MAN Denmark") and Skaugen Norway. It is not in dispute that the plaintiff became a party to the Contracts following a merger with MAN Denmark. As for the defendant, it took over the Contracts as assignee of all rights and obligations from Skaugen Norway.

11 The Engines Contract was the first time the parties had sold and bought 2-stroke engines. Under the Engines Contract, the defendant purchased four 2-stroke engines that were to be delivered in two tranches: the first two engines (Engines 1 and 2) in 2008, and the second two engines (Engines 3 and 4) in 2009. As agreed, plaintiff had the right to sub-contract the production of the engines to a South Korean licensee, STX Engine Co Ltd ("STX Engine"). Like the Engines Contract, the Propellers Contract provided for delivery of four propellers purchased by the defendant in two tranches: the first two propellers (Propellers 1 and 2) in 2008, and the second two propellers (Propellers 3 and 4) in 2009. However, unlike the engines, the propellers were to be built directly by the plaintiff.

12 The four engines and propellers were intended for installation on board four of the defendant's LNPG carriers; each engine was to interface with a propeller, and the engine-propeller combinations were referred to as shipsets.

13 In 2008, the defendant took delivery and paid for the first two of the four shipsets (Shipsets 1 and 2). The two shipsets were subsequently, in 2011, installed on board two of the defendant's LNPG carriers, the *Norgas Unikum* and the *Bahrain Vision*. To this end, it is not disputed that the parties performed the Contracts for Shipsets 1 and 2. As regards Shipsets 3 and 4, what transpired is that the defendant made several attempts at postponing the delivery of the remaining shipsets.

14 Separately, technical problems arose in relation to Engines 1 and 2. The technical problems related to: (a) faulty chain drives; (b) abnormal piston ring and cylinder liner wear; and (c) abnormal and heavy vibrations. A further issue arose when irregularities relating to the Factory Acceptance Tests ("FATs") on the plaintiff's 4-stroke marine diesel engines came to light in 2011. The FATs results showed that its 4-stroke engines have had a lower fuel consumption rate than contractually warranted. In 2013, the Local Court of Augsburg in Germany fined the plaintiff for violation of the supervisory duties imposed by the German Regulatory Offences Act. This led the defendant to mount a case that the plaintiff's manipulations of its 4-stroke engines FATs extended to the 2-stroke engines.

15 The relationship between the parties deteriorated in 2012. The defendant attributed the breakdown in relationship to some of the technical issues (see [14] above) that affected the performance of the *Norgas Unikum* and the *Bahrain Vision*, and the plaintiff's bad aftersales performance including the loss of trust in the plaintiff due to the FATs irregularities (*ie*, the manipulation of fuel consumption tests in relation to the 4-stroke engines). To the plaintiff, the defendant had simply lost interest in Shipsets 3 and 4 as a result of the 2008 global crisis which affected the shipping industry and instead viewed the

defendant's adoption of the fuel irregularities as an excuse to get out of the Contracts with the plaintiff. Negotiations between the parties continued but ended without reaching an amicable settlement.

The DIA Arbitration

16 The plaintiff commenced the DIA Arbitration on 15 September 2014 (date on which the DIA received the Statement of Claim dated 11 September 2014) to compel the defendant to perform the Contracts. According to the plaintiff, the defendant's failure to take delivery of the remaining shipsets (Shipsets 3 and 4) constituted breaches under the Contracts. As regards the Engines Contract, the plaintiff said that the Engines Contract was only terminated when it commenced the DIA Arbitration and the plaintiff sought compensation for loss of profits, among other things. As regards the Propellers Contract, the plaintiff asserted that the Propellers Contract remained binding and insisted on the defendant's taking delivery of Propellers 3 and 4.

17 In response, the defendant's defence was that it was not obligated to take delivery of Shipsets 3 and 4 for three alternative reasons:

(a) First, the defendant contended that it was fraudulently induced by the plaintiff to enter into the Contracts; put another way, the defendant would not have agreed to the Contracts had the plaintiff disclosed its manipulation of fuel consumption tests in relation to its 4-stroke engines, pursuant to its duty of good faith and loyalty ("First Defence");

(b) Secondly, the Contracts had been terminated sometime in 2012 by mutual agreement between the parties; and

(c) Thirdly, the Contracts were terminated for cause. The defendant contended that it had, prior to the commencement of the DIA Arbitration, exercised its right to terminate the Contracts due to defects relating to Engines 1 and 2 that had already been installed on board the *Norgas Unikum* and the *Bahrain Vision*. The defects included the ill-fitting chain drives, abnormal wear of the piston rings and cylinder liners, and heavy and abnormal vibrations of the engines.

18 The defendant further counterclaimed the following:

(a) As regards Shipsets 3 and 4, the defendant sought restitution of the down payments it had previous made to the plaintiff as a consequence of the termination of the Contracts, together with interest; and

(b) As regards Engines 1 and 2, the defendant sought damages or a reduction in the purchase price of the engines for the alleged defects described in [17(c)] above.

19 The plaintiff's objections to the defence and counterclaim are essentially that the defects occurred long after the expiry of the warranty period and that the irregularities of the FATs were irrelevant. The irregularities involved four-stroke engines and not the two-stroke engines that were the subject matter of the Contracts.

The procedural history of the DIA Arbitration

20 The procedural history of the DIA Arbitration was marred with multiple delays at various junctures by many procedural motions and requests. Of these motions, the Third Pleading (filed on 10 June 2016), and the events following

the defendant's filing of its Third Pleading, lie at the heart of the applications before this court. The Third Pleading included a new counterclaim for the excessive fuel consumption relating to the Engines 1 and 2. The defendant also requested, among others, a postponement of the Oral Hearing scheduled for the period between 4 and 7 July 2016. In support of its new counterclaim for the excessive fuel consumption relating to the Engines 1 and 2, the defendant sought disclosure of documents relating to the plaintiff's internal investigations on the manipulation of fuel consumption tests and further wanted to adduce an expert report that tended to show that the plaintiff had manipulated the fuel consumption tests of its 2-stroke engines.

21 As detailed in the DIA Final Award, the Tribunal in Procedural Order 3 ("PO3") rejected the defendant's application to postpone the Oral Hearing. The Tribunal also declared as inadmissible, and struck off from the record, both the defendant's new counterclaim and the expert report prepared in support of the new counterclaim, namely exhibits R-88, R-89 and R-90. The Tribunal saw as irrelevant and hence disallowed further disclosure of documents relating to the plaintiff's internal investigation on the FATs manipulations in ICC Case No 20806/GFG/FS ("the Hamburg Engine Arbitration"). I digress to explain that the Hamburg Engine Arbitration concerned two shipsets consisting of a 4-stroke diesel engine, a gearbox and propeller (collectively referred to as "the Hamburg Engines"). The Hamburg Engines were manufactured in Augsburg, Germany. In contrast, it is not disputed that 2-stroke engines in question were manufactured by the South Korean licensee, STX Engine.

22 The defendant nonetheless insisted that the entire Third Pleading and all related evidence should be admitted. This is despite having been given the opportunity by the Tribunal to identify, with appropriate explanations, the

portions of the Third Pleading and related evidence that complied with the Tribunal's earlier procedural directions. A few days before the Oral Hearing, the Tribunal, "conscious of the need to ensure the orderly, efficient, timely and cost-effective handling of the arbitration", undertook what was described as a time consuming exercise to identify "portions of the Third Pleading and related evidence that [could] be considered as responsive to the [Tribunal's directions on] Six Witness statements, and therefore admissible". The Tribunal also identified other portions that were "not responsive and must therefore be struck from the record". The outcome of the exercise is contained in Procedural Order 4 ("PO4") which, among other things, also explained why the Tribunal held that the defendant's new counterclaim was "in clear contravention of the [Tribunal's] directions in that it was not limited to rebutting the Six Witness Statements…".[1]

23 After 22 months since the commencement of the DIA Arbitration, the Oral Hearings took place in Copenhagen between 4 and 7 July 2016.

The DIA Final Award

24 The DIA Final Award was eventually rendered on 4 April 2017 and it comprised of a majority decision, and a dissenting opinion that dissented in part and concurred in part with the majority. Specifically, the majority and minority concurred on the matters set out in sections I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII including subsections XIII.A, XII.B, XII.B2 of the DIA Final Award.

25 The majority determined that the Engines Contract had been terminated by the plaintiff on the account of the defendant's refusal to take delivery of

[1] Plaintiff's Core Bundle ("PCB"), Tab 4, Award, para 77.

Engines 3 and 4 and to pay the outstanding price. It also determined that the Propellers Contract remained valid and binding.

26 The dissenting opinion related to subsection XII.B3 of the majority's decision. The minority's dissent on the merits concerned to the defendant's First Defence – that the defendant was fraudulently induced by the plaintiff to enter into the Contracts; the plaintiff's breach of the duty of good faith and loyalty in not disclosing the manipulation of fuel consumption tests (see [17(a) above]. As a result, the minority arbitrator declined to express an opinion on certain aspects of the DIA Final Award and explained that he "will not formulate any dispositive".[2]

27 The DIA Final Award contained the followings orders:

> (a) As to [the Plaintiff's] claims:
>
> (i) **Orders** [the Defendant] under the Engines Contract to pay to [the Plaintiff] EUR 630,780.00 in respect of lost profit [sic], plus interest at the rate of 8.05% p.a. from September 11, 2014 until final payment;
>
> (ii) **Orders** [the Defendant] under the Engines Contract to pay to [the Plaintiff] EUR 400,000.00, representing the portion of the down payment made by [the Plaintiff] that STX Engine Co. Ltd has declared it will not reimburse, plus interest at the rate of 8.05% p.a. from September 11, 2014 until final payment;
>
> (iii) **Dismisses** [the Plaintiff's] claims under the Engines Contract for lost licence fees and liquidated damages;

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2 PCB, Tab 4, Dissenting Opinion, pp 1–2.

