IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 209

Originating Summons No 980 of 2019 (Summons No 4116 of 2019)

Between

Vitol Asia Pte Ltd

… *Applicant*

And

Machlogic Singapore Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[Arbitration] — [Award] — [Recourse against award]

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v
Machlogic Singapore Pte Ltd

[2020] SGHC 209

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Vinodh Coomaraswamy J
13 January 2020

22 October 2020

Vinodh Coomaraswamy J:

Introduction

1 The applicant and the respondent were parties to a documents-only arbitration seated in Singapore.[1] The arbitration concluded with an award entirely in the applicant's favour in February 2019.[2] The applicant secured leave *ex parte* in August 2019 to enforce the award as a judgment of the High Court under s 19 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the Act").[3] The respondent now applies to set aside the applicant's leave to enforce the award.[4]

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1 Chong Li Tang's affidavit (01.08.2019) ("Chong's Affidavit") at pp 26 to 35.

2 Chong's Affidavit at pp 26 to 35.

3 HC/ORC 5177/2019.

4 See HC/SUM 4116/2019.

2 Chapter VIII of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") deals with recognising and enforcing awards. Art 36 of the Model Law, found in Chapter VIII, prescribes the grounds on which a court may refuse to recognise or enforce an award. Unlike the remainder of the Model Law, Chapter VIII is not given the force of law in Singapore by s 3(1) of the Act. It is common ground, however, that an application to resist enforcement of an award under s 19 can succeed only on one of the grounds prescribed in Art 36 (*PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 at [84]).[5] I therefore proceed in these grounds as though Art 36 of the Model Law applied directly to the application before me.

3 The respondent resists enforcement of the award on three of the grounds prescribed in Art 36 of the Model Law:[6]

(a) The arbitration agreement on which the applicant relies is not in truth an arbitration agreement within the meaning of s 2A(1) of the Act. In the alternative, the arbitration agreement is vitiated by corruption and fraud in which the applicant was complicit. The arbitration agreement is therefore "not valid" under Singapore law within the meaning of Art 36(1)(*a*)(i).

(b) The contract between the parties was procured by fraud and corruption in which the applicant was complicit. The respondent therefore required a hearing to present and test *viva voce* critical

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5 Applicant's Submissions (08.01.2020) ("Applicant's Submissions") at para 9; Respondent's Submissions (09.01.2020) ("Respondent's Submissions") at para 4.

6 Respondent's Submissions at paras 6, 11 and 23.

evidence going to the issue of fraud and corruption. The arbitrator's decision to proceed documents-only deprived the respondent of that opportunity. The respondent was therefore unable to present its case in the arbitration within the meaning of Art 36(1)(*a*)(ii).

(c) Because the parties' contract was procured by fraud and corruption, enforcing the award is contrary to the public policy of Singapore within the meaning of Art 36(1)(*b*)(ii).

4 Having considered the parties' submissions and evidence, I have dismissed the respondent's application. In brief, I have found as follows. First, s 2A(6) of the Act operated on the facts of this case to deem there to be an effective arbitration agreement between the parties. It therefore does not matter whether the parties' contract contains an arbitration agreement within the meaning of s 2A(1) of the Act and whether the parties' contract was procured by fraud or corruption. Second, the arbitrator's decision to proceed documents-only did not leave the respondent unable to present its case in the arbitration. In any event, proceeding documents-only caused no prejudice to the respondent. Finally, even assuming that the parties' contract was procured by fraud and corruption, there is nothing contrary to public policy in the arbitration or the award. And the respondent was aware of the fraud and corruption during the arbitration but deliberately declined to raise the issue for the arbitrator to determine. The respondent therefore cannot resist enforcement of the award on the public policy ground.

5 The respondent has appealed against my decision. I now set out the grounds for my decision.

Background facts

The contract

6 The applicant is a trader in a number of oil products, including gas oil.[7] The dispute between the parties arose out of a contract under which, as the arbitrator found, the respondent agreed in late December 2017 to sell a substantial cargo of gas oil to the applicant.

7 Taufik Othman ("Mr Taufik") is a broker who introduced business to the applicant from time to time.[8] In December 2017, Mr Taufik was approached by one Saiful Alam ("Mr Saiful") via a mutual acquaintance, one Jimmy Ong ("Mr Ong"). Mr Saiful described himself as the respondent's "Field Sales Manager".[9] Mr Saiful told Mr Taufik that the respondent was interested in supplying a substantial cargo of gas oil to the applicant.[10] Mr Taufik duly put Mr Saiful in touch directly with the applicant.[11] Mr Saiful thanked Mr Taufik by email, copying the email to the respondent's director, one Choo Foong Yee (also known as Ms Chanel Choo) ("Ms Choo").[12]

8 Mr Saiful followed up with a formal written offer to sell a substantial cargo of gas oil to the applicant.[13] The offer was set out on the respondent's

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7 Applicant's Submissions at para 5.

8 Mohammad Taufik Othman's Affidavit (12.11.2019) ("Mr Taufik's Affidavit") at para 1; David Poon's Affidavit (26.09.2019) ("Mr Poon's Affidavit") at p 7.

9 Mr Poon's Affidavit at p 8.

10 Mr Taufik's Affidavit at paras 6 to 11.

11 Mr Taufik's Affidavit at paras 7 to 9.

12 Mr Poon's Affidavit at p 7.

13 Mr Poon's Affidavit at pp 9 to 10.

letterhead and addressed directly to the applicant.[14] It was signed by Mr Saiful, bore the defendant's rubber stamp and described Mr Saiful as the respondent's "Field Sales Manager".[15]

9 As part of the applicant's routine "know your customer" due diligence, the applicant asked Mr Saiful for additional information about the respondent.[16] Mr Saiful emailed the information to the applicant, copying Ms Choo on his email.[17]

10 The parties differ in their account of subsequent events. The applicant's account is as follows. The applicant accepted the respondent's offer in late December 2017. The parties then entered into a contract under which the respondent was obliged to deliver the cargo of gas oil to the applicant. Mr Saiful executed the contract as the respondent's employee and with the respondent's actual or ostensible authority.[18] The contract was therefore valid and binding on the respondent.[19]

11 The arbitrator accepted the applicant's account in its entirety in her award.

12 The respondent's account is as follows. Mr Saiful was not an employee of the respondent and had no authority to enter into the purported contract with

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14 Choo Foong Yee's Affidavit (19.08.2019) ("Ms Choo's Affidavit") at para 14.

15 Mr Poon's Affidavit at p 10.

16 Mr Poon's Affidavit at para 8.

17 Mr Poon's Affidavit at p 15.

18 Applicant's Submissions at paras 29, 45 and 54.

19 Applicant's Submissions at p 20.

the applicant on the respondent's behalf.[20] Mr Saiful in fact conspired with the applicant to defraud the respondent[21] by purporting to bind it to a contract which he procured for his own personal benefit by offering corrupt gratifications to Mr Taufik and Mr Ong.[22]

13 Two clauses in the contract are relevant for present purposes:[23]

(a) A performance deposit clause which required the respondent to pay the applicant US$297,000 at the very outset as a guarantee of supply;

(b) The final clause of the contract:

> **Law and Arbitration**
> Singapore law shall be applied.

14 The applicant asserted in the arbitration and asserts on this application that the final clause of the contract is an arbitration agreement within the meaning of s 2A(1) of the Act. The respondent did not deny this assertion at any time in the course of the arbitration. But the respondent denies the applicant's assertion now, in order to resist enforcement of the award. The respondent's case on this application is that the award is unenforceable under Art 36(1)(*a*)(i) of the Model Law on the ground that there is no valid arbitration agreement between the parties.

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20 Ms Choo's Affidavit at paras 7 and 22.

21 Ms Choo's Affidavit at paras 11, 34 and 37.

22 Ms Choo's Affidavit at paras 12 and 15.

23 Stephen Peter Martin's Affidavit (27.09.2019) ("Mr Martin's Affidavit") at pp 28 and 30.

The dispute

15 The respondent failed to comply with the performance deposit clause. It also failed to deliver any gas oil to the applicant. This failure was despite several reminders which the applicant sent to Mr Saiful reminding him to comply with both obligations. Ms Choo was copied on some of this correspondence.[24]

16 The applicant took the position that the respondent's failures amounted to repudiatory breaches of the contract.[25] In May 2018, the applicant served notice on the respondent accepting the repudiatory breaches and terminating the contract with immediate effect.[26]

17 Ms Choo received the notice of termination.[27] But she did not respond to it. Her evidence is as follows. The notice of termination was the first time she knew anything about any purported contract between the respondent and the applicant.[28] She investigated internally. She discovered that all of the emails between the applicant and Mr Saiful about the contract which had been copied to her had gone into her junk mail folder.[29] She retrieved these emails from her junk mail folder. She also retrieved emails from Mr Saiful's email account.[30] As a result, she read the full email chain for the first time.[31] She pieced together Mr Saiful's conspiracy with the applicant to defraud the respondent.[32] She

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24 Mr Martin's Affidavit at pp 31 to 33, 36 and 38 to 39.

25 Mr Martin's Affidavit at p 132.

26 Mr Martin's Affidavit at p 132.

27 Ms Choo's Affidavit at para 6.

28 Ms Choo's Affidavit at para 6.

29 Ms Choo's Affidavit at para 6.

30 Ms Choo's Affidavit at para 10.

31 Ms Choo's Affidavit at para 13.

32 Ms Choo's Affidavit at paras 10 and 13 to 21.

confronted Mr Saiful with the applicant's notice of termination and interrogated him about the contract.[33] But Mr Saiful disappeared in June 2018 without offering any explanation at all.[34]

18 It is probably at this point that the applicant engaged Kennedys Legal Solutions ("Kennedys"). Kennedys are the firm of solicitors who have acted for the applicant throughout this dispute, including in this application.

19 In mid-July 2018, Kennedys sent a letter before action to the respondent.[35] The letter claimed that the applicant was entitled to recover damages quantified at about US$279,000 from the respondent for the losses which the applicant had suffered as a result of the respondent's repudiatory breaches of the contract.[36] The letter demanded that the respondent pay the US$279,000 within 14 days.[37]

20 Up until this point, Ms Choo had not communicated with the applicant. Ms Choo now replied to the applicant. Her reply denied any liability to the applicant and refused to make payment.[38]

21 The parties met in an attempt to resolve the matter amicably. The attempt failed.[39]

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33 Ms Choo's Affidavit at para 12.

34 Ms Choo's Affidavit at para 12.

35 Mr Martin's Affidavit at para 9, pp 46 to 47 and 154.

36 Mr Martin's Affidavit at para 9, pp 46 to 47 and 154.

37 Mr Martin's Affidavit at para 9, pp 46 to 47 and 154.

38 Mr Martin's Affidavit at p 48.

39 Ms Choo's affidavit at para 22.

The arbitration

22 In July 2018, the applicant served a notice of arbitration on the respondent.[40] The notice of arbitration asserted that the parties' contract provides for disputes be submitted to arbitration. Although the notice of arbitration did not cite a specific clause in the contract as the arbitration agreement, it is common ground that the applicant relied on the final clause in the contract (see [13(b)] above) as the parties' arbitration agreement.

23 Ms Choo accepts that she received the notice of arbitration.[41] The applicant and Ms Choo exchanged two further emails. In both emails, Ms Choo denied that the respondent was bound by any contract with the applicant.[42]

24 The respondent did not appoint solicitors to advise it or represent it in the arbitration. The respondent also did not cooperate in appointing an arbitrator.

25 In August 2018, the applicant applied to the President of the Court of Arbitration of the Singapore International Arbitration Centre ("SIAC") under s 8(2) of the Act read with Article 11(4)(*a*) of the Model Law to appoint a sole arbitrator.[43] The applicant proposed three names to the SIAC for appointment. Ms Choo responded to this letter. She again denied that the respondent was bound by any contract with the applicant. She did not comment on the three

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40 Mr Martin's Affidavit at p 51.

41 Ms Choo's Affidavit at para 22.

42 Mr Martin's Affidavit at para 12.

43 Mr Martin's Affidavit at para 15, p 81.

names which the applicant had proposed. She also did not counterpropose any names on behalf of the respondent.[44]

26 The President of the Court of Arbitration of the SIAC appointed the sole arbitrator in September 2018.[45] The tribunal was thereby constituted.

27 It is important at this point to note that the arbitration was an *ad hoc* arbitration.[46] It was neither administered by the SIAC nor was it subject to the SIAC Rules.[47] The only role which the SIAC played in the arbitration was that the President of its Court of Arbitration appointed the sole arbitrator under s 8(2) of the Act read with Article 11(4)(*a*) of the Model Law.

28 Between October and December 2018, the parties exchanged pleadings and documentary evidence.[48] In January 2019, after the deadline she had set for the parties to submit evidence had expired,[49] the arbitrator decided to proceed documents-only.[50]

29 A documents-only arbitration is one which in which the arbitrator receives the parties' evidence and submissions solely in documentary form and not *viva voce*. As a result, there is no scope in a documents-only arbitration to lead oral evidence in chief, to cross-examine opposing witnesses or to present

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44 Mr Martin's Affidavit at para 16, pp 85 to 87.

45 Mr Martin's Affidavit at para 19, p 92.

46 Mr Martin's Affidavit at pp 95 to 96.

47 Mr Martin's Affidavit at pp 50 to 51 and 68 to 70.

48 Mr Martin's Affidavit at para 24.

49 Mr Martin's Affidavit at p 174.

50 Mr Martin's Affidavit at p 169.

oral submissions. In all other respects, a documents-only arbitration proceeds like any other arbitration.

30 It is the respondent's case on this application that Ms Choo did not understand the significance of the arbitrator's decision to proceed documents-only.[51] As a result of the decision, the respondent submits, it was unable to present its case in the arbitration within the meaning of Art 36(1)(*a*)(ii) of the Model Law.

31 In February 2019, the arbitrator issued her final award.[52] She held that there was a indeed a valid and binding contract between the parties.[53] She also found that the respondent had adduced no evidence that Mr Saiful lacked authority to bind the respondent.[54] She thus accepted that the respondent was in repudiatory breach of the contract.[55] She awarded the applicant its claim in full: just over US$279,000 in damages plus costs.[56]

The respondent's additional evidence

32 Before I address the respondent's grounds for resisting enforcement of the award, I must address an evidential objection taken by the applicant to the respondent's attempt to adduce certain evidence on this application.

33 Mr Saiful's evidence is obviously critical to establishing the respondent's case that he conspired with the applicant to defraud the

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51 Ms Choo's Affidavit, paras 28 and 31.

52 Mr Martin's Affidavit at pp 177 and 187.

53 Mr Martin's Affidavit at pp 181 to 182 (see [15]–[16] of the award).

54 Mr Martin's Affidavit at p 183 (see [22] of the award).

55 Mr Martin's Affidavit at p 183 (see [23] of the award).

56 Mr Martin's Affidavit at p 186 (see [38] of the award).

respondent[57] by procuring the contract for his own personal benefit by offering corrupt gratifications.[58] Ms Choo's evidence is that she lost all contact with Mr Saiful from June 2018, shortly after she confronted him about the contract in May 2018 (see [16]–[17] above) and was unable to re-establish contact with him again until July 2019, when she tracked him down through an intermediary.[59] As a result, she was unable to secure and present Mr Saiful's evidence in the arbitration but has been able to secure and present his evidence for this application.[60]

34 In support of this application, the respondent now adduces the following three items of evidence:[61]

(a) Screenshots of an undated WeChat conversation between Mr Saiful and Ms Choo.[62]

(b) A police report which Ms Choo filed in July 2019 about the applicant's "commercial tactics" against the respondent.[63]

(c) An affidavit affirmed by Mr Saiful and filed by the respondent in support of this application.

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57 Ms Choo's Affidavit at paras 11, 34 and 37.

58 Ms Choo's Affidavit at paras 12 and 15.

59 Ms Choo's Affidavit at para 37.

60 Ms Choo's Affidavit at para 37; Notes of Argument (13.01.2020) ("NOA") at p 9, lines 4 to 5 and p 15, line 14.

61 Applicant's Submissions at para 11.

62 Ms Choo's Affidavit at pp 123 to 125.

63 Ms Choo's Affidavit at p 127.

These three items of evidence are all additional evidence in the sense that they were, for whatever reason, not adduced in the arbitration.

35 The WeChat conversation and Mr Saiful's affidavit are particularly critical for the respondent's case. The two documents taken together contain admissions by Mr Saiful of four critical facts. First, he admits that he negotiated and executed the contract without the respondent's knowledge or authority.[64] Second, he admits that he used the respondent as a vehicle through which to sell the cargo of gas oil purely for his own personal benefit.[65] Third, he admits that he procured the contract by colluding with the applicant and by offering corrupt gratifications to Mr Taufik and Mr Ong.[66] Finally, he admits that he did all of this without Ms Choo's knowledge.[67]

36 It is the respondent's case that the fraud and corruption in the formation of the contract makes enforcing the award contrary to the public policy of Singapore within the meaning of Art 36(1)(*b*)(ii) of the Model Law.

37 The applicant submits that the respondent is precluded from adducing the additional evidence on this application because it does not satisfy the test for admitting fresh evidence on appeal laid down in *Ladd v Marshall* [1954] 3 All ER 745.[68] The applicant relies for this submission on the decision of Edmund Leow JC in *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] 2 SLR 322 ("*Sanum*") at [43]–[44]).

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64 Saiful Alam Bin Abdul Samad's Affidavit (23.10.2019) ("Mr Saiful's Affidavit") at para 9.

65 Mr Saiful's Affidavit at paras 5 to 8.

66 Mr Saiful's Affidavit at para 5; Ms Choo's Affidavit at p 123.

67 Mr Saiful's Affidavit at paras 4, 6 and 8.

68 Applicant's Submissions at para 20.

38 In *Sanum*, Leow JC applied the *Ladd v Marshall* test – albeit modified by attenuating its first condition – to determine whether to receive additional evidence on an application to the High Court to determine a tribunal's jurisdiction under s 10(3) of the Act. The evidence in question had not been placed before the tribunal when it determined the issue of jurisdiction for itself. Leow JC's decision to apply a modified *Ladd v Marshall* test was left undisturbed on appeal to the Court of Appeal (*Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [17] and [28]). The applicant therefore urges me to apply a modified version of the *Ladd v Marshall* test to the respondent's attempt to adduce the additional evidence.[69]

39 An authority to the opposite effect of *Sanum* is the decision of Judith Prakash J (as she then was) in *AQZ v ARA* [2015] 2 SLR 972 at [59]. That is also a decision on an application under s 10(3) of the Act. As Prakash J held:

> There is nothing … which restricts parties from adducing new material that was not before the arbitrator. Parties can adduce new evidence in the affidavits they file in the originating summons and if there is a need, the court may order the deponents to appear and be cross-examined on the new evidence.

40 I do not need to address the applicant's evidential objection directly. For the reasons which I set out in the remainder of these grounds, even if I were to receive and consider all of this additional evidence and even if I were to assume all of it to be true, I would still hold the award to be enforceable.

41 If I had to address this objection directly, however, I would accept that my discretion to receive the additional evidence is unconstrained by the *Ladd v*

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69 Applicant's Submissions at paras 17 and 20.

Marshall test. I do not consider that the *Ladd v Marshall* test – even by analogy and even in modified form – ought to constrain the court's discretion to receive or reject evidence on an application to resist enforcement of an award under s 19 of the Act. I say that for two reasons.

42 First, the *Ladd v Marshall* test upholds the procedural interest in imposing a degree of finality in the parties' opportunity to obtain and produce evidence in dispute-resolution proceedings. But that interest is engaged only when a party makes a *second* attempt to adduce evidence on the same issue as against the same party. For example, that interest is engaged when a court is asked to determine the issue of a tribunal's jurisdiction under s 10(3) of the Act. *Sanum* was such an application. The applicant in *Sanum* had had an opportunity to obtain and produce evidence on the issue of jurisdiction when the tribunal determined the issue. That is no doubt why Leow JC felt it appropriate to apply a modified *Ladd v Marshall* test to the applicant's attempt to adduce further evidence before him. That is also no doubt why the Court of Appeal left his approach undisturbed on appeal. Even then, as *AQZ v ARA* shows (see [39] above), views at first instance differ on whether this is the correct approach to an attempt to adduce additional evidence on an application under s 10(3) of the Act.