(iv) **Dismisses** as inadmissible [the Plaintiff's] claims under the Engines Contract for the unrecovered portion, in excess of EUR 400,000.00, of the amount paid by [the Plaintiff] to STX Engine Co. Ltd in respect of Engines 3 and 4;

(v) **Orders** [the Defendant] under the Propellers Contract to take delivery of Propellers 3 and 4;

(vi) **Orders** [the Defendant] under the Propellers Contract to pay EUR 1,992,000.00, corresponding to the outstanding price to [the Plaintiff], plus interest at the rate of 8.05% p.a. from September 11, 2014 until final payment;

(vii) **Orders** [the Defendant] under Propellers Contract to pay to [the Plaintiff] DKK 184,507.81 in respect of storage costs until December 31, 2016, plus interest at the rate of 8.05% p.a. from January 1, 2017 until final payment, and DKK 2,336.00 per month from January 1, 2017 until the date of this Final Award;

(viii) **Dismisses** [the Plaintiff's] claims under the Propellers Contract for potential price increase of the components for Propellers 3 and 4, transportation costs and liquidated damages;

(b) As to [the Defendant's] counterclaims:

(i) **Dismisses** [the Defendant's] counterclaim for damages under the Engines Contract;

(ii) **Orders** [the Plaintiff] under the Engines Contract to repay [the Defendant] EUR 1,455,000.00, representing the down payment for Engines 3 and 4, plus interest at the rate of 8.05% p.a. as of April 27, 2015 until final payment;

(iii) **Dismisses** [the Defendant] counterclaim under the Propellers Contract for the restitution of the down payment for Propellers 3 and 4;

(c) **Declares** that each Party shall bear its own legal fees and other costs sustained in connection with this arbitration;

(d) **Declares** that each Party shall bear 50% of the costs of arbitration as determined by the Danish Institute of Arbitration; and

(e) **Dismisses** all other claims and defenses.

Post-award events

28 A dispute arose between the parties after the DIA Final Award was issued. The dispute was over the performance of the DIA Final Award in relation to the delivery of Propellers 3 and 4 and the defendant's payment obligations under the DIA Final Award. The plaintiff indicated in its post-hearing brief that it could deliver Propellers 3 and 4 "on short notice".[3] Shortly after the DIA Final Award was rendered, the plaintiff wrote to the defendant on 18 April 2017, requesting the payment of Propellers 3 and 4 and stated that the propellers would be "ready for delivery within approximately 14 weeks from receipt of payment".[4] The defendant, on the other hand, asserted that payment was to be concurrent with delivery and insisted that the propellers were to be delivered without any delay. There was subsequent discourse between the parties on various matters involving the delivery of the propellers. The defendant eventually treated the plaintiff's overall conduct as a failure to comply with the order in the DIA Final Award. This led to the defendant

3 PCB, Tab 6, Plaintiff's Post Hearing Brief, para 234.

4 Plaintiff's Bundle of Cause Papers ("PBCP") Vol 2, Tab 6, 2MS, Exhibit MS-9, p 60.

commencing a new of arbitration against the plaintiff in the Danish Institute of Arbitration on 9 June 2017 ("DIA E-2635").

29 The defendant's contentions in DIA E-2635 include the following:[5]

(a) in the light of the plaintiff's post-Award conduct, the defendant is entitled to terminate the Propellers Contract and is consequently under no obligation to take delivery and pay for Propellers 3 and 4 ("Dispute (a)"); and

(b) the defendant is also entitled to damages for the excessive wear and tear, and excessive fuel consumption of Engines 1 and 2 ("Dispute (b)").

30 After the *ex parte* Leave Order was obtained on 28 June 2017, the defendant on 30 June 2017 filed in the Danish Court an application to set aside in part the DIA Final Award that was decided in the plaintiff's favour. Both the arbitration in DIA E-2635 and the setting aside proceedings in the Danish Court are ongoing.

31 I digress from the narration of the chronology of events to mention that Dispute (b) is the same claim as the one the Tribunal did not permit the defendant to raise by way of a new counterclaim in the DIA Arbitration (*ie*, PO3) but the Tribunal had noted back then that its refusal was without prejudice to the defendant's right to bring the new claim elsewhere. Separately, Dispute (a) concerns a breach of the DIA Final Award, and for the defendant to mount such a complaint in DIA E-2635, there would have to be implicit acceptance of the DIA Final Award.

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5 PBCP Vol 1, Tab 5, 1JSH, Exhibit JSH-2, para 4.1.

SUM 3315 and SUM 5596

Comments on the alternative prayer in SUM 3315

32 As outlined in [3] above, the defendant is asking the court to refuse enforcement of the DIA Final Award by reason of s 31(2)(*c*) and s 31(4)(*b*) of the IAA. There is also an alternative prayer for a "stay and/or adjournment".

33 I propose to now deal with the way the alternative prayer has been framed. The primary prayer is to refuse enforcement of the DIA Final Award. The alternative prayer, as framed, seeks a "stay and/or adjournment" if the court decides that the grounds to refuse enforcement are not made out. Such an approach effectively ignores the language of s 31(5) of the IAA and gives no regard to the two-stage regime in the enforcement of a foreign award within the meaning of s 27 of the IAA. Each stage of the regime bears on the court's power to make certain orders under Order 69A of the Rules of Court and the IAA. I will elaborate on why a ruling under s 31(5)(*a*) for an adjournment has to be made prior to a decision on the application to refuse enforcement. Suffice to say for now that there is a distinction between the powers of a court at the enforcement stage and after entry of judgment (see [35] below).

34 Section 29(1) of the IAA sets out the regime on the recognition and enforcement of a foreign award in two ways: the award creditor may at his option by an action or by application for leave enforce the foreign award in the same manner as a judgment of the High Court. The plaintiff chose the second mode of enforcement. At the first stage of enforcement, a party seeking to enforce a foreign award obtains a leave order, *ex parte*, pursuant to s 29 read with s 19 of the IAA and O 69A r 6 of the Rules of Court. Once leave to enforce a foreign award is granted, the *ex parte* order has to be served on the award

debtor according to the relevant timelines set out in O 69A r 6(4). Notably, the *ex parte* Leave Order is not immediately enforceable; the foreign award cannot be enforced until the applicable period of time has expired. If the award debtor does not contest the matter, the *ex parte* Leave Order takes effect after expiry of the applicable time limit. However, if the award debtor applies to set aside the *ex parte* Leave Order within the time stipulated in the order (or extended timeline, if any), the foreign award may not be enforced until such application is finally resolved.

35 The second stage of the enforcement is played out until the application resisting enforcement is finally resolved. If the court rejects the challenge against the award, judgment on the foreign award would be entered. The stage at which judgment is entered in terms of the foreign award is at the conclusion of the second stage. Notably, there is a distinction between the powers of the court before allowing judgment to be entered on the foreign award (*ie*, second stage of the enforcement) on the one hand, and the powers of the court after entry of judgment and an application to stay an execution order on the other hand.

36 Section 31(5) of the IAA reads as follows:

> Where, in any proceedings in which the enforcement of a foreign award is sought by virtue of this Part, the court is satisfied that an application for the setting aside or for the suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made, the court may —
>
> (*a*) if the court considers it proper to do so, adjourn the proceedings or, as the case may be, so much of the proceedings as relates to the award; and
>
> (*b*) on application of the party seeking to enforce the award, order the other party to give suitable security.

37 The language in s 31(5) makes clear that an adjournment pursuant to this provision can only be made at the second stage of enforcement. The adjournment application is likely to be heard at the same time as the application to challenge the *ex parte* Leave Order (*ie*, where a court is asked to refuse enforcement of a foreign award under s 31 of the IAA). Significantly, after a judgment on the foreign award is affirmed, the enforcing court has no power to adjourn under s 31(5)(*a*). After entry of judgment, the judgment is much like any other judgment rendered by the court and the plaintiff would seek an execution order. The other party seeking a stay of the execution order would have to turn to the procedural principles of stay of execution of a civil judgment.

38 The English High Court decision of *H & C S Holdings Pte Limited v RBRG Trading (UK) Limited* [2015] EWHC 1665 ("*H & C S Holdings*") is helpful. The court there was faced with an application to stay execution of a judgment enforcing an award pending determination of a new arbitration claim. The court observed that there is a distinction drawn between the powers of a court at the enforcement stage and after entry of judgment (at [8]):

> [t]he distinction drawn … between the restrictions on the court refusing to make an order for enforcement on the one hand and a regime for enforcement after entry of judgment on the other hand appears clear and entirely logical and none of the authorities or other materials to which [counsel] has referred [to], in my judgment, undermine that clear distinction.

In arriving at this conclusion, the court accepted Potter J's reasoning in *Far Eastern Shipping Company v Sovcomflot* [1995] 1 Lloyd's Rep 520 at 524 that upon converting an award into a judgment, procedural rules appertaining to the enforcement of judgments ought to apply. It was clear to Potter J that the statutory provision on adjournment in the Arbitration Act 1975 (equivalent to

section 31(5)(*a*) of the IAA) was not intended to deal with matters post-entry of judgment.

39 The court in *H & C S Holdings* further noted that the approach of Potter J was followed in *Continental Transfer Technique Limited v The Federal Government of Nigeria* [2010] EWHC 780 at [14] where it was stated:

> Given that a judgment has already been entered in terms of the award pursuant to section 103(3) of the 1996 Act and CTTL is now seeking to enforce that judgment, the relevant discretion is that which can be invoked to stay enforcement of any judgment of the court, namely that provided by RSC Order 47 Rule 1(1), which is not yet replaced by an equivalent provision in the CPR.

40 These English decisions fortify my conclusion that it is not correct to frame the application for an adjournment in the manner worded by the defendant. That said, in the present case, the court asked Mr Teh to deal with question of adjournment first. Whilst the *circumstances* in which proceedings for the enforcement of a foreign award may be adjourned is different from the *grounds* on which enforcement may be refused, the defendant's claim that it has a strong case in the setting aside proceedings in the Danish Court to warrant an adjournment of the enforcement proceedings is likely to overlap the grounds which are being relied upon to refuse enforcement here. Thus, in considering the issue of adjournment in this case first, the court ends up hearing counsel's arguments that form the grounds upon which the refusal of enforcement is sought.