43 In any event, the interest in evidential finality is not engaged on an application like this one, *ie*, an application to set aside leave to enforce an award under s 19 of the Act. This application is neither an appeal against the award nor an appeal against the decision granting the applicant leave to enforce the award under s 19 of the Act. The respondent has never before had an opportunity to obtain and produce evidence on the set of issues to be determined on this application. There is, to my mind, no analogy to be drawn between this application and an application of the type in *Sanum*. There is therefore no

procedural interest which justifies constraining the general discretion to receive relevant and admissible evidence on the hearing of an application by way of an interlocutory summons.

44 Second, constraining the general discretion to receive evidence is not necessary to deter potential tactical abuse on an application like this. There are other doctrines and principles which suffice to deter potential abuse. The doctrine of *res judicata* and the principle of minimal curial intervention prevent a party from rearguing issues which were or could have been argued before the tribunal. And even if additional evidence is produced and received, there is always the court's power to draw adverse inferences and to assess critically the weight to be given to that evidence in all the circumstances of the case. Those circumstances include whether the evidence could have been obtained and produced earlier and the manner in which it has now been obtained and produced. Finally, potential tactical abuse is also deterred by the usual power to award costs, and to award indemnity costs in appropriate cases.

45 As such, even if I were to address directly the applicant's objection to the respondent's additional evidence, I would consider myself free to exercise my discretion to receive or reject this evidence unconstrained by even a modified *Ladd v Marshall* test.

46 And if I thought it necessary to consider the exercise of that discretion, I would exercise it in favour of receiving the respondent's additional evidence. I say that for three reasons. First, it appears to me that the issues raised on this setting aside application make receiving at least Mr Saiful's WeChat conversation and affidavit of critical importance. The evidence offers direct support to the respondent's case that there are serious issues of fraud and corruption which taint the parties' contract. Those issues are of potentially

fundamental relevance to the respondent's first and third grounds (see [3] above). Second, there is no basis to reject out of hand, on affidavit evidence alone, Ms Choo's evidence that she could not obtain and produce Mr Saiful's evidence earlier than July 2019. Finally, the applicant is prepared to argue this application even if this additional evidence is admitted and without adducing any additional evidence of its own.[70] Receiving the evidence will therefore not require the hearing to be adjourned for applicant's counsel to take instructions and to file affidavits in response. Had it been necessary for me to exercise my discretion, therefore, I would consider that receiving this evidence would not cause any prejudice to the applicant for which the applicant could not be adequately compensated by an award of costs, whether or not the award in its favour is ultimately enforced.

47 I now turn to consider in turn each of the three grounds on which the respondent relies in this application (see [3] above) in light of all the material before me, including the additional evidence (see [34] above).

There is a valid arbitration agreement

48 The respondent's first ground for resisting enforcement of the award is that there is no valid arbitration agreement between the parties within the meaning of Art 36(1)(*a*)(i) of the Model Law.[71] The respondent raises two arguments on this ground. The first argument is that the final clause of the contract (see [13(b)] above) is not an arbitration agreement within the meaning of s 2A(1) of the Act.[72] The second argument is that the contract is vitiated by

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70 Applicant's Submissions at para 25.

71 NOA at p 4, line 32 to p 5, line 2 and p 6, lines 17 to 23.

72 NOA at p 4, line 32 to p 5, line 2 and p 6, lines 17 to 23.

fraud and corruption,[73] and therefore any arbitration agreement within it is likewise vitiated.

49 In my view, both arguments fail.

Section 2A(6) of the Act

50 The respondent's first argument is that the final clause of the contract is not an arbitration agreement within the meaning of s 2A(1) of the Act.[74] The applicant submits in response that it is immaterial whether or not the final clause is, strictly speaking, an arbitration agreement.[75] This is because, on the facts of the case, s 2A(6) has operated to deem there to be an effective arbitration agreement between the parties.[76]

51 I accept the applicant's submission.

52 Section 2A(6) of the Act provides that if one party (the claimant) asserts the existence of an arbitration agreement in the course of any proceedings and the opposing party (the respondent) does not deny the assertion in circumstances where the assertion calls for a reply, there is deemed to be an effective arbitration agreement between the parties. Section 2A(6) reads as follows:

> Where in any arbitral or legal proceedings, a party asserts the existence of an arbitration agreement in a pleading, statement of case or any other document in circumstances in which the assertion calls for a reply and the assertion is not denied, there shall be deemed to be an effective arbitration agreement as between the parties to the proceedings.

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73 NOA at p 4, line 32 to p 5, line 2 and p 6, lines 17 to 23.

74 Applicant's Submissions at paras 7 to 10.

75 Applicant's Submissions at para 99.

76 Appellant's Submissions at para 100.

53 The applicant (through Kennedys as its solicitors) asserted the existence of an arbitration agreement with the respondent twice in the course of the arbitration. Both assertions called for a reply from the respondent. Ms Choo's reply failed to deny both assertions. However, both of Ms Choo's replies did deny that a contract existed between the parties. The question which arises, therefore, is whether Ms Choo's general denial of a contract between the parties is the type of denial which s 2A(6) requires in order to avoid its operation.

54 It may be thought that a general denial of a contract must *a fortiori* constitute a denial of an arbitration clause within the contract. The greater includes the lesser, after all. That submission may well be correct generally (see *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd (receiver and manager appointed)* [2018] 2 SLR 1207 at [43]). But I consider the submission not to be correct when considering the type of denial which s 2A(6) of the Act requires.

55 In my view, s 2A(6) requires a respondent to deny with specificity a claimant's assertion that an arbitration agreement exists between the parties. It will not suffice for the respondent generally to deny the existence of an arbitration agreement if it does not go on to deny with specificity the arbitration agreement as asserted by the claimant. *A fortiori*, it will not suffice for the respondent generally to deny the existence of the contract which the claimant asserts contains an arbitration clause if it does not go on to deny with specificity the claimant's assertion that that clause is a valid arbitration agreement.

56 I come to this conclusion for three reasons.

57 First, the language of s 2A(6) expressly requires the respondent to deny the claimant's *assertion*: "Where…a party asserts the existence of an arbitration agreement…and the *assertion* is not denied" (emphasis added). Denying

generally that a contract exists between the parties does not address the target of s 2A(6), which is the claimant's assertion that an arbitration agreement exists between the parties.

58 Second, only a specific denial of a claimant's assertion of an arbitration agreement advances what I consider to be the twin purposes of s 2A(6): (a) to promote efficiency in the allocation of dispute-resolution resources; and (b) to avoid defeating the reasonable expectations of stakeholders in dispute-resolution proceedings. These twin purposes are why s 2A(6) operates expressly not only in arbitration but generally in all dispute-resolution proceedings.

59 Assume a claimant who asserts expressly in dispute-resolution proceedings that an arbitration agreement exists between the parties. Assume also that the respondent's reply to the claimant denies generally that a contract exists between the parties but fails specifically to deny the assertion that an arbitration agreement exists between the parties.

60 These dispute resolution proceedings will have many stakeholders. The stakeholders will include: (a) the claimant; (b) its legal representatives; (c) the court or other adjudicating institution; and (d) the actual or potential factual or expert witnesses who have been approached or who have agreed to give evidence in the proceedings on one side or the other. In arbitration, these stakeholders will in addition include the administering institution (if any) and the arbitrators approached by the parties or the institution for actual or potential appointment to the tribunal.

61 The respondent's general denial of a contract between the parties is ambiguous. Because the denial is not directed specifically to the claimant's assertion of an arbitration agreement, it is indistinguishable from an assertion

by the respondent that it has a defence on the merits of the claim but accepts that it is bound to arbitrate those merits. Stakeholders will therefore assume from the respondent's failure to deny the assertion of an arbitration agreement that the respondent accepts that the asserted arbitration agreement exists. This assumption will be entirely foreseeable, entirely understandable and entirely reasonable. Relying on the respondent's failure, the stakeholders will incur or continue incurring actual costs, time costs and opportunity costs in preparing for the dispute to be resolved on the expectation that the respondent accepts the claimant's asserted arbitration agreement. Stakeholder expectations will be defeated and dispute-resolution resources wasted if the respondent retains the liberty at any point in the future of those proceedings to deny the asserted arbitration agreement – and thereby to nullify all that it has allowed to transpire in those proceedings up to that point – when it allowed the assertion to pass without specific denial. This waste of resources has a systemic effect. It operates to the prejudice of parties and stakeholders in unrelated disputes which had an equal claim on the scarce dispute-resolution resources which have now been wasted.

62 I conclude for these reasons that the twin purposes of s 2A(6) require a respondent to deny specifically a claimant's assertion of an arbitration agreement. A general denial does not suffice to address the twin purposes of s 2A(6). It does not put stakeholders on notice that dispute-resolution resources may be wasted and expectations may be defeated.

63 Third, s 2A(6) must require the same specificity for a respondent's denial whether or not the underlying claim arises from a contract and, if it does, whether or not the contract contains a defective arbitration clause. By way of illustration, assume the three following hypothetical respondents to a hypothetical arbitration of a hypothetical claim: (a) a respondent to a claim

which does not arise out of a contract but which the parties have apparently agreed *ad hoc* to refer to arbitration; (b) a respondent to a claim arising out of a contract which contains no arbitration clause at all; and (c) a respondent to a claim arising out of a contract which contains a defective arbitration clause.

64 Section 2A(6) applies in all three of these hypothetical arbitrations. That is because the twin purposes of s 2A(6) are engaged in all three of them. They each entail the same risk of wasted resources and of defeated expectations if a respondent fails specifically to deny a claimant's express assertion that an arbitration agreement exists. Section 2A(6) must therefore require a denial with an identical degree of specificity from all three hypothetical respondents.

65 Section 2A(6) cannot require the first hypothetical respondent to issue a general denial of the parties' contract. That is simply because the first hypothetical respondent has no contract with the claimant to deny generally. Section 2A(6) must of necessity require the first hypothetical respondent to deny specifically the claimant's assertion of an arbitration agreement. So too, s 2A(6) cannot require the second hypothetical respondent to issue a general denial of the parties' contract. That is because the parties' contract *ex hypothesi* cannot have any rational connection to the existence of an arbitration agreement. Section 2A(6) must equally of necessity require the second hypothetical respondent to deny specifically the claimant's assertion of an arbitration agreement. The third hypothetical respondent cannot be in a better position as regards the required specificity of its denial than the first and second hypothetical respondents. Section 2A(6) must therefore also require the third

hypothetical respondent to deny specifically the claimant's assertion of an arbitration agreement.