41 Nonetheless the main question for this court is whether or not to adjourn pending the decision of the Danish Court. If so, whether or not to order the defendant to give security, and how much.

Section 31(5) of the IAA

The approach in Singapore

42 The defendant wishes to set aside the DIA Final Award in Denmark, and if it fails in the challenge, to then resist the grant of leave to enforce the DIA Final Award in Singapore. In the meantime, an adjournment of the enforcement proceedings in Singapore is needed to await the outcome of the setting aside application in the seat-court. The parallel proceedings surface the perennial tension between the notion of finality of an international arbitral award (derived from one of the fundamental principles of international arbitration), and the two remedies available to an award debtor (*ie*, to set aside a foreign award and resist enforcement of the foreign award). As with such matters, the concern most often voiced is the award debtor's deployment of any one or both of the two remedies as purely a delaying tactic when there is no valid reason to challenge the foreign award in the seat-court or to resist enforcement of the same in other jurisdictions. Recognising the tension between promoting the enforceability of foreign arbitral awards and preserving judicial oversight of the award by the curial court, the compromise embodied in Article VI of the New York Convention 1958 ("the Convention") (see Second Schedule of the IAA) leaves it to the enforcing court to decide whether or not to adjourn enforcement proceedings.

43 Article VI of the Convention which is given statutory effect by s 31(5) of the IAA, states as follows:

> If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V(1)(*e*), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the

> application of the party claiming enforcement of the award, order the other party to give suitable security.

44 The commentary on Article VI in the *Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Award* (United Nations, 2016) at p 264) ("*2016 Guide*") is apposite:

> 1. Article VI of the Convention addresses the situation where a party seeks to set aside an award in the country where it was issued, while the other party seeks to enforce it elsewhere.
>
> 2. In this context of parallel proceedings, article VI achieves a compromise between the two equally legitimate concerns of promoting the enforceability of foreign arbitral awards and preserving judicial oversight over awards by granting courts of Contracting States the freedom to decide whether or not to adjourn enforcement proceedings.
>
> 3. … In turning their minds to these issues, the drafters of the Convention sought to ensure that a party wishing to frustrate the enforcement of an award could not circumvent the Convention by simply initiating proceedings to set aside or suspend the award, while at the same time limiting the risk that an enforced award would be subsequently set aside in the country in which it was made.
>
> 4. As explained by Mr. de Sydow, Chairman of Working Party No 3 that drafted article VI: '[T]he Working Party recommended the adoption of that article in order to permit the enforcement authority to adjourn its decision if it was satisfied that an application for annulment of the award or for its suspension was made for a good reason in the country where the award was given. At the same time, to prevent an abuse of that provision by the losing party which may have started annulment proceedings without a valid reason purely to delay or frustrate the enforcement of the award, the enforcement authority should in such a case have the right to either enforce the award forthwith or to adjourn its enforcement only on the condition that the party opposing enforcement deposits a suitable security.'

45 I have already set out the text of s 31(5) in [36] above. The powers of the court to adjourn the enforcement proceedings and to order security on an application of the award creditor (in this case SUM 5596) reside in s 31(5)(*a*)

and (*b*), respectively (see generally, *Dardana Ltd v Yukos Oil Company* [2002] 2 Lloyd's Rep 326 ("*Dardana*")). Furthermore, the use of the word "may" in the context of s 31(5)(*a*) and (*b*) of the IAA is permissive – the court may adjourn an application to refuse the enforcement proceedings with or without ordering security to be furnished (see David Joseph QC and David Foxton QC, *Singapore International Arbitration: Law & Practice* (LexisNexis, 2014) at p 493). The permissive nature of s 31(5) to adjourn enforcement proceedings is repeated in s 31(5)(*a*) as gathered from the words: "if the court considers it proper to do so …"; and by these words the wide statutory discretion of the court is plain. It is also clear that under s 31(5)(*a*), the court may allow adjournment of the enforcement proceedings in full or in part. It is pertinent to note that s 31(5) is silent on the test or standard to be satisfied on what amounts to a proper case for adjournment. This absence of a statutory prescribed test is in keeping with Article VI. As the commentary in the *2016 Guide* on Article VI explains (at p 271):

> 24. The Convention does not provide any standard by which a court should decide whether to stay enforcement proceedings, thereby leaving courts in the Contracting States to use their discretion.

46 Consequently, a decision for or against the grant of an adjournment of the enforcement proceedings is a matter of discretion for the enforcing court. As stated, the enforcing court faced with a s 31(5)(*a*) application is concerned with the *circumstances* in which proceedings for the enforcement of a foreign award may be adjourned. The court takes a multi-factorial approach to the exercise of its discretion and it is not possible to comprehensively list all the factors to be considered. In keeping with the wide discretion conferred by s 31(5)(*a*) and its open-textured nature, the enforcing court would have to weigh in the balance factors of the case in favour of or against adjournment. In

deciding where to strike a fair balance, the court will come down on the side of an outcome that is the most just or least unjust.

47 It is incumbent on the applicant to justify his application for an adjournment of the enforcement proceedings; the applicant must at least show, from the strength of his arguments, that he is demonstrably pursuing a meritorious application in the seat-court. The reason for the enforcing court's inquiry into the prospective merits of the setting aside application before the seat-court is to be satisfied that the setting aside application is made in good faith and is not devoid of a properly arguable basis. This is to guard against attempts at frustrating or delaying the enforcement of a binding foreign award. At this stage of inquiry, the enforcing court would not engage in a detailed assessment of the facts or legal argument of the setting aside proceedings. Typically, it may appear to the enforcing court at the outset or after hearing, on the strength of some of the rival arguments on the setting aside application, that one or the other side is bound to succeed. The closer the case appears to one or the other of these extremes, the less likely it is that a grant or refusal of an adjournment will represent an injustice to the other. Therefore, if the setting aside application is lacking in merits, there would be little or no tangible prejudice to the award debtor if his application for an adjournment is refused. In other words, prejudice is a much less important feature of the balancing exercise. From this perspective, prejudice (or for that matter the concept of convenience) are features that may feed into the assessment of what justice requires in the exercise of discretion. Another factor or circumstance the enforcing court is concerned with is the likely consequences of an adjournment, in particular its likely length of delay. This factor will dovetail with a s 31(5)(*b*) application.

48 SUM 5596 is the defendant's cross-application for security under s 31(5)(*b*). The enforcing court will have to consider the additional question of granting security and the quantum thereof. Security is viewed "as the price" of an adjournment; adopting the language of Lord Mance in *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2017] 1 WLR 970 at [28] ("*IPCO (SC)*"). In this cross-application, the enforcing court will take into account the length of delay an adjournment would cause as this may have a consequential prejudicial effect on the award creditor as assets amenable to enforcement may diminish or be transferred out of the jurisdiction.

49 The parties said that there are no local decisions on s 31(5) and the plaintiff has urged this court to take guidance from English authorities. This is a valid point since s 31(5) is similar to s 103(5) of the English Arbitration Act 1996 (and its other iterations). Indeed, the English authorities do mention some of the factors referred above in exercise of discretion to adjourn and in determining whether to make an order for security. In this regard, the English cases show a number of variant factors and the following conclusions can be drawn:

(a) Whether the application to set aside before the seat-court is *bona fide* and not simply a way of delaying tactics.

(b) The enforcing court would consider the length of adjournment, the likely consequences occasioned by an adjournment and any resulting prejudice.

(c) Lastly, the factors to be considered cannot be comprehensively stated as much depends upon the circumstances of each case.

50 The English cases have also tended to consider the issue of adjournment and the provision of security together. The oft-cited decision is the case of *Soleh Boneh International Ltd and anor v Government of the Republic of Uganda and National Housing Corporation* [1993] 2 Lloyd's Rep 208 ("*Soleh Boneh*") where Staughton LJ, in the context of an application for security, laid down the following guidelines at 212:

> In my judgment two important factors must be considered on such an application, although I do not mean to say that there may to be others. The first is *the strength of the argument that the award is invalid, as perceived on a brief consideration by the Court which is asked to enforce the award while proceedings to set it aside are pending elsewhere*. If the award is manifestly invalid, there should be an adjournment and no order for security; if it is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security. In between there will be various degrees of plausibility in the argument for invalidity; and the Judge must be guided by his preliminary conclusion on the point.
>
> The second point is that the Court must consider the *ease or difficulty of enforcement of the award*, and whether it will be rendered more difficult, for example, by movement of assets or improvident trading, if enforcement is delayed. If that likely to occur, the case for security is stronger; if, on the other hand, there are and always will be insufficient assets within the jurisdiction, the case for security must necessarily be weakened.
>
> [emphasis added]

51 Staughton LJ considered two factors to be important and he rightly cautioned that there may be others. The first factor is the strength of *the argument* that the award is invalid, as perceived on a brief consideration by the enforcing court. The second factor is the ease or difficulty of enforcement of the award.

52 In examining the first factor, Staughton LJ began by stating that "[w]hat [the court is] not asked to do is to decide the point … here and now" and so

"must be careful to express no opinion on it" (at 210). He then went on to find that one of the principal grounds put forward in the case for maintaining that the award is invalid was "seriously arguable, although in a short compass". The invalidity of the award was seriously arguable from "the very fact that two such eminent teachers of commercial law [took] opposite views" on the matter (at 210).

53 In relation to the second factor, Staughton LJ noted that while there was little evidence on the assets of the party against whom enforcement is sought (or how long the assets are likely to remain in jurisdiction for that matter), "it cannot … be said that further delay will definitely not prejudice the enforceability of the award … as would be the case of a substantial company carrying on business in this country". In such circumstances, "the right course … would be to order security in a significant sum" (at 212–213).

54 In *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2005] 2 Lloyd's Rep 326 ("*IPCO (2005 HC)*"), Gross J at [15] stated:

> … the Act does not furnish a threshold test in respect of the grant of an adjournment and the power to order the provision of security in the exercise of the court's discretion under s.103(5). In my judgment, it would be wrong to read a fetter into this understandably wide discretion (echoing, as it does, Art. VI of the New York Convention). Ordinarily, a number of considerations are likely to be relevant: (i) whether the application before the court in the country of origin is brought *bona fide* and not simply by way of delaying tactics; (ii) whether the application before the court in the country of origin has at least a real (i.e., realistic) prospect of success (the test in this jurisdiction for resisting summary judgment); (iii) the extent of the delay occasioned by an adjournment and resulting prejudice. Beyond such matters, it is probably unwise to generalise; all must depend on the circumstances of the individual case. As it seems to me, *the right approach is that of a sliding scale*, in any event embodied in the decision of the

> Court of Appeal in [*Soleh Boneh*] in the context of the question of security …
>
> [emphasis added]

55 Notably, Gross J observed that the English Arbitration Act furnishes no threshold test in respect of the grant of an adjournment and the power to order security. Gross J also characterised the approach to an application for adjournment (or security) as that of a sliding scale as between manifest validity and manifest invalidity of the foreign award.

56 While Gross J uses the terminology "real prospect of success" (the English test in this jurisdiction for resisting summary judgment) to evaluate the strength of the arguments in relation to the setting aside application, it must be remembered that the strength of the argument is put forward as a *circumstance* in which proceedings for the enforcement of a foreign award may be adjourned. Viewed as such, "real prospect of success" is simply a means to find out where in the sliding scale the strength of the grounds of challenge to the validity of the award is before the seat-court. If the grounds are unfounded, the challenge would be viewed to be at the bottom of the sliding scale in terms of prospect of success. As such, the award cannot be considered to be manifestly invalid. What this approach also testifies to is the possibility that "real prospect of success" as a test will have to be applied differently depending on the nature of the particular issues and where each side has points that require the court, at that stage, to take a view as to who appears to have the better, or much better, argument. This observation is borne out by Gross J's approach when dealing with the various impugned sums awarded by the tribunal where the judge, having examined the strength of the arguments in relation each of the sums, could not come to a position that the award was manifestly valid or invalid (at [52(ii)]). On the facts the judge had to eventually resort to "practical justice" and he concluded that

practical justice would best be done by adjourning the enforcement of the order on terms, *inter alia*, requiring Nigerian National Petroleum Corp to pay the US$13 million indisputably due to IPCO (Nigeria) Ltd and to provide appropriate security in London (at [53]).

57 The factual situation in that Nigerian case developed over time since the matter was before Gross J, and different issues proceeded to the UK Supreme Court in *IPCO (SC)*. As such, it was not necessary for the Supreme Court to review Gross J's list of factors and the approach he adopted to the application of the factors.

58 The guidelines in *Soleh Boneh* and *IPCO (2005 HC)* have since been followed in subsequent cases: see *Dowans Holding SA and another v Tanzania Electric Supply Co Ltd* [2012] 1 All ER 820 at [42]; *Travis Coal Restructured Holdings LLC v Essar Global Fund Ltd* [2014] 2 Lloyd's Rep 494 at [32]–[35] ("*Travis Coal*"); *Anatolie Stati, Gabriel Stati, Ascom Group S.A., Terra Raf Trans Traiding Ltd. v The Republic of Kazakhstan* [2015] EWHC 2542.

59 In the course of the arguments, Mr Teh, submitted that if the enforcing court, in considering the *bona fides* of the setting aside application in the seat-court, forms the view that any of the grounds relied upon raises a serious issue to be tried, the court should lean in favour of an adjournment. On another occasion, Mr Teh submitted that the court's scrutiny of a party's setting aside application should be akin to a review of a summary judgment according to the English standard. The phrase "a serious issue to be tried" was taken from some Canadian authorities but as the review below shows, the approach to the question of adjournment is not settled there.

60 The decisions in Canada on the question of adjournment and security traces back to the case of *Europcar Italia S.p.A. v Alba Tours International Inc.* [1997] OJ No 133 ("*Europcar*"), which considered the Article VI equivalent of Article 36 of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"). The court there considered the cases decided under Rule 63.02 of the Rules of Civil Procedure in Ontario (which provides for stay pending appeal) to be relevant and referenced the three-part test espoused in *RJR - MacDonald Inc. v Canada (Attorney General*) [1994] 1 SCR 311 ("*RJR – MacDonald Inc*") for the purposes of an adjournment application pending the setting aside proceedings in the seat-court (at [22]). It should be noted that the three-part test—*ie*, involving considerations of (a) a serious issue to be tried; (b) balance of convenience; and (c) irreparable harm—is the commonly understood test for injunctive relief. Its adoption here is probably because under Canadian law, the principles governing stay applications and injunctions are generally the same (see generally *RJR – MacDonald Inc*).

61 A later decision by the Supreme Court of British Columbia, *Powerex Corp (formerly British Columbia Power Exchange Corporation) v Alcan Inc (formerly Alcan Aluminium Limited)* (2004) BCSC 876 ("*Powerex Corp*"), adopted the three-part test in *Europcar* and appeared to take the view that the "serious issue to be tried" requirement is a threshold test (at [18]–[26]). In the most recent case of *Empresa Minera Los Quenuales S.A.* v *Vena Resources Inc* [2015] ONSC 4408 ("*Empresa*"), the court was invited to apply the three-part test but declined to do so; adopting instead, a refined approach where the court determines: (a) if there is *an issue* to be tried (as opposed to a "serious issue"); and (b) the balance of convenience of the parties (at [12]–[32]).

62 Given the 2015 decision, the application of a threshold test to evaluate the setting aside proceedings in the seat-court, in the context of an application for an adjournment pending the outcome of the setting aside proceedings, is not settled in Canada. For the reasons stated in [56] above, the adoption of a threshold test is unsatisfactory or unhelpful. It is worthwhile reiterating here that s 31(5)(*a*) does not furnish a threshold test in respect of a grant of an adjournment. As explained earlier in [46]–[47] above, the Singapore approach to an application under s 31(5)(*a*) is to strike a balance between the competing interests and the court will come down on the side of an outcome that is the most just or least unjust. Without the need for lengthy arguments, an experienced commercial court judge would be in a good positon to gauge where the balance is to be struck. That said, the absence or presence of certain factors to be considered would have a bearing on the exercise of the court's discretion and previous decisions of the courts in England and Canada are essentially illustrations of exercises of discretion in different circumstances.

Discussion on an adjournment of the enforcement proceedings under s 31(5)(a) of the IAA

63 I now come to examine the *circumstances* in which proceedings for the enforcement of a foreign award may be adjourned. The factors raised by the defendant in favour of an adjournment are as follows:

(a) The defendant has a strong case in the setting aside proceedings before the Danish Court. An immediate enforcement of the DIA Award would pre-empt the decision of the seat-court.

(b) The setting aside proceedings before the Danish Court will be disposed within a relatively short period of time.

(c) No prejudice to the plaintiff if an adjournment were granted as there are no assets in the jurisdiction amenable to enforcement. In contrast, a refusal to grant adjournment would be prejudicial to the defendant. Apart from there being no assets in the jurisdiction, the defendant is not in a position to furnish security as the defendant's main asset is contingent on the success in the claims that the defendant has against the plaintiff and its related companies.

The setting aside application before the seat-court

64 The defendant's application to set aside the DIA Final Award rests on three grounds: (a) the defendant was unable to present its full case; (b) the Tribunal had violated the parties' agreed procedure; and (c) the DIA Final Award is contrary to the public policy of Denmark. The plaintiff opposes the adjournment application explaining that there are real reasons for concern that the defendant is engaged in nothing more than delaying tactics given the validity of the DIA Final Award.

65 Generally, the court's inquiry as to whether there is good reason for the award debtor bringing a challenge in the seat-court is guided by the judge's preliminary evaluation and conclusion on the point. Hence, the evaluation of the strength of the argument that the foreign award is valid or invalid is "perceived on a brief consideration by the enforcing court" (*per* Staughton LJ in *Soleh Boneh* at 212). Furthermore, while there is no expressed requirement for a party to adduce expert opinion on foreign law in a s 31(5)(*a*) application where foreign law is involved (as in this present case*, ie*, Danish law is involved as

regards the setting aside application), it is preferable to adduce expert evidence since the court needs sufficient information on the foreign law in question to be in a position to assess the strength or otherwise of the arguments of the challenge before the seat-court. However, lengthy arguments about foreign law should be avoided if possible on such an application (see *Travis Coal* at [35]).

66 While Denmark, like Singapore, adopts the Model Law, it does not follow that this court can adequately assess the strength of the grounds invoked by the defendant in its setting aside application without some assistance of an expert opinion. This has to be so where the grounds relied upon are subject to domestic considerations of the seat-court. This is especially in the present case since the public policy of Denmark is one of the grounds the defendant is relying upon in its setting aside application.

67 In *Soleh Boneh* foreign law was treated as a question of fact. The position is the same in Singapore (*Pacific Recreation Pte Ltd v S Y Technology Inc and another Appeal* [2008] 2 SLR(R) 491 at [54] ("*Pacific Recreation*"). While the court may admit raw sources of foreign law such as legal codes (see section 40 of the Evidence Act (Cap 97, 1997 Rev Ed)), it would be prudent to have an expert assist the court in the interpretation and application the foreign statute. This is because simple words may have been subjected to judicial interpretation (see *Pacific Recreation* at [60]). Here, the defendant adduced raw sources of Danish law in Mr Jimmy Skjøld Hansen's ("Mr Hansen") affidavits: the Danish Arbitration Act of 2005, as exhibited in Mr Hansen's 1st Affidavit, and the Rules of Arbitration Procedure of the Danish Institute Arbitration, as exhibited in Mr Hansen's 2nd Affidavit. Mr Hansen was the defendant's counsel in the DIA Arbitration and is not proffering evidence as an expert witness in the affidavits filed in these proceedings. Mr Hansen's affidavits

"comprise facts and events, that [his law firm] has come to know".[6] Absent any expert opinion, the defendant is constrained in persuading me on the strength of its challenge before the seat-court. Indeed, picking up on this evidential shortcoming, Mr Ong in his written submissions stated that the defendant had not adduced any evidence demonstrating its chances of succeeding in the annulment of the DIA Final Award before the Danish Court.