66 In that sense, the parties' historical conduct underlying their dispute is irrelevant for the purposes of s 2A(6). It is the claimant's *present* assertion of an arbitration agreement which must be denied, not the existence of a putative arbitration agreement in the *past*. If a respondent fails to deny *now* the claimant's assertion *now* of an arbitration agreement when the assertion calls for a reply, s 2A(6) will achieve its twin purposes by deeming there *now* to be an effective arbitration agreement between the parties. This deemed arbitration agreement does not arise from a past contract but from the parties' present conduct.

67 Where a claimant asserts that an arbitration agreement exists in the course of an arbitration (as opposed to other legal proceedings), there is undoubtedly an element of circularity to the introductory words of s 2A(6). The claimant's assertion cannot in reality be made "in…arbitral… proceedings" if there is no arbitration agreement between the parties within the meaning of s 2A(1) and if s 2A(6) has not yet operated to deem the asserted arbitration agreement to be effective. But I consider that s 2A(6) intended this circularity to be resolved pragmatically. An assertion that an arbitration agreement exists is an assertion made "in any arbitral…proceedings" within the meaning of s 2A(6) if the assertion is made on an occasion which has the potential to engage either or both of the twin purposes of s 2A(6). So too, an assertion "calls for a reply" within the meaning of s 2A(6) if a failure to deny the assertion has the potential to engage those purposes.

68 As I have already mentioned (see [53] above), Kennedys, on behalf of this applicant, asserted the existence of an arbitration agreement twice in the

course of the arbitration. On my construction of s 2A(6), both assertions were made "in… arbitral…proceedings" and both called for a reply from the respondent. The respondent failed to deny both assertions. Therefore, s 2A(6) operated to deem the asserted arbitration agreement to be effective immediately upon the respondent's failure. I now describe the two assertions.

The first assertion

69 Kennedys first asserted an arbitration agreement in July 2018. The assertion came in the notice of arbitration itself (see [22] above):[77]

> The Contract provides that disputes be referred to arbitration in Singapore subject to Singapore Law.
>
> … [The applicant] hereby seek [*sic*] your agreement in the appointment of a sole arbitrator.

70 A notice of arbitration has foundational significance in an arbitration. This notice of arbitration was no different. It was addressed directly to the respondent. It asserted expressly that an agreement existed between the parties to arbitrate disputes that might arise between them. It invoked the applicant's right under the asserted arbitration agreement to initiate the arbitration of a specific dispute.

71 The notice of arbitration engaged the twin purposes of s 2A(6). It manifested the applicant's expectation that the parties' dispute will be fully and finally resolved by arbitration in accordance with their agreement. It manifested also that the applicant had commenced incurring costs in preparing for the dispute to be resolved in the arbitration. I therefore consider that the assertion in the notice of arbitration came "in… arbitral…proceedings" within the meaning of the introductory words of s 2A(6). I also consider that, in these

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77 Mr Martin's Affidavit at p 51.

circumstances, the assertion called for a reply if the respondent disagreed with it.

72 Ms Choo replied to the assertion. But she did not deny the assertion specifically. Her reply alleged only that a condition precedent to the contract coming into existence was not satisfied because the respondent had failed to comply with the performance deposit clause in the contract (see [13(a)] above):[78]

> **From you**: … The Contract provides that disputes be referred to arbitration in Singapore subject to Singapore Law. … [the applicant] hereby seek [*sic*] your agreement in the appointment of a sole arbitrator.
>
> **My Reply**: From I can see [*sic*], we have not make [*sic*] the payment for the performance deposit, therefore we hv [*sic*] not enter to the contract to supply [*sic*].
>
> [emphasis in original]

73 For the reasons I have given, a general denial of the existence of a contract said to contain an arbitration agreement does not suffice to prevent s 2A(6) from operating. The reasonable interpretation of Ms Choo's general denial was that it was raised as a defence to the merits of the applicant's claim and not to deny the applicant's assertion of an arbitration agreement. If the final clause were missing entirely from the parties' contract, Ms Choo's general denial of the existence of the contract could not have sufficed to prevent s 2A(6) from operating. The respondent cannot be in a better position simply because the final clause of the contract exists and is arguably an arbitration agreement.

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78 Mr Martin's Affidavit at p 52.

74 Section 2A(6) therefore deemed there to be an effective arbitration agreement between the applicant and the respondent from the date of Ms Choo's reply in July 2018.

The second assertion

75 Kennedys asserted an arbitration agreement for a second time in August 2018. At that time, the parties were engaged in a tripartite correspondence with the SIAC under s 8(2) of the Act (see [24] above). Ms Choo informed the SIAC that she objected to an arbitrator being appointed because Mr Saiful had entered into the contract without the respondent's authority.[79] Kennedys took the position in reply that Mr Saiful's authority was a matter going to the merits of the parties' dispute and was not relevant to its application under s 8(2) of the Act. In the course of the reply, Kennedys asserted both that: (a) the respondent did not dispute that the arbitration had been validly commenced; and (b) that an arbitration agreement existed between the parties:[80]

> …
>
> 2. With respect, the matters stated in [the respondent's] email are irrelevant to our request for the appointment of a sole arbitrator.
>
> 3. We note that *it is not disputed that our client has commenced arbitration validly against [the respondent]*, and that the Notice of Arbitration had been validly served.
>
> …
>
> 6. Any substantive issues and allegations relating to the existence or validity of the contract … constitute disputes between [the applicant] and [the respondent], which are *subject to the Parties' arbitration agreement.* Those matters should therefore be raised before the [appointed arbitrator], and not before the appointing authority, SIAC.
>
> …

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79 Mr Martin's Affidavit at p 88.

80 Mr Martin's Affidavit at para 6, p 84.

> [emphasis added]

76 It is true that the applicant addressed this assertion to the SIAC and not to the respondent. I nevertheless consider that the assertion comes within the scope of s 2A(6). This exchange of correspondence was tripartite. Kennedys' assertion was therefore communicated to the respondent in copy. And Ms Choo chose to respond to the assertion directly to Kennedys.[81] Given that the respondent received and replied to the communication containing this assertion, I consider it immaterial that the assertion was, as a strict matter of form, addressed to the SIAC.

77 Once again, though, Ms Choo's reply did not specifically deny Kennedys' express assertion. Instead, she repeated her allegation that the respondent's obligation to pay the performance deposit was a condition precedent to the contract coming into existence and had not been satisfied:

> Refer again the the [*sic*] Saiful email to [the applicant] that, to get [the respondent] management approval of payment of performance deposit, no one from [the applicant] is coming over to the contract and its payment, it's completion, and what make the conclusion of getting the claim of loss? Without the deposit of performance, it is without the guaranteed of the supply, contract is incomplete. Throughout the entire emailing, no respond from [the respondent] management to take action to pay and no email being replied from the management. THIS, NEED TO JUSTIFIED.
>
> [all grammatical errors in original]

78 The context in which Kennedys made this assertion called for the respondent to deny it. The subject matter of this tripartite correspondence was the applicant's invitation to the President of the SIAC's Court of Arbitration to exercise his power under under s 8(2) of the Act read with Article 11(4)(*a*) of the Model Law to act for the respondent in constituting a tribunal. The twin

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81 Mr Martin's Affidavit at p 83.

purposes of s 2A(6) of the Act were engaged, just as they were engaged when the respondent received the notice of arbitration. Additional stakeholders in the putative arbitration had begun to incur costs. These additional stakeholders are the SIAC, albeit not as the administering institution, and any arbitrator who might be approached to constitute the tribunal. The applicant's assertion called for a specific denial. Otherwise, the procedure under s 8(2) of the Act would continue. Stakeholders would incur further costs in the expectation that the respondent did not deny the assertion. Ms Choo failed to deny the assertion specifically. All she did, once again, was to deny the existence of the contract generally. That does not suffice to prevent s 2A(6) from operating.

79 If for any reason it did not operate in July 2018, s 2A(6) operated now to deem there to be an effective arbitration agreement between the applicant and the respondent in and from August 2018.

Conclusion on s 2A(6)

80 Ms Choo now claims conveniently that it was the respondent's position during the arbitration "that there was no valid contract *and therefore no valid arbitration agreement*" [emphasis added].[82] This is not true in point of fact. Ms Choo never once in the course of the arbitration denied the existence of an arbitration agreement or connect her general denial of a contract to a specific denial of the claimant's express assertion of an arbitration agreement. Ms Choo's claim is also not to the point. What s 2A(6) required the respondent to do was to deny in 2018 the applicant's assertions in 2018 that an arbitration agreement existed between the parties. Denying the existence of a contract which the parties entered into in 2017 does not suffice for this purpose. That is

[82] Ms Choo's Affidavit at para 23.

the case even if the general denial is read as encompassing a denial of the binding force of each individual clause in the contract and even if it is assumed that the final clause is a defective arbitration clause.

Section 2A(1) of the Act

81 My holding on the operation of s 2A(6) of the Act makes it unnecessary for me to consider whether the final clause of the contract is in fact an arbitration agreement within the meaning of s 2A(1) of the Act. But I must confess some doubt on this point. I say that for two reasons.

82 First, as the respondent quite rightly points out, the operative words – such as they are – of the final clause of the contract (see [13(b)] above) makes no reference to arbitration whatsoever. Those operative words provide only that Singapore law is to be the governing law of the contract.[83] Choosing a governing law is obviously and fundamentally making a different choice from choosing arbitration as a dispute-resolution mechanism.

83 Second, even if one has regard to the boldface heading of the clause and to the word "arbitration" which appears there, it would be very difficult legitimately to read into that single word by a process of contractual construction an obligation on the parties to submit to arbitration "all or certain disputes" under the contract as s 2A(1) requires. And even then, this approach would require lavishly interpreting the word "arbitration" in the heading as having operative effect rather than merely having a descriptive effect which was left unfulfilled when the parties failed to include the necessary operative words in the body of that clause. This construction would therefore to my mind be doubly strained.