68 During the hearing, Mr Teh made an oral application for leave to adduce expert evidence. Mr Ong objected to Mr Teh's late application. He pointed out that the present applications were made in July 2017, and the defendant has had more than ample time to file the relevant expert opinion if it had wanted to do so. While the defendant was minded to provide an expert opinion for SUM 3315 on the documentary requirements relating to the production, certification and delivery of Propellers 3 and 4, the defendant chose not to submit expert opinion on Danish law on the viability of the grounds to set aside the DIA Final Award. It is for these reasons that the defendant's application to submit an expert opinion on foreign law at a very late stage was refused.

69 Mr Teh then invited the court to assess the setting aside application against international standards as opposed to the law of the arbitral seat. This proposition is dubious. I make two points. First, as can be seen from the authorities cited by the parties, evidence of foreign law (*ie*, the law of the seat) was put before the enforcing court dealing with the equivalent of a s 31(5)(*a*) application. Second, as a matter of principle, the law of the seat is relevant in the setting aside proceedings. It has not been explained how and under what circumstances, if any, can international standards take over the law of the seat

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6 PBCP Vol 1, Tab 5, 1JSH, para 2; PBCP Vol 3, Tab 7, 2JSH, para 2.

in a setting aside application. And it has not been articulated as to what the internationally accepted norms representing minimum standards are.

70 Whilst maintaining the stance that the defendant has not even established that its case has any merits at all, Mr Ong accepts that the grounds raised in the setting aside application under Danish law are likely similar to, or premised on, those under Article 34 of Model Law, and since the general principles on Article 34 are well known, he is nevertheless content for this court to take guidance from cases where such principles have been applied in evaluating the merits of the setting aside application. In this regard, Mr Ong has in mind common principles on case management discretion including the duty of the arbitral tribunal to progress an arbitration without unnecessary cost and delay.

71 The three grounds relied upon by the defendant in the setting aside application set out in Mr Hansen's affidavit are as follows: [7]

> The *Defendant was precluded from presenting its case*: As mentioned, the Defendant was precluded from presenting its case in numerous ways, including namely in relation to the two key aspects of over-consumption of fuel on the Plaintiff's four stroke and two stroke engines and manipulation of FATs in order to cover this up, and this must result in the [DIA Final Award] being set aside pursuant to Section 37(2)(1)(b) of the Danish Arbitration Act regarding the right to due process [which reflects Article 34(2)(*a*)(ii) of the Model Law].
>
> The *Tribunal violated its mandate* (violated the arbitration agreement): *As a result of the Defendant being precluded/prevented from presenting its case* in relation to the mentioned issues and other aspects, the Tribunal clearly violated the procedural rules laid down in the Rules of Arbitration Procedure of the Danish Institute of Arbitration, which resulted in violation of the arbitration agreement and thereby the mandate of the Tribunal … Accordingly, the [DIA

[7] PBCP Vol 1, Tab 5, 1JSH, para 54.

> Final Award] must be set aside pursuant to Section 37(2)(1)(d) of the Danish Arbitration Act [which reflects Article 34(2)(*a*)(iv) of the Model Law].
>
> The [*Award] is evidently contrary to public policy*: Under an overall *evaluation of the Tribunal's management of the arbitral process*, the [DIA Final Award] must be set aside pursuant to Section 37(2)(2)(b) of the Danish Arbitration Act [which reflects Article 34(2)(*b*)(ii) of the Model Law] …
>
> [emphasis added]

72 The substance of the defendant's complains in all three grounds for setting aside the DIA Final Award in the Danish Court stem from the Tribunal's decision in PO3 to disallow the defendant's new counterclaim and its related evidence. This was a point that Mr Teh candidly accepted in the hearing before me. Broadly, the first two grounds in Mr Hansen's affidavit are based on same facts and they overlap. In short, the complaint about PO3 is about the failings of due process in the arbitration procedure by the Tribunal and as such, the defendant has accordingly been denied a reasonable opportunity to present its full case. The allegation that the Tribunal had violated the procedural rules in the Rules of Arbitration Procedure of the Danish Institute of Arbitration by preventing the presentation of its case relating to the fuel consumption issue is also directed at PO3.

73 As stated, the DIA Final Award detailed PO3 and explained the Tribunal's reasons for excluding the defendant's attempt to bring in, at almost the eleventh hour, a new counterclaim for damages due to excessive fuel consumption of Engines 1 and 2. In support of its new counterclaim for the excessive fuel consumption relating to the Engines 1 and 2, the defendant sought disclosure of documents relating to the plaintiff's internal investigations on the manipulation of fuel consumption tests for the 4-stroke engines and further, wanted to adduce an expert report to show that the plaintiff had manipulated the

fuel consumption tests of its 2-stroke engines. The principal complaint of the defendant in the setting aside application related to the aforementioned exclusions.

74 Fuel manipulation in relation to the 4-stroke engines was raised throughout the DIA Arbitration but the defendant waited until 10 June 2016 to introduce new claims by extending the allegation of excessive fuel consumption to the 2-stroke Engines 1 and 2. The defendant also sought a postponement of the Oral Hearing which was scheduled for the period between 4 and 7 July 2016. The Tribunal felt it necessary to devote six pages of the DIA Final Award explaining why it disallowed the new counterclaim, and why additional material and accompanying requests were rejected for irrelevance:[8]

> After submitting the Third Pleading, [the defendant] requested postponement of the Oral Hearing, invoking prudence and '*safe case management*'. It also objected to the striking from the record of the Third Pleading, which in its view would violate its right to be heard and due process, claiming its entitlement – as Respondent – to have the last word. Thereafter it '*strongly disagree[d]*' with the Tribunal's decision in PO3 to strike out Section 2 of the Third Pleading [containing the new counterclaim] (and the related evidence), which it alleged to be '*alien to arbitration proceedings conducted under the Danish Arbitration Act and Danish arbitration practice, and in obvious violation of the right to be heard and to present its case in full (due process).*
>
> …
>
> At the end of the proceedings [the defendant] complained about the '*material evidence left out*' and in particular striking from the record of the Third Pleading and the rejection of the document production request No. 9 … and reiterated '*its previous reservation about the conduct of this arbitration and the limitations placed on* [*the* defendant] *in presenting its case*' and claimed that it was not given an opportunity to comment …
>
> Although these issues were exhaustively addressed by the Arbitral Tribunal as and when they arose, given the

[8] PCB, Tab 4, Award, paras 219, 221–224, 228.

> [defendant's] insistence on them throughout the proceedings until the very end, the following considerations are in order.
>
> It is well established, but worth evoking, that absent party agreement, arbitral tribunals have the power to conduct the proceedings as they see fit, having regard to the circumstances and subject only to due process and the right to be heard. This principle is codified in Sections 18 and 19(2) of the Danish Arbitration Act and Article 18(1)-(2) of the DIA Rules. It is equally well understood that due process and the right to be heard ***cannot be interpreted as requiring arbitrators to countenance whatever request of the Parties, and that exchanges of submissions cannot go on forever. Arbitral tribunals have the duty to ensure speedy, efficient and cost effective resolution of the dispute, as unequivocally set out in Article 18(1) of the DIA rules.***
>
> As explained in the relevant [Procedural Orders], these principles, recalled several times during the proceedings by the Arbitral Tribunal, formed the basis of its decisions on the Parties', and particularly [the defendant's], procedural motions, including those rejecting the postponement of the date of the Oral Hearing, the untimely submission of evidence and the rejection of untimely new claims from both Parties. It is worth recalling that the procedural calendar and rules, including the rules on submission of evidence, were laid down at the outset in PO1 after consultation with the Parties … ***The Arbitral Tribunal could not, however, be expected to uphold all such requests, many of which were in flagrant disregard of the agreed rules and deadlines.*** … the Arbitral Tribunal does not believe that 'Danish Practice' favours granting [the defendant's] requests in the particular circumstances of this case, because to do so would have ***unduly disrupted or prolonged the proceedings***. Even if, however, that were the case, the Arbitral Tribunal would not be bound by it, give then arbitrators' overriding discretion …
>
> …
>
> … Here it suffices to recall that the Third Pleading was a full-fledged and unauthorized brief filed in violation of the Arbitral Tribunal's unequivocal instructions that, in light of the procedural calendar and of the rules governing the pleadings, that submission should be '*strictly limited*' to discussing the six witness statements submitted by [the plaintiff] … the Third Pleading contained arguments going beyond the 'strict limitation' foreseen in the relevant [Procedural Orders] and, what is more, ***sought to broaden the scope of the dispute – and that, less than a month before the Oral Hearing – by introducing a new and untimely, and moreover partially***

> ***unsubstantiated and unquantified, counterclaim for the excessive fuel consumption of Ships 1 and 2***.
>
> [emphasis added in bold italics]

75 It is a well-accepted principle of arbitration that a tribunal is master of its own procedure and has wide discretionary powers to conduct the arbitration in any way it sees fit. This, of course, is subject to the proviso that the Tribunal exercises its discretion within the procedure agreed to by the parties in a manner is neither manifestly unfair nor contrary to natural justice (see Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) ("*International Commercial Arbitration*") at pp 3232–3244). The author of *International Commercial Arbitration* also noted that it is within the substantial discretion of an arbitral tribunal under its case management powers to disallow new claims, or refuse to admit evidence, oral and documentary, and refuse to order disclosure of documents. There is also the obligation of the arbitral tribunal to progress the arbitration without unnecessary cost and delay.