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[83] Respondent's Submissions at para 8.

84 It may well be the case, therefore, that the respondent's argument on s 2A(1) would have succeeded if the respondent had specifically denied the applicant's assertion that an arbitration agreement existed between the parties in July 2018. But the respondent did not do that. Its argument on s 2A(1) of the Act has been overtaken by the operation of s 2A(6) of the Act.

Fraud and corruption immaterial to the operation of s 2A(6)

85 The respondent's second argument on the first ground is that the contract is vitiated by fraud and corruption,[84] and therefore any arbitration agreement within it is also vitiated. This argument may have assisted the respondent if I had held that the final clause of the parties' contract is an arbitration agreement within the meaning of s 2A(1) of the Act. It would then have been necessary to analyse whether that arbitration agreement – even though separable – is vitiated by the alleged fraud or corruption which is said to vitiate the remainder of the contract.

86 I have instead held that the claimant's argument under s 2A(6) of the Act succeeds. In my view, any fraud or corruption in the formation of the parties' contract is incapable of having any effect on the operation of the arbitration agreement which is deemed effective by s 2A(6) of the Act. The effect of s 2A(6) is not to reach into the past to cure or validate the defect in the drafting of the final clause of the parties' contract and to deem that clause henceforth be effective as an arbitration agreement within the meaning of s 2A(1). As I have pointed out, s 2A(6) operates whether or not there is a contract between the parties, let alone whether or not there is a defective

[84] NOA at p 4, line 32 to p 5, line 2 and p 6, lines 17 to 23.

arbitration agreement in their contract. Section 2A(6) operates in the present, when the assertion of an arbitration agreement and the failure to deny take place.

87 The arbitration and the award are therefore not founded on the final clause of the contract which the parties entered into in December 2017. Instead, the arbitration and the award are founded on an arbitration agreement between the parties which s 2A(6) deemed to be effective by reason only of the parties' communications in July and August 2018 (see [69]–[79] above). It has therefore operated in this case without any connection to the parties' contract and therefore untainted by any fraud or corruption which may vitiate that contract. Further, there is no allegation that there is any factor which vitiates the parties' communications in July and August 2018.

88 Therefore, even if I were to find that the contract was vitiated by fraud and corruption which took place in 2017, and even if I were to find that the final clause of the contract (assumed to be and analysed as a separable arbitration agreement) was also vitiated by the same fraud and corruption, the arbitration agreement which s 2A(6) deemed to be effective in 2018 would remain entirely untainted by any such fraud or corruption and would stand.

Conclusion on the first ground

89 I have rejected the respondent's first ground for resisting enforcement of the award because I have concluded that s 2A(6) of the Act deems there to be an effective arbitration agreement between the parties from July 2018 at the earliest and August 2018 at the latest. I have also held that it is irrelevant to that conclusion that: (a) the final clause of the contract may not be an arbitration agreement within the meaning of s 2A(1); and (b) the final clause may be vitiated by fraud and corruption in December 2017.

90 The result is that the respondent is bound to arbitrate its substantive dispute with the applicant by the operation of s 2A(6) even if it is assumed that: (a) the respondent has never consented to arbitration, whether in the subjective sense or even in the objective contractual sense; and (b) the contract is tainted by fraud or corruption. That is undoubtedly an inroad on the consensual nature of arbitration. That is an especially serious inroad given that the allegations of fraud and corruption are made directly against the applicant and not just against Mr Saiful. An observer could justifiably take the view that the approach I have taken to s 2A(6) must be wrong because it demonstrates nothing so much as the proposition that fraud unravels everything except arbitration agreements.

91 I do not think that view would be correct. I consider the inroad on the consensual nature of arbitration created by my approach to s 2A(6) to be a justified inroad in terms of policy and a moderate inroad in terms of effect.

92 I consider the inroad justified in terms of policy because of the twin purposes of s 2A(6) of the Act (see [58] above). To advance those twin purposes, s 2A(6) does nothing more than to provide that a respondent who fails to deny a claimant's assertion of an arbitration agreement in the circumstances envisaged by s 2A(6) is precluded permanently from denying the arbitration agreement and from having recourse to litigation. Seen in that light, s 2A(6) merely establishes a statutory waiver or estoppel which binds the respondent. Whether it is correctly analysed as a waiver or an estoppel is immaterial for present purposes.

93 I consider this inroad to be a moderate inroad because it relates only to the mode of dispute resolution. Section 2A(6) says nothing about the parties' substantive rights and obligations. Thus, the respondent remained entirely at liberty in the arbitration to argue that there was fraud and corruption in the

formation of the contract. In that sense, s 2A(6) is merely the mirror image of the rule in s 6 of the Act that delivering a pleading or taking a step in litigation extinguishes permanently a defendant's right to have recourse to arbitration even if there is an arbitration agreement between the parties within the meaning of s 2A(1). Both provisions affect only the mode of dispute resolution and not its outcome. It is true that the operation of s 2A(6) does, at least in an arbitration governed by the Act, deprive a respondent of a right of an appeal against the outcome on the merits. But a respondent which finds itself bound by s 2A(6) has only itself to blame for its predicament.

94 I therefore reject the respondent's first ground for resisting enforcement of the award. For the reasons I have given, I rest this conclusion on the operation of s 2A(6) of the Act alone. It is therefore not necessary for me to decide: (a) whether the final clause of the contract is an arbitration agreement within the meaning of s 2A(1) of the Act; (b) if so, whether the contract is vitiated by fraud or corruption; and (c) if so, whether the final clause of the contract, treated as a separable arbitration agreement, is likewise vitiated by fraud or corruption.

The respondent was able to present its case

95 The respondent's second ground for resisting enforcement of the award is that it was unable to present its case in the arbitration within the meaning of Art 36(1)(*a*)(ii) of the Model Law. For this ground, the respondent relies only on the arbitrator's decision to proceed documents-only.[85] To understand and analyse the parties' submissions on this ground, it is necessary first to set out in more detail the chronology of the arbitration for the five-month period from the

[85] Respondent's Submissions at para 14.

time the tribunal was constituted in September 2018 to the time the arbitrator delivered her final award in February 2019.

The chronology of the arbitration

96 During this five-month period, the arbitrator, Kennedys on behalf of the applicant and Ms Choo on behalf of the respondent communicated regularly about the arbitration. The chain of emails which I summarise below is a complete record of the parties' communications during this period. There is no suggestion that any of these communications took place by telephone calls, video calls or physical meetings. All of the emails in this chain were sent or received (whether as addressee or in copy) by all three parties: the arbitrator, Kennedys and Ms Choo. Ms Choo does not suggest that she did not receive any of these emails, whether as addressee or in copy, at or about the time the email was sent.

97 On 9 October 2018, shortly after the tribunal was constituted, Kennedys made three procedural proposals to the arbitrator. First, Kennedys proposed for the first time that the arbitration "be dealt with on a documents only basis".[86] Kennedys proposed a documents-only arbitration because, in their view, the respondent could not credibly contest liability and therefore the only issue in the arbitration would be damages.[87] Secondly and accordingly, Kennedys proposed that the arbitration proceed without factual witness evidence and with expert evidence only on damages.[88] Third, Kennedys proposed a procedural timetable to take the arbitration forward.[89] They proposed that the parties

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86 Mr Martin's Affidavit at p 97.

87 Mr Martin's Affidavit at p 97.

88 Mr Martin's Affidavit at p 97.

89 Mr Martin's Affidavit at p 97.

exchange pleadings by mid-December 2018, exchange expert evidence by end-January 2019 and then seek the arbitrator's directions on closing submissions.[90]

98 On 17 October 2018, the arbitrator invited Ms Choo to respond specifically to the applicant's proposal for a documents-only arbitration and to its suggested procedural timetable.[91] Ms Choo did not respond.

99 On 19 October 2018, at the arbitrator's request, Kennedys confirmed that Ms Choo's email address was an active email address and that hard copies of Kennedys' 9 October 2018 email and the arbitrator's 17 October 2018 email in response had been delivered to the respondent's registered address.[92] On 24 October 2018, the arbitrator set a deadline of noon on 29 October 2018 for Ms Choo to respond.[93] Once again, Ms Choo did not respond.

100 On 30 October 2018, the arbitrator noted that the respondent had failed to respond to any of the preceding emails.[94] She then issued her first procedural direction setting out a timetable for the parties to exchange pleadings and expert evidence. Her timetable adopted Kennedys' proposed timetable from their 9 October 2018 email (see [97] above).[95] But the arbitrator did not adopt Kennedys' proposal to proceed documents-only. Instead, she invited the parties to discuss that proposal between themselves after the close of pleadings:[96]

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90 Mr Martin's Affidavit at p 97.

91 Mr Martin's Affidavit at pp 95 to 96.

92 Mr Martin's Affidavit at p 94.

93 Mr Martin's Affidavit at p 94.

94 Mr Martin's Affidavit at p 93.

95 Mr Martin's Affidavit at pp 93 to 94.

96 Mr Martin's Affidavit at pp 93 to 94.

> After the pleadings have been filed, the Parties to discuss (i) whether the arbitration will proceed as a documents only arbitration or if a hearing is required, (ii) whether parties to call any factual witness(es), and (iii) the time for service of Closing Submissions.

101 On 21 November 2018, within the deadline directed by the arbitrator, the applicant submitted its principal pleading, which it called the "Buyers' Claim Submissions".[97] The submission identified the contract, set out its material terms, asserted the respondent's breach and prayed for an award of damages of just over US$279,000, interest and costs. Annexed to the submission was all of the documentary evidence and the legal authorities on which the applicant relied in support of it.[98] The documentary evidence included information on market prices of gas oil from S&P Global Platts,[99] the industry-standard source for such data.

102 On 23 November 2018, two days later, Ms Choo finally responded. She emailed to the arbitrator and Kennedys her response to the applicant's submission. The response was in narrative and somewhat disjointed form. Ms Choo's 23 November 2018 email, as I shall call it, is critical to the respondent's case on its second ground for resisting enforcement. I therefore set the email out in full:[100]

> Dear [arbitrator],
>
> Greetings.
>
> 1- …[The applicant] should have at least care enough to ring the seller office, to send the order by post for the follow up.
>
> I have only come across the order only upon the termination where the buyer send by courier.

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97 Mr Martin's Affidavit at p 99.

98 Mr Martin's Affidavit at pp 133 to 146.

99 Mr Martin's Affidavit at pp 148 to 153.

100 Mr Martin's Affidavit at para 27, pp 158 to 159.

Question: If there is the tension of the supply, have they done the D.D to seller? showing track record.from the seller? To visit or to call the office? Did the buyer send out the vendor form for the seller to do the submission? This is an incomplete order to claim. Also known as an unreasonable claim / unreasonable case to be raised.

By looking at that, 08 March 18, Stephen / buyer wrote to mention that they will protect their position in term of losses will suffer soon as a consequence of seller non-performance of supply and paying the PD.

REFER to the above statement from the buyer, showing that from Dec 2017 till March 2018, they have not suffer any loss.

REFER to the slings of emailing. This can be seen as they have been getting updated that Saiful have been trying to SOURCE for the replacement cargo for them. It is obviously they have known that Saiful attempting to source for them.

REFER to the slings of emailing, particularly on 28 Dec 2017, Saiful mentioned that he have not manage to get his company to commit the PD to the buyer. Saiful wrote that he has notified the management to get to prepare the PB. (This showing effectively to the buyer that he is just notified the company to pay, but not getting approval for the payment. THEREFORE, the buyer is alerted the performance payment having problem, with this, they should or at least take the necessary action to call and to follow up with the buyer company but not email only. (No tension of loss being shown)

Question: With all this problem of the order status, still non of the buyer reach seller for the clarification, i.e call, or visit the buyer management. This looks like either the buyer missed out their duty or some mattering on with both buyer and Saiful.

Upon I received the letter that courier to my office. I have quickly contact the buyer. And after a while, Saiful have left Singapore. I then immediately send out a letter handwritten from myself to inform the buyer the leaving of Saiful and over the phone call too.

I strongly believe that the buyer is here for some earning but not to claim of the losses AS I couldn't see the buyer real INTENTION to get into order. I am not too sure but for references it might at which arrangement of buyer and Saiful appear into my company into this order. This should be under investigation but not on the table here.

Again. To be reasonable and a proper deal - a contract sign, SPA and the invoice of PD from the BUYER. It shall be mail out to

> the seller. However, NON of it having so. In the case if we have today, it is not deemed to fit.
>
> I, hereby to reject to enter sole arbitration by SIAC and to reject the fee of the hourly charge by [the arbitrator].
>
> REMARKS: Refer to the buyer loss that mentioned. Referring to the contract, the SUPPLY commitment of Saiful was the date of supply on 7th Jan 2018. If, on 8 March 2018, email from buyer mentioning that the buyer will then do something to avoid the suffer of loss. Meaning, the non arrangement of the delivery on 7th Jan have not caused buyer any loss.
>
> There are the matters need to be justified by the buyer but not sending a legal reps and engaging any government resources to mislead further.
>
> Thank you
>
> Yourse sincerely,
>
> Choo Foong Yee
>
> [all grammatical errors in original]

103 Under the arbitrator's procedural timetable, the respondent's defence was not due until 19 December 2018.[101] By an email in immediate response to Ms Choo's 23 November 2018 email, Kennedys asked the arbitrator whether the applicant should treat Ms Choo's 23 November 2018 email as the respondent's defence.[102]

104 On 27 November 2018, the arbitrator replied to Ms Choo. She asked Ms Choo to confirm by noon on 4 December 2018 whether the respondent intended Ms Choo's 23 November 2018 email to stand as the respondent's defence in the arbitration, failing which the arbitrator would proceed on the basis that it was.[103] The arbitrator also invited Ms Choo to respond by return email if she

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101 Mr Martin's Affidavit at p 93.

102 Mr Martin's Affidavit at p 158.

103 Mr Martin's Affidavit at p 157.

nevertheless intended to file a defence by 19 December 2018 as the arbitrator had originally directed.[104]

105 By a second email on 27 November 2018, the arbitrator asked the respondent to submit documentary evidence and authorities in support of its defence by 4 December 2018 or, at the latest, by 19 December 2018:[105]

> I would like to impress upon the Respondent that all documents including correspondence, together with any legal authorities / case law, referred to in the Defence is to be exhibited / annexed to the Defence with the appropriate cross-referencing. This ensures that all evidence are placed before the Tribunal for consideration.
>
> Thus, if it is the intention of the Respondent that its email of 23 November 2018 … is to stand as the Respondent's Defence, the Respondent is invited to furnish copies of the various documents including emails and other correspondence. I would like these documents should be submitted by 12 noon on 4 December 2018. That said, if the Respondent requires more time to submit the documents, I am prepared to consider the Respondent's request provided that the deadline for the submission of documents is no later than 19 December 2018.

Ms Choo did not respond to the arbitrator by the deadline set, whether by 4 December 2018, by 19 December 2018 or at all.

106 On 6 December 2018, Kennedys noted in an email to the arbitrator that Ms Choo had failed to respond by the deadline set and that Ms Choo's 23 November 2018 email therefore now stood as the respondent's defence. That accelerated the procedural timetable by two weeks. Kennedys indicated that they would file the applicant's reply by 26 December 2018 in accordance with the accelerated timetable.[106]

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104 Mr Martin's Affidavit at p 157.

105 Mr Martin's Affidavit at p 156.

106 Mr Martin's Affidavit at p 156.

107 A week earlier than foreshadowed, on 19 December 2018, Kennedys served its reply accompanied by a bundle of documents.[107] Annex A to the reply was Ms Choo's 23 November 2018 email.[108] Kennedys numbered in manuscript each of the paragraphs in the email and addressed each paragraph in turn in their reply, admitting or denying the paragraphs, as the case may be, and elaborating as necessary.

108 On 21 December 2018, Kennedys proposed that the arbitrator issue her award documents-only, on the basis of the material then before her. To that end, they confirmed that the applicant did not intend to adduce any factual evidence and proposed that the arbitrator dispense with expert evidence and closing submissions:[109]

> There is also very little an expert could say in the circumstances. It is not like an expert adducing evidence of market rates for vessel hire – using reported fixtures and perhaps the Baltic indices too. Here, we can only really go by the Platts indices - the globally accepted market indicator. There is no such thing as reported contracts for the sale and purchase of gas oil.
>
> On this basis, we believe that expert evidence can be dispensed with.
>
> We are also of the view that there is no need for an oral hearing – this is a simple case that can easily be dealt with on documents. The Claimant does not intend to adduce any factual witness evidence.
>
> Further, given there is no expert or factual witness evidence, there would be no need for Closing Submissions to "tie up" the evidence.
>
> Accordingly, we would respectfully request that the Arbitrator now proceeds to her Award on the basis of the evidence before her.

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107 Mr Martin's Affidavit at p 160.

108 Mr Martin's Affidavit at p 165.

109 Mr Martin's Affidavit at para 31, pp 171 to 172.

109 On 26 December 2018, the arbitrator asked Ms Choo to comment on Kennedys' proposals by 3 January 2019.[110]

110 On 27 December 2018, Ms Choo acknowledged receipt of the arbitrator's email and said that she would "read through [Kennedys'] … email properly and understand it accordingly".[111] Ms Choo did not follow up on this holding email with a substantive response to Kennedys' proposals, whether by 3 January 2019 or at all.

111 On 4 January 2019, in the absence of a response from Ms Choo, the arbitrator decided to proceed documents-only. I set out her procedural direction in full:[112]

> Dear Sirs,
>
> 1. I refer to the above matter.
> 2. In an email from the Claimant's solicitors dated 21 December 2018 ("the Claimant's 21 Dec Email"), the Claimant proposed procedural directions summarized as follows: -
>
> a. This is to be a document only arbitration;
>
> b. There is no need to adduce expert evidence;
>
> c. The Claimant does not intend to call adduce factual witness evidence; and
>
> d. There is therefore no requirement for Parties to submit Closing Submissions.
>
> 3. In my emails of 26 December 2018 (below) and 27 December 2018 (attached), the Respondent was invited to provide its comments on the Claimant's 21 Dec Email by 3 January 2019. Although the Respondent's representative had sent two emails on 27 December 2018 appearing below, I have

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110 Mr Martin's Affidavit at p 171.

111 Mr Martin's Affidavit at p 170.

112 Mr Martin's Affidavit at p 169.

> not received any substantive comments from the Respondent.
>
> 4. In view of the foregoing, here are the Procedural Directions No. 2 in order to take this arbitration forward.
>
> a. This reference is to proceed as a document only arbitration.
>
> b. As matters presently stand, there is no need for any oral hearing or expert evidence to be adduced.
>
> c. The Claimant and the Respondent are to adduce any factual witness evidence, if any or if necessary, by 18 January 2019.
>
> d. The Parties are also to provide their submissions on costs by 18 January 2019.
>
> 5. These directions are made after having considered the Claimant's Claim Submissions dated 21 November 2018, the Respondent's Defence Submissions dated 23 November 2018 (sent by way of Ms. Chanel Choo's email), the Claimant's Reply Submissions dated 19 December 2018, and the matters set out in the Claimant's 21 Dec Email. For the avoidance of doubt, the directions have been made notwithstanding that the Claimant has stated in their 21 Dec Email that it does not intend to adduce any factual witness evidence.
>
> 6. Thank you.
>
> Yours faithfully
>
> [The arbitrator]

112 On 15 January 2019, Kennedys confirmed again to the arbitrator that the applicant would not be adducing any factual witness statements. They also served the applicant's submission on costs as directed.[113] Ms Choo failed to respond to the arbitrator at all.

113 On 24 January 2019, Kennedys noted the respondent's failure and invited the arbitrator to proceed to her award.[114]

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113 Mr Martin's Affidavit at p 174.

114 Mr Martin's Affidavit at p 174.

114 On 1 February 2019, the arbitrator issued her award.[115] It was entirely in the applicant's favour. In little over an hour, Ms Choo responded as follows:[116]

> Good day.
>
> Refer to the attachment from you today.
>
> Clause 5&6 shall not be established, pls refer to clause 3 & 4 carefully.
>
> (pls see file enclosed)
>
> We should not be here as a whole.
>
> Thank you
>
> Regards,
>
> Chanel Choo
>
> [all grammatical errors in original]

115 On 11 February 2019, the arbitrator informed the parties that her award would stand despite Ms Choo's email.[117]

116 Within 18 minutes, Ms Choo responded as follows:[118]

> Refer to the email dated 26th Dec 2018.
>
> To my study through the case. This is his (the solicitor's of [the applicant]) personal philosophy that doesn't comply between [the respondent] and [the applicant] happening facts. Typically considered Out of the scope from the defining to the topic.
>
> Refer to my attachment below that sent out from [the applicant]. Have [the applicant] conduct the check through [the respondent] accounts details, for it order and the performance guaranteed to be paid before such a large order being issue?