76 In my view, the defendant has not shown that the Tribunal had acted beyond the bounds of its discretion. As I have highlighted above, the new counterclaim and its related evidence were filed on 10 June 2016 and the Oral Hearing was scheduled for the period 4 to 7 July 2016. The lateness of the application must be viewed against the backdrop of an already drawn out arbitration that was commenced in 2014.

77 Furthermore, the Tribunal said that the defendant's new counterclaim and its related evidence were introduced in violation of the Tribunal's earlier directions. However, in the Third Pleading, there were some parts that the Tribunal had declared admissible as they were responsive to the witness statements submitted by the plaintiff along with the plaintiff's rejoinder. In

respect of some evidence, other additional materials that went beyond the Tribunal's direction were disallowed.

78 The defendant has not shown how the Tribunal's rejection of the defendant's additional material was a denial of procedural justice. Without more, the Tribunal's procedural decision cannot be assailed as this falls squarely within the Tribunal's discretion (see *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR(R) 871 at [55]).

79 Mr Teh seeks to persuade this court that the Tribunal's procedural ruling had the effect of reducing the scope of the defendant's case and undermined the defendant's First Defence (see [17(a)] above). In other words, the defendant was left to argue a partial case. He sought to demonstrate this by contrasting between the dissenting opinion and the majority decision; a contrast which he said is like "night and day". To him, the dissenting opinion shows that the excluded evidence would have provided a complete picture of the defendant's case and turned the tables in its favour.

80 In its First Defence, the defendant contended that it was fraudulently induced by the plaintiff to enter into the Contracts as the plaintiff had failed to disclose its manipulation of fuel consumption tests pursuant to its duty of good faith and loyalty. In considering the defendant's contention under section 30 of the Danish Contracts Act, the majority at para 291 of the DIA Final Award explained that the First Defence must fail because:[9]

> The Majority cannot accept the proposition that [the defendant's] consent was obtained by fraud, or even simply that there was a misrepresentation at the time of the conclusion of the Contracts. [The defendant] completely overlooks the

9 PCB, Tab 4, Award, para 293.

> fundamental and undisputed fact that, at that moment, [the defendant's] contracting party was not [the plaintiff], but, as indicated above …, its Danish subsidiary, MAN Denmark, which was a distinct legal entity from [the plaintiff]. There has been no allegation that MAN Denmark was in any way involved in the alleged manipulations of the FATs, nor is there evidence that it had knowledge of such actions. Even if it were established that [the plaintiff] was aware of the manipulations of the FATs at the time, that cannot *per se* translate into knowledge of those manipulations by MAN Denmark. There are therefore no elements supporting the conjecture that MAN Denmark committed any fraud or made any misrepresentation or withheld information or otherwise acted in bad faith or committed a breach of trust in its relations with [the defendant]. This conclusion is unaffected by the subsequent merger between the two entities, which cannot have any impact on the validity of the contract concluded before the merger.
>
> …
>
> Moreover, even were one to assume, for the sake of argument, that the behaviour of [the plaintiff], as opposed to MAN Denmark, could have any relevance in this context, there is no evidence that [the plaintiff] itself, or at least its Executive Board, had knowledge of the fraud at the time of the conclusion of the Contracts, which is the relevant time for a plea of nullity of the Contracts. [The defendant] provided no explanation as to the factual or legal grounds based upon which any knowledge that might have existed somewhere within [the plaintiff] would be imputable to [the plaintiff's] Executive Board, or [the plaintiff] as a legal entity, under the law governing the functioning of [the plaintiff] and its organs, it presents any evidence in this regard [*sic*].

81 In making his point, Mr Teh referred me to the following portions of the dissenting opinion:[10]

> It is truly next to unbelievable that [the plaintiff] – who during a long period had performed internal investigations regarding the manipulation and also presented such information in respect of the proceedings in the Ausburg-case –is [*sic*] not in the position to provide more specific information regarding the manipulations.

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10 PCB, Tab 4, Dissenting Opinion, p 21.

> It is not to be disregarded, that [the plaintiff] itself is the only party that should be in the possession of specific information on this subject, resulting from the simple fact that the manipulations were carried out by [the plaintiff] itself. [The plaintiff] is for that reason the party that has the nearest and closest access to those evidences [*sic*].
>
> Based on the fact that the manipulation, doubtless, was planned and executed by [the plaintiff], the burden of proof that the Executive Board of [the plaintiff] did not have knowledge of the manipulation in 2007 when the two-stroke Contracts were concluded is, in the opinion of this arbitrator, no doubt, on the party of [the plaintiff].
>
> In the opinion of this arbitrator it is difficult to understand that the Majority is basing its reasoning on the fact that [the plaintiff] did not present any evidences [*sic*] in regard of [the plaintiff's] knowledge, thereby placing the burden of proof on [the defendant] (section 293).
>
> In respect of the assessment of the evidences [*sic*] it should be noted that [the plaintiff] has never provided the actual fuel consumption values for the other two propulsion systems [also known as shipsets] delivered to [the defendant] for which [the plaintiff] has admitted '*irregularities*', see above, or provided any other information about the manipulations.

Mr Teh said that the above passages demonstrate that PO3 had reduced the scope of the defendant's case and thus effectively precluded the defendant from presenting its full case.

82 I do not read the dissenting opinion as a critique on the majority's decision to disallow evidence related to the new counterclaim. The passages cited by Mr Teh merely show that the minority had disagreed with the majority on whose burden it was to prove knowledge of the alleged fuel manipulation (or the lack thereof). This is essentially a disagreement of legal and evidential burden of proof. In this context, it is widely accepted that due deference must be given to a tribunal's decision on the merits of a case. Mere errors of fact or law do not itself justify the court's intervention (*AJU v AJT* [2011] 4 SLR 739 at [65]–[66]).

83 I agree with Mr Ong's point that both the majority and minority relied on the same evidence in coming to their respective conclusions; they only differed in their legal analysis on the burden of proof issue. The minority arbitrator, himself, explained that:[11]

> [this] ***dissenting opinion is based on*** the ***same references of the Parties' pleadings and arguments*** (positions) that are provided for in the [main Award] and on the ***same evidences*** [*sic*] that have been presented to the (whole) Arbitral Tribunal, ***notwithstanding that these evidences*** [*sic*] – as will be described – ***on several occasions may be evaluated in a different manner***.
>
> [emphasis added in bold italics]

84 The minority further clarified that "this arbitrator is on common ground with the Majority regarding … *sections ... V ... X* … [of the Award]" [emphasis added].[12] These sections are of critical importance as they set out the Tribunal's decisions on procedure. Section V sets out the procedural history of the DIA Arbitration, whereas Section X provides the Tribunal's reasons for rejecting the new counterclaim for excessive fuel consumption of Engines 1 and 2. As stated, not only was the counterclaim new, it was introduced less than a month before the Oral Hearing, it was unsubstantiated and unquantified. On document production, the Tribunal said (at para 226):

> The request for document production…seeking disclosure of six categories of documents relating to [the plaintiff's] alleged manipulations of the FATs was denied on the grounds of irrelevance for the present dispute. When the request was made, it had no basis. … At that point in time, and for that matter even subsequently, there was no documentary or other element supporting the accusation that [the plaintiff] had engaged in manipulations of the emissions tests on two-stroke engines. [The defendant] was essentially extrapolating from the material relating to [the plaintiff's] behaviour in relation four-

11 PCB, Tab 4, Dissenting Opinion, p 1.

12 PCB, Tab 4, Dissenting Opinion, p 1.

> stroke engines the possibility that illegalities would also have been committed have engaged in relation to two-stroke engines. This emerges unmistakably from the SoD where [the defendant] was unable to invoke more than 'a strong presumption that also two-stroke engines could be affected'.

85 Continuing, the Tribunal said (at para 227):

> The discretion of arbitrators in terms of procedure and evidence extends to the production of documents. … Requests merely aimed at identifying possible claims or sources of further inquiry, rather than obtaining materials that are likely to be adduced as evidence in support of existing claims, are viewed with disfavour. In light of this, given the dearth of symptoms that [the plaintiff] had engaged in manipulations of two-stroke engines, [the defendant's] requests for document production were clearly inadmissible and suggestive of a fishing expedition, possibly aimed at obtaining evidence for use in other proceedings or at exploring the basis of a new counterclaim for the excessive fuel consumptions of Ships 1 and 2.

86 Another procedural injustice raised by Mr Teh has to do with the contention that the defendant was not given an opportunity to argue that the Propellers 3 and 4 were interconnected to Engines 3 and 4, and that the termination of the Engines Contracts should also end the Propellers Contract. It seems to me that this is another dubious point. The interconnected point was argued and considered by the majority who ruled against the defendant (see paras 434 to 451 of the DIA Final Award).

87 Moving away from the arguments on the defendant's inability to present its full case, Mr Teh argues that the setting aside application was nonetheless meritorious as the plaintiff had perpetrated fraud on the Tribunal. The DIA Final Award is therefore contrary to public policy of Denmark. According to Mr Teh, the plaintiff was never in the position to perform its end of the Propellers Contract. Yet the plaintiff had falsely misrepresented to the Tribunal that it was able to deliver Propellers 3 and 4 on short notice. This misrepresentation led the

Tribunal to order the defendant to take delivery of the propellers and to pay the outstanding purchase price.

88 The genesis of this contention lies in the words "short notice". The defendant understood this to mean "immediately" or "shortly after" the Tribunal issues the DIA Final Award.[13] The plaintiff, however, did not share the same view. This can be seen in the letter sent on 18 April 2017 informing the defendant that "the Propellers will be fully assembled and ready for delivery within approximately 14 weeks from receipt of payment".[14]

89 As the defendant's case in the DIA Arbitration was that the Propellers Contract had been terminated either by agreement or for cause, Mr Ong pointed out that the plaintiff's ability to deliver Propellers 3 and 4 was never an issue in the course of the arbitration. Hence, the plaintiff in its Post-Hearing Brief to the Tribunal indicated that:[15]

> From a practical perspective, several steps will have to be taken prior to delivery. [The plaintiff] is in a position to *assemble and deliver the propellers on short notice once [the* defendant*'s] duty to take delivery of Propellers 3&4 (sic) has been confirmed by the Arbitral Tribunal*. The actual delivery presupposes that the Parties agree on a date and place of delivery. Should [the defendant] refuse cooperation, [the plaintiff] will unilaterally set a delivery date within a reasonable time after issuance of a Final Award confirming [the defendant's] duty to take delivery.
>
> …
>
> After it had become obvious that [the defendant] would not take delivery of Propellers 3&4 (*sic*), [the plaintiff] used all components that were not specifically tailor made for other projects in order to mitigate storage costs. All components tailor made for [the defendant's] orders were put on storage.