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115 Mr Martin's Affidavit at p 177.

116 Mr Martin's Affidavit at p 176.

117 Mr Martin's Affidavit at p 176.

118 Mr Martin's Affidavit at pp 175 to 176.

> Evident of LC issuance facilities, trade references and the supplier from [the respondent] as per their criteria mentioned ? Hv that gone through properly? Answer is absolutely no. This order obviously given unrightfully. No evident sufficiently are found to the liability mentioned, contract given with other intention or deem a faulty of order given.
>
> Firstly and clearly. Refer to the files that Saiful sent Dec 2017 for the qualifier level prior the order issue. The file highlighted by [the applicant] on 20 Dec 2017, does it comply for it approval level? Again answer is nope. Also have not show prove of fund for it PB. As if above issues, [the respondent] not qualified to meet the requirements, how the order being award? With this unsatisfied criteria, how the claimant team not following up for it PB accordingly to [the respondent]?
>
> During my first visit to [the applicant] official address after I received the termination letter from them. The trader and the lawyer asked me repeatedly for a lump sum to paid to them for the amount of $30,000 to $50,000 for it settlement before moving to supply the cargo the them. Also they highlighted to make payment to them is a must before we can proceed to talk about the order further. (if that's the case, how does the order approved?)
>
> This is being suspect as such a prearrangement planned intentionally to seek payment of lose claim to victims before we can further, and to investigate.
>
> Thks
>
> [all grammatical errors in original]

117 In little over an hour, the arbitrator responded to point out that the respondent had been afforded an opportunity to present its case and that the award had been issued:[119]

> The Parties, including the Respondent, have been given the opportunity to present their respective cases within the timelines as set by the Tribunal. That time has since passed, I have considered the papers which has [*sic*] been submitted to the Tribunal, and the Award has now been issued. Please be guided accordingly.

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119 Mr Martin's Affidavit at p 175.

The arbitrator's point – presumably, and quite correctly – was that she was *functus officio* and that the respondent would have to raise the concerns set out in Ms Choo's 11 February 2019 email before another forum and on another occasion.

118 On 1 May 2019, the three-month time limit stipulated in Art 34(3) of the Model Law expired for the respondent to bring an application to set aside the award. The respondent did not apply to set aside the award within that time or at all.

The respondent's submissions

119 The respondent's submission on the second ground is as follows. Ms Choo did not appreciate the significance of the arbitrator's decision to proceed documents-only. As a result, right up until the arbitrator issued her award on 1 February 2019, Ms Choo was waiting for the arbitrator to hold a hearing to receive the parties' evidence *viva voce* and subject to cross-examination.[120] It was or ought to have been evident to the arbitrator: (a) that Ms Choo's command of English is poor;[121] (b) that the respondent's case in the arbitration was that the contract was vitiated by fraud and corruption;[122] (c) that the arbitrator could not determine the respondent's allegations of fraud and corruption and therefore the parties' dispute without receiving the evidence in chief of Mr Saiful *viva voce* and the evidence of Mr Taufik and Mr Ong[123] subject to *viva voce* cross-examination;[124] and (d) that Ms Choo may not appreciate the significance of the

120 Ms Choo's Affidavit, para 36.

121 NOA at p 8, lines 32 to 35.

122 Respondent's Submissions at para 17.

123 Mr Saiful's Affidavit at para 4.

124 Respondent's Submissions at para 22; NOA at p 13, lines 24 to 32.

decision to proceed documents-only.[125] Given all of these red flags, the arbitrator should have called the parties to attend physically before the arbitrator in order to see Ms Choo in person[126] and to "explain the meaning of a documents-only arbitration to [Ms Choo] in layman's terms".[127] The arbitrator's failure to do so left the respondent unable to present its case in the arbitration.

120 I reject the respondent's submission.

The legal principles

121 That a party was unable to present its case in an arbitration is both a ground for setting aside an award under Art 34(2)(*a*)(ii) of the Model Law and a ground for refusing enforcement of an award under Art 36(1)(*a*)(ii) of the Model Law. The two provisions contain the identical words: "was otherwise unable to present his case". The test under both provisions must therefore be the same and ought properly to be approached in the same way.

122 The proper approach on this ground is to ask whether the tribunal's conduct of the arbitration falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done. This enquiry will necessarily be fact-specific (see *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*China Machine*") at [98]).

123 This ground is related directly to the tribunal's obligation under Art 18 of the Model Law to give each party a "full opportunity" to present its case in

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125 NOA at p 10, lines 10 to 11.

126 NOA at p 8, lines 35 to 36.

127 NOA at p 10, lines 13 to 17.

the arbitration. An award issued by a tribunal which has complied with its duty under Art 18 will not be susceptible to attack under either Art 34(2)(*b*)(ii) or Art 36(1)(*a*)(ii) of the Model Law by reason only of an alleged deficiency in the tribunal's conduct of the arbitration.

124 Despite the use of the unqualified modifier "full" in Art 18, the obligation of a tribunal under this article to allow each party an opportunity to present its case is not without limit. A tribunal is obliged only to give each party a *reasonable* opportunity to present its case (*China Machine* at [97(a)]; see also *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 at [145]).

125 To succeed on its second ground, therefore, the respondent must satisfy me that the arbitrator failed to afford the respondent a reasonable opportunity to present its case in the arbitration by conduct which falls outside the range of what a reasonable and fair-minded tribunal in the circumstances of this case might have done.

The two senses of the respondent's argument

126 There are two senses in which to understand the respondent's submission that it was unable to present its case in the arbitration. First, it could be understood in the sense that the arbitrator did not give the respondent a reasonable opportunity to present its case against the arbitrator's *procedural decision* on 4 January 2019 to proceed documents-only. Second, it could be understood in the sense that the arbitrator did not give the respondent a reasonable opportunity to present its case on the merits of the parties' *substantive dispute* in the arbitration simply because she decided to proceed documents-only.

127 In oral submission, counsel for the respondent at times advanced the argument in the first sense and at other times disclaimed any intention to do so.[128] Thus, early in his oral arguments, counsel submitted that the arbitrator deprived the respondent of a reasonable opportunity to present its case in the arbitration by deciding to proceed documents-only.[129] The respondent's real point, he said, is that the arbitrator failed to consider that resolving the allegations of fraud and corruption raised in Ms Choo's 23 November 2018 email would require *viva voce* cross-examination and failed to consider that Ms Choo's poor command of English meant that she did not understand that a documents-only arbitration would omit these critical (from the respondent's perspective) features.[130]

128 To my mind, the gist of this submission is that a reasonable and fair-minded tribunal in the circumstances of this case would have considered both these issues and would not have decided to proceed documents-only on 4 January 2019 without seeing the parties in person and without explaining to Ms Choo what a documents-only arbitration entails.[131] That appears to me to be an attack on the decision-making process which led the arbitrator to decide to proceed documents-only, both in terms of the procedural justice she accorded to the parties before making her decision and in terms of the considerations which she took into account or failed to take into account in doing so. It amounts to an allegation that the arbitrator failed to give the respondent a reasonable opportunity to present its case on the arbitrator's procedural decision to proceed documents-only.

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128 NOA at p 11, lines 20 to 31.

129 NOA at p 9, lines 13 to 17.

130 NOA at p 12.

131 NOA at p 8, line 28 to p 9, line 2.

129 But later in his oral submissions, in response to a specific question from me, counsel for the respondent said that it was not his submission that the respondent was unable to present its case on the procedural decision whether to proceed documents-only.[132] He further disavowed any suggestion that the arbitrator denied the respondent natural justice in arriving at her decision to proceed documents-only.[133] He submitted that the respondent's case was only that it was unable to present its case on the merits of the dispute because it could not adduce Mr Saiful's evidence in chief and because it was unable to cross-examine the applicant's witnesses.[134]

130 Despite counsel's protestations to the contrary, it appears to me that the respondent is in reality advancing its argument on this ground in both of the two senses I have identified at [126] above. The respondent accepts that it is within the jurisdiction and the power of an arbitrator to conduct an arbitration documents-only.[135] That is of course correct, subject only to what I say at [143]–[149] below. The respondent must then accept that the mere fact that the arbitrator proceeded documents-only cannot, in and of itself, mean that she breached her duty to give the respondent a reasonable opportunity to present its case within the meaning of Art 18.

131 The heart of the respondent's submission on the second ground is that the arbitrator's decision to proceed documents-only on the facts of this case and in particular in light of Ms Choo's 23 November 2018 email failed to give the respondent a reasonable opportunity to present its case. Thus, on the

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132 NOA at p 11, lines 23 to 25, p 12 at lines 3 to 5.

133 NOA at p 9, line 30 to p 10, line 5.

134 NOA at p 11, lines 27 to 31.

135 NOA, p 12 lines 1 to 9.

respondent's case, it is the arbitrator's decision on 4 January 2019 (see [111] above) to proceed documents-only which is the root cause of the respondent being unable to present its case. But the respondent cannot now claim to have been unable to present its case in the arbitration by reason of a procedural decision which was within the arbitrator's jurisdiction and within her power unless that procedural decision itself is subject to a procedural defect, such as a failure to accord natural justice to a party.

132 I therefore examine the respondent's argument in both the senses I have identified (see [126] above). In both of those senses, I am satisfied that the arbitrator conducted the arbitration well within the range of what a reasonable and fair-minded tribunal in these circumstances might have done.

No breach in deciding to proceed documents-only

133 For the purposes of this analysis, I accept that it would have been evident to the arbitrator and to the applicant from the 23 November 2018 email (see [102] above) at the latest: (a) that Ms Choo's command of English is poor;[136] and (b) that Ms Choo is not trained in the law. I consider first the position disregarding these two personal characteristics of Ms Choo. I then consider the position taking these two characteristics into account.