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13 PBCP, Tab 7, 2JSH, para 46.

14 PBCP Vol 2, Tab 6, 2MS, Exhibit MS-9, p 60.

15 PCB, Tab 6, Post-Hearing Brief, para 234.

> [*The* plaintiff] *will, as a consequence, have to procure the missing component*s which will in the meantime likely have increased price.

90 While the Tribunal did not spell out when the defendant was to take delivery of the propellers, the Tribunal was cognisant of the plaintiff's predicament. The Tribunal "acknowledge[d] that it may have been reasonable for [the plaintiff] to sell certain components of the Propellers in order to reduce its exposure in the not unlikely event of default by [the defendant] on its obligations".[16] It follows that the Tribunal accepted that the plaintiff would have needed sufficient lead time to have Propellers 3 and 4 ready for delivery as missing components will have to be procured.

91 Mr Teh, however, referred me to a line in the DIA Final Award which stated that "[the plaintiff] contend[ed] … that [Propellers 3 and 4] were fully built … and that the equipment is currently stored in Frederikshavn, Denmark".[17] He thus submitted that the plaintiff must be understood to be in the position to deliver the propellers immediate after the rendering of the DIA Final Award. Mr Teh's contention, however, is unpersuasive. The line referred to by Mr Teh when read in context is not inconsistent with the plaintiff's position that certain components had been sold.

92 In any event, it appears that the plaintiff's alleged misrepresentation did not operate on the Tribunal's mind:[18]

> As discussed above …, the Propellers Contract remains valid and binding because it was not terminated either according to its own terms or as a consequence of the avoidance of the Engines Contract. ***The question for analysis here is***

16 PCB, Tab 4, Award, para 547.

17 PCB, Tab 4, Award, para 144.

18 PCB, Tab 4, Award, paras 536–542.

therefore whether [the plaintiff] is entitled to exercise its rights under Article 62 CISG, pursuant to which:

> 'The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.'

There never having been raised any question of actual or anticipated breach by [the plaintiff] of its obligations under the Propellers Contract that would have entitled [the defendant] to forego performance of its own obligations under the Contract, which remain independent of those under the Engines Contract, [the defendant's] obligations remain in force. Since [the plaintiff] has declared that it is in a position to deliver the Propellers on short notice …, which [the defendant] has not contested, and that it has not done so thus far simply because of [the defendant's] refusal to take delivery, the conclusion to be drawn from Article 62 CISG can only be that [the defendant] must take delivery of the Propellers it purchased.

[The defendant] must also pay the remaining portion of the purchase price. …

[The defendant's defences] to these claims are not persuasive. This is not the case for those based on the termination of the Propellers Contract by mutual agreement or unilaterally by [the defendant], and for the one that it has no use for the Propellers, given the Arbitral Tribunal's decision that the Propellers Contract is not legally linked to the Engines Contract. …

Contrary to [the defendant's] position, the limitation period for the obligation to pay the price cannot be held to have started running on the original contractual delivery date of the Propellers pursuant to Clause 3 of the Contract … That is because there seems to have been an agreed postponement of the delivery date …, and in any case there never was a request for delivery by [the defendant], who actually continued to signal its intention not to perform the Contract and to take delivery. *Furthermore, under Clause 5 of the Contract payment becomes due on presentation of the delivery documents which were incontrovertibly never presented by [the plaintiff]. This position is convincingly encapsulated by the authority cited by [the plaintiff], according to whom '****the seller cannot be expected to deliver in a situation in which, in the view of the buyer's unlawful declaration of avoidance, he must certainly count on the buyer's refusal to take delivery and, in particular, to pay the price****'.*

[emphasis added]

93 While the Tribunal did mention the plaintiff's indication that it was able to deliver on "short notice", this was not critical to the Tribunal's findings and decision. The more pertinent point to note is that the Tribunal, having made certain key findings of fact, accepted the authority cited by plaintiff (describing the authority as convincing) which was to the effect that a buyer's refusal to take delivery would have a knock on effect on the seller's entitlement to payment. A fuller exposition of this authority can be found in the plaintiff's statement of reply and defence to counterclaim in the DIA Arbitration:[19]

> However, where the seller abides by the contract, this leads to a problem where the buyer's unjustified declaration of avoidance is made at the time when neither have the goods been delivered nor has the price been paid. On the one hand, it is clear that the buyer cannot use his unjustified refusal to perform as means of compelling the seller to declare the contract avoided under Article 72. On the other hand, the seller cannot be expected to deliver in a situation in which, in view of the buyer's unlawful declaration of avoidance, he must certainly count on the buyer's refusal to take delivery and, in particular, to pay the price. In such a situation, it must be possible for the seller to require the buyer to pay the price before delivery of the goods, even where the price is payable only after the seller has delivered the goods. It is the buyer's unjustified refusal to perform which has caused the seller's temporary failure to deliver. The buyer is therefore precluded from claiming that the price is not payable because delivery had not yet been made.

Hence, Mr Teh's assertion that the DIA Final Award was obtained by the plaintiff's fraudulent misrepresentation to the Tribunal is not made out.

94 Before I conclude this section, I note two additional arguments on fraud which Mr Teh appeared to advance.

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19 PCB, Tab 5, Statement of Reply and Defence to Counterclaim, para 212; see also footnote 147.

95 The first is the argument that there was fraud perpetrated on the Tribunal as the plaintiff had withheld information of its fraudulent practices from the Tribunal. This argument is in essence similar to Mr Teh's point on contrasting the majority and minority decisions, *ie*, that the plaintiff had the burden to disclose information on the FATs manipulations. For the reasons I have stated above at [82]–[83], this argument does not advance the defendant's case.

96 The second argument appears to be along the lines of public policy – that an enforcement of the DIA Final Award would be tantamount to enforcing contracts procured by fraud. This is because the DIA Final Award upheld a contractual bargain that was tainted by the fraud that the plaintiff perpetrated on the defendant. This argument wades into the merits of the Tribunal's decision. One of the issues the Tribunal had to address was whether the defendant was fraudulent induced into contracting with the plaintiff. The Tribunal held that there was no such misrepresentation. The defendant, at the material time, did not contract with the plaintiff but with the Man Denmark instead and there is no evidence that the Man Denmark, being a distinct legal entity, had knowledge of the plaintiff's alleged fraudulent misconduct at the time (see [80] above). That there was no knowledge of the fuel manipulation and that Man Denmark is a separate legal entity are findings which is ordinarily not a matter that the seat-court can review even if the majority's findings there were wrong.

97 Lastly, in this case, there is another important circumstance to consider for an adjournment. The setting aside application was filed in Denmark only after the plaintiff filed enforcement proceedings against the defendant in Singapore. Separately, much earlier in June 2017, the defendant started new arbitral proceedings DIA E-2635 against the plaintiff on 9 June 2017. Dispute (a) of DIA E-2635 (see [29] above) is plainly predicated on the validity of the

DIA Final Award that confirmed the Propellers Contract and ordered the defendant to take delivery and pay for Propellers 3 and 4. The allegation in DIA E-2635 is that the plaintiff's post-Award conduct gave the defendant a new cause to terminate the Propellers Contract and having terminated the Propellers Contract, the defendant is no longer contractually obligated to take delivery and pay for Propellers 3 and 4. The contradiction is stark when comparing the new arbitration and the setting aside application in the Danish Court. The new arbitration is premised on and arises from the DIA Final Award whilst the defendant in the setting side application attempts to set aside the DIA Final Award for invalidity. Both proceedings are pursued concurrently by the defendant. Thirdly, s 31(5)(*a*) applies to the setting aside proceedings in the seat-court and would not engage the new arbitration.

Delay and the length of the adjournment

98 One factor to consider is the delay that would arise as a consequence of the adjournment. The setting aside application was filed in the Copenhagen City Court and the defendant has sought to have the case transferred to the High Court of East Denmark where the avenue for appeal is available. At the time of the hearing before this court, the application to transfer the case to the High Court of East Denmark had not taken place. If transfer were permitted, it is estimated that it would be 2019/2020 before the setting application be disposed of. The delay would be too long and the adjournment sought would prejudice the plaintiff.

Other considerations

99 I have also considered the potential prejudice each side may suffer as a result of an adjournment. As stated, I agree with Mr Ong that the plaintiff has

not established its case that the DIA Final Award is impeachable. Therefore, there would be little or no tangible prejudice to the defendant by a refusal of an adjournment.

Security

100 The issue of security also feeds into the consideration of prejudice as a circumstance relevant to adjournment and I will with deal them together. Mr Teh argues that the court should refuse the immediate enforcement of the DIA Final Award, or if the court were minded to adjourn the enforcement proceedings, not grant security, as the defendant does not have assets within the jurisdiction. The prejudice to the plaintiff would therefore be negligible as the defendant has no available assets that would be amenable to enforcement. His argument that since there are no assets in the jurisdiction there is no prejudice to the plaintiff if immediate enforcement is not affirmed is a circular argument that does not assist the defendant.

101 In this connection, with there being no assets in Singapore, the defendant's 2016 Financial Statements were referred to. It was pointed out that the only current asset the defendant has is the prepayment made to the plaintiff under the Contracts, the very subject matter of the DIA Final Award.

102 The plaintiff, on the other hand, points to the contrary. The plaintiff referred me to portions of the defendant's Financial Statements where the defendant had obtained proceeds from a sale of assets in China but did not account for where the monies went. As a result of enforcing two Hong Kong arbitral awards made on 22 March 2013 and 25 April 2013, the defendant came to hold liens over "4 real properties" in China. As at 31 December 2016, 1 of the property had been sold for RMB 4.39 million (equivalent to US $631,000)

and the proceeds had been transferred to the defendant in July 2017. The remaining 3 properties were expected to be auctioned in 2017. The defendant, however, has not disclosed the status of the sale proceeds, or the auction of the 3 remaining properties. The Financial Statements also states that the defendant had been seeking enforcement of an arbitral award in the US. The US Department of Justice is recorded to have seized certain real and personal assets on behalf of the defendant and the defendant has since applied for remission of the seized assets. Again, the defendant has not disclosed the status of its recovery actions in the US.

103 The plaintiff further referred me to evidence which pointed to, and demonstrated, the defendant's propensity to dissipate assets in anticipation of the outcome of legal proceedings. I was first brought to a portion of the Financial Statements where it revealed that the defendant had suddenly reduced a large portion of its cash assets between 2015 and 2016. My attention was also drawn to a share capital reduction of approximately 99% by the end of 2015. These reductions occurred in the midst of the DIA Arbitration which was lasted from 2014 to 2017.

104 I was further told that the defendant has been systemically transferring valuable assets to its affiliate entities since 2014. The Financial Statements, in fact, revealed that the defendant's principal activities were "previously ship owning and operations", but that the defendant "transferred ownership of its vessels during 2014 and ceased ship owning/operation activity thereafter". I was referred to the 2nd Affidavit of Mr Skaugen where he explained that in an attempt to avoid potential claims arising from a vessel collision in 2013, the defendant transferred its interest in various vessels to other entities. I agree with

Mr Ong that the defendant's conduct gives rise to concerns over a risk of dissipation of undisclosed assets.

105 Mr Teh contends that the evidence of dissipation shown by the plaintiff is not enough. Such evidence must be to the degree of a mareva injunction and cites *Dardana* in support. There are, however, two problems with this contention. First, nowhere in *Dardana* was the proposition put forth by Mr Teh mentioned. Second, it would be incongruous to analogise the evidential requirements of a mareva injunction to a decision to adjourn enforcement or grant security under s 31(5) of the IAA. The key point to be made here is that there is substantial evidence to suggest that enforcement of the award would be more difficult if an adjournment is granted and no security is ordered.

106 The arguments of the parties set out above is reminiscent of those before the court in *Travis Coal*. There, a dispute arose as to the non-payment of certain promissory notes issued for the acquisition of a company. The matter proceeded to arbitration and an award was eventually rendered. While proceedings were ongoing in New York to annul the award, the plaintiff sought to enforce the award in England. Like the defendant in the present case, the defendant in that case sought to resist the grant of security on the basis that it had no assets in the jurisdiction. The court noted that the defendant made certain unusual decisions in relation to its assets after the award was issued and came to the view that there may be a potential restructuring of the defendant's assets which could lead to assets being taken out of English jurisdiction. Thus, "[w]hen a comparison is made between the position of the would-be enforcing party if it were allowed to enforce immediately, and its position if any steps by way of enforcement were delayed as a result of the grant of an adjournment [the plaintiff] can … point to substantial potential prejudice occasioned by an adjournment" (at [66]).

107 Hence, on a total consideration of the defendant's application to adjourn the enforcement proceedings, I am of the view that no adjournment should be granted. I will now turn to the question of enforcement of the DIA Final Award.

Enforcement of the DIA Final Award

108 The grounds raised by the defendant to resist enforcement are the same as the grounds relied upon in the setting aside application before the seat-court. I repeat and adopt my comments above. I wish to make some further comments on the defendant's public policy argument. On a challenge under s 31(4)(*b*) of the IAA, the court has to consider the public policy of Singapore. Regardless of the shape of defendant's fraud arguments, the defendant has not demonstrated that the public policy of Singapore is engaged. It bears stating that the evidential threshold for establishing fraud is a high one (see *Prometheus Marine Pte Ltd v Ann Rita King* [2018] 1 SLR 1 at [55]; see also a summary of the applicable principles in *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd v The Republic of Kazakhstan* [2017] EWHC 1348 at [11]). The recent decision of the English Court of Appeal in *RBRG Trading (UK) Ltd v Sinocore International Co Ltd* [2018] EWCA 838 is illustrative of this high evidential requirement to prove fraud and further demonstrates the need to show a causal connection between the alleged fraud and the tribunal's decision. In that case, the English Court of Appeal allowed enforcement of a Chinese arbitral award despite the seller-claimant's attempted fraud in presenting forged bills of ladings to the buyer-defendant's bank for the purposes of securing payment pursuant to a contract between the parties. On the tribunal's findings, the attempted fraud was not the basis of the seller's claim or loss. The tribunal found that the buyer had been in breach of the sale contract which caused the loss and that the loss occurred before the seller's forgery. In the circumstances, no public

policy was engaged to refuse enforcement the award. In the circumstances, no public policy considerations are engaged to refuse the enforcement of the DIA Final Award. A proper order is the immediate enforcement of the DIA Final Award.

The defendant's challenge against the ex parte *Leave Order*

109 This leads to me to the defendant's challenge against the *ex parte* Leave Order. For context, the impugned portion of the *ex parte* Leave Order is as follows:

> Upon expiry of fourteen (14) days, after service of the Order of Court to be made herein on the Defendant, the Plaintiff be at liberty to enter Judgment against the Defendant as follows:
>
> (a) The Defendant shall pay the Plaintiff EUR 1,965,585.91…

The sum of EUR 1,965,585.91 in the *ex parte* Leave Order was arrived at after setting-off the sums due to the plaintiff from the defendant against the those due to the defendant from the plaintiff. The defendant takes umbrage with the set-off. Mr Teh, on the defendant's behalf, argues that the *ex parte* Leave Order ought to mirror to the terms of the DIA Final Award. Since the tribunal did not set-off the sums in making its order in the award, the court, as a matter of law, is not entitled to set-off the sums on its own motion. Further, the defendant holds the view that the DIA Final Award requires payment and delivery of the propellers to be concurrent. As the plaintiff had not yet delivered the propellers, the defendant is not obligated to pay the remaining purchase price and thus a set-off amount be incorrect.

110 I begin first with the set-off in the *ex parte* Leave Order. Mr Teh contends that the Assistant Registrar had impermissibly second guessed the

Tribunal's decision in failing to mirror the *ex parte* Leave Order according to the strictures of the DIA Final Award. To this end, Mr Teh cites Reyes J's decision in *Xiamen Xinjingdi Group Ltd v Eton Properties Ltd and another* [2008] HKCFI 540 at [47]:

> To that extent, I would wholly accept Gross J's observation that the Court should not second guess an arbitration award. Its role should be, although by no means entirely "mechanistic", as "mechanistic as possible".

111 Mr Teh's contention, however, is a non-starter. As I have stated earlier at [33]–[40], there are two stages in the enforcement of a foreign award. Thus, the question of whether the *ex parte* Leave Order should mirror the terms of the DIA Final Award does not even arise at the leave stage as it is only at the entry into judgment stage that the award is enforced. I, accordingly, see no basis for the argument that the *ex parte* Leave Order ought to be set aside on the ground that it was entered into in excess of the terms of the DIA Final Award.

112 The question remains as to whether the court, at the entry into judgment stage, is entitled to set-off sums in an award. In this regard, the effect of Mr Teh's submission is that all judgments entered pursuant to s 19 must be an exact copy of the relevant award regardless of how enforcement is to be carried out. This makes little practical sense because the circumstances before an enforcing court might be quite different post-award. Indeed, parties may choose to enforce an award in part, as opposed to full enforcement of the award. To my mind, it is sufficient that the judgment gives *effect* to the terms of the award. This brings me to the final point raised by Mr Teh – that is, whether a set-off is appropriate in the present case.

113 According to the defendant, since the Tribunal was called upon to order specific performance of the Contracts, the plaintiff's obligation to deliver and

the defendant's obligation to make payment must follow the sequence as provided for in the Contracts. This meant that the defendant's own obligation to make payment would only arise after the plaintiff had delivered Propellers 3 and 4. As the propellers have yet to be delivered, it would be incorrect to set-off the sums. This argument is inconsistent with the DIA Final Award. Having made the finding that the defendant would not take delivery and that the plaintiff had demanded payment of the purchase price on 11 September 2014, the Tribunal accepted the authority cited by the plaintiff (see [93] above). On this basis, the Tribunal held that the defendant's obligation to make payment precedes delivery. This position is reinforced by the interest awarded by the Tribunal from 11 September 2014, which was the date the plaintiff demanded payment. It would have been incongruous for the Tribunal to impose interest if there were no obligation on the part of the defendant to make payment. Thus, the DIA Final Award did not provide for the concurrent obligations of payment and delivery as the defendant seeks to contend.

114 Accordingly, I am of the view that a set-off in this case is appropriate. I therefore affirmed the *ex parte* Leave Order save that judgment to enforce the award should append a breakdown of the net sums the defendant is liable to pay under the DIA Final Award.

Conclusion

115 For the reasons set out above, I make the following orders:

(a) SUM 3315 is dismissed. The *ex parte* Leave Order is affirmed.

(b) As the DIA Final Award is enforceable as judgment in the terms set out in the *ex parte* Leave Order, I make no order on the plaintiff's cross-application seeking security in SUM 5596.

(c) Costs are to follow the event but there is to be one set of costs for both summonses because they overlap. If parties are unable to agree on costs, they are to submit on the quantum of costs, in writing, no later than 12 June 2018.

Belinda Ang Saw Ean
Judge

Ong Tun Wei Danny, Yam Wern-Jhien and Teo Li Ping, Annabelle
(Rajah & Tann LLP) for the plaintiff;
Teh Kee Wee Lawrence, Loh Jen Wei and Ravin Periasamy
(Dentons Rodyk & Davison LLP) for the defendant.