134 I have no doubt that the arbitrator dealt with the issue of whether to proceed documents-only well within the range of what a reasonable and fair-minded tribunal in these circumstances might have done. I rely on three points which I extract from the chronology in the arbitration.

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136 Ms Choo's Affidavit at paras 24 and 33.

135 First, Ms Choo knew that whether the arbitrator should proceed documents-only was a live issue from 9 October 2018. Kennedys first proposed a documents-only arbitration in its email to the arbitrator on 9 October 2018 (see [97] above). That proposal was copied to Ms Choo by email and by way of a physical copy delivered to the respondent's registered address (see [98] above). Ms Choo replied to this email on 23 November 2018 (see [102] above). There is no suggestion, either in that email or in her evidence for this application, that Ms Choo did not receive the applicant's proposal to proceed documents-only on or about 9 October 2018.

136 Second, the arbitrator proceeded cautiously on the applicant's proposal to proceed documents-only. The arbitrator did not direct a documents-only arbitration as soon as Kennedys proposed it on 9 October 2018. Instead, the arbitrator invited the parties to discuss between themselves after the close of pleadings the applicant's proposal to see if they could agree a position (see [100] above).

137 Third, even when the applicant revived its proposal to proceed documents-only on 21 December 2018, the arbitrator gave the respondent an opportunity to be heard on it. Ms Choo was aware that Kennedys repeated the proposal to proceed documents-only on 21 December 2018, after pleadings had closed (see [108] above). On 26 December 2018, the arbitrator allowed Ms Choo nine days to respond to the request (see [109] above).This gave the respondent a total of 13 days from Kennedys' email of 21 December 2018 to consider the proposal. Ms Choo acknowledged her opportunity to be heard (see [110] above). But she failed to take the opportunity. It was only after Ms Choo failed to reply within the arbitrator's deadline that the arbitrator finally took the decision to proceed documents-only on 4 January 2019 (see [111] above).

138 These three points taken together establish that the arbitrator afforded the respondent more than a reasonable opportunity to present its case on whether to proceed documents-only. This argument therefore fails as an argument for resisting enforcement of the award.

139 Does it matter that I have accepted that it would have been obvious to the arbitrator from 23 November 2018 at the latest that Ms Choo's command of English is poor and that she is not trained in the law? In my view it does not.

140 The fact remains that Ms Choo at no time expressed any confusion or misapprehension about the applicant's proposal to proceed documents-only, whether when the proposal was first made on 9 October 2018 (see [97] above) or when it was repeated on 21 December 2018 (see [108] above). Likewise, she expressed no confusion or misapprehension about the proposal when the arbitrator expressly invited her to comment on it on 26 December 2018 (see [109] above). Quite the contrary: Ms Choo replied to the arbitrator's invitation affirmatively to say that she would read Kennedys' proposal "properly" and "understand it accordingly" (see [110] above).[137] Having presumably read and understood the proposal as foreshadowed, Ms Choo did not communicate any confusion or misapprehension to the arbitrator about its substance. She did not do so even when the arbitrator decided to proceed documents-only on 4 January 2019 (see [111] above). In particular, Ms Choo never once: (a) told the arbitrator that she did not understand the significance of proceeding documents-only; (b) ask the arbitrator to explain that term to her; or (c) told the arbitrator that she was waiting for a *viva voce* hearing to present and test the parties' factual evidence. Ms Choo's confusion and misapprehension was entirely self-engendered and uncommunicated.

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137 Mr Martin's Affidavit at p 170.

141 There was therefore no reason for the arbitrator: (a) to appreciate that Ms Choo was operating under any confusion or misapprehension as to what a documents-only arbitration would entail; (b) to believe that Ms Choo was waiting for a *viva voce* hearing; or (c) to think that the arbitrator should meet the parties in person in order to explain to Ms Choo how a documents-only arbitration would work.

142 There is accordingly no procedural defect in the arbitrator's decision to proceed documents-only.

No breach in proceeding documents-only

143 My finding that the respondent was given a reasonable opportunity to present its case on the decision whether to proceed documents-only leaves no room for the respondent to succeed on the second sense of this argument, *ie*, in the sense that the arbitrator's decision to proceed documents-only left the respondent unable to present its case in the arbitration generally.

144 I begin by accepting that the breadth of a tribunal's procedural power to conduct an arbitration documents-only under Art 19 of the Model Law is subject expressly to the parties' agreement and to any mandatory provision of the *lex arbitri*.

145 The parties have no agreement requiring a *viva voce* hearing within the meaning of Art 19 of the Model Law. Many institutions have rules which oblige a tribunal to hold a hearing. For example, Rule 24.1 of the SIAC Rules (6th Edition, 1 August 2016) ("the SIAC Rules") obliges the tribunal to hold a hearing unless the parties have agreed to a documents-only arbitration:

> Unless the parties have agreed on a documents-only arbitration or as otherwise provided in these Rules, the Tribunal shall, if

> either party so requests or the Tribunal so decides, hold a hearing for the presentation of evidence and/or for oral submissions on the merits of the dispute, including any issue as to jurisdiction.

Rule 24.1 provides, in effect, that either party may veto a proposal to conduct an arbitration documents-only, *ie*, without a hearing.

146 The SIAC Rules do not apply to the parties' arbitration. I have held that the arbitration was founded on an arbitration agreement between the parties deemed to be effective under s 2A(6) of the Act. An arbitration founded on s 2A(6) is necessarily an *ad hoc* arbitration, not an institutional arbitration. And even if the parties did have an arbitration agreement within the meaning of s 2A(1), they did not agree that the SIAC was to administer the arbitration. Neither did they agree to adopt the SIAC Rules in any such arbitration agreement or by an *ad hoc* agreement.

147 Singapore's *lex arbitri* is to the same effect as Rule 24.1 of the SIAC Rules. Art 24(1) of the Model Law provides as follows:

> Article 24. Hearings and written proceedings
>
> (1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

148 Like Rule 24.1 of the SIAC Rules, the effect of Art 24(1) is that a party which requires a *viva voce* hearing may veto any proposal to conduct an arbitration documents-only. To exercise this veto, however, the objecting party must *both*: (a) not agree "that no hearings shall be held"; *and* (b) positively make a request for a hearing to be held.

149 Article 24(1) of the Model Law does not assist the respondent. The most that can be said is that the respondent did not agree to the applicant's proposal that no hearings be held. And even that would be correct only if one assumes that the respondent's silence following Ms Choo's holding response to the arbitrator on 27 December 2018 (see [110] above) does not amount to implied consent to proceeding documents-only. The fact remains, however, that at no time did the respondent positively request a *viva voce* hearing. So, even though Art 24(1) of the Model Law gave the respondent a right to compel the arbitrator to hold a *viva voce* hearing despite the applicant's proposal to proceed documents-only and the tribunal's inclination to accede, the respondent failed to exercise that right.

150 There was therefore nothing on the facts of this case which removed the arbitrator's procedural discretion under Art 19 of the Model Law to proceed documents-only, whether in the parties' arbitration agreement or under the *lex arbitri*.

Conclusion

151 In whichever of the two senses the respondent's submission on this ground is understood (see [126] above), it amounts to arguing that the arbitrator had an obligation to deduce Ms Choo's confusion or misapprehension about what a documents-only arbitration entailed and an obligation to divine that Ms Choo was waiting for a hearing at which the respondent could present and test the factual evidence *viva voce*.[138] And the arbitrator was apparently obliged to do all of this even though Ms Choo's confusion and misapprehension was

138 Ms Choo's Affidavit, para 36.

entirely self-engendered and was never once communicated to the arbitrator in any of Ms Choo's several communications with her.

152 If the respondent's submission is correct, a tribunal's failure to discharge these obligations would be grounds for both refusing to enforce an award and also for setting it aside. This, as I pointed out to respondent's counsel in the course of the arguments, would be "an intolerable burden to put on arbitrators".[139] A tribunal cannot be faulted for failing to address a matter which neither party brings to its attention, as the Court of Appeal held in *China Machine* at [99]:

> … the tribunal's conduct and decisions should only be assessed by reference to what was known to the tribunal at the material time. A tribunal cannot be criticised as having acted unfairly for failing to consider or address considerations or concerns which the parties never brought to its attention.

153 In no way can it be said, therefore, that the arbitrator's decision to proceed documents-only falls outside the range of what a reasonable and fair-minded tribunal in the circumstances of this case might have done (see [122] above), given that Ms Choo's difficulties were self-engendered and uncommunicated. My summary of the chronology in the arbitration shows that the arbitrator gave the respondent every opportunity to be heard. And a tribunal is not expected to read minds.

154 I note finally that it is not uncommon for a commercial arbitration to proceed documents-only.[140] That is particularly so for a dispute which arises from the trade in a commodity such as gas oil. Indeed, the ability to conduct an

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139 NOA at p 14, line 2.

140 Mr Martin's Affidavit at para 22.

arbitration documents-only is an example of the procedural flexibility which gives arbitration an advantage over litigation as a dispute-resolution procedure.

155 This suffices to dispose of the respondent's argument that it was unable to present its case in the arbitration. However, for completeness, I make some further observations on this ground, assuming – in the respondent's favour and contrary to my finding – that the arbitrator's decision to proceed documents-only did in fact render the respondent unable to present its case within the meaning of Art 36(1)(*a*)(ii).

No prejudice

156 A party which establishes that it was unable to present its case in an arbitration will not succeed in resisting enforcement of an award for that reason alone. That party must also show that it was prejudiced as a result of being unable to present its case in the manner which it has established (see *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd and another matter* [2018] 4 SLR 271 at [65], discussing Art 34(2)(*a*)(ii) Model Law).

157 I am satisfied that the respondent suffered no prejudice as a result of the arbitrator's decision to proceed documents-only.

158 The respondent's argument on prejudice is as follows. The arbitrator's decision to proceed documents-only meant that she rendered her final award against the respondent without the benefit of the evidence of Mr Saiful, its key witness, as well as without cross-examination of the evidence of Mr Taufik and Mr Ong (see [7] above).[141] Mr Saiful has now admitted that he procured the contract through fraud and corruption without the respondent's knowledge (see

[141] Respondent's Submissions at para 22.

paragraph [35] above). If the respondent had been able to adduce Mr Saiful's evidence in the arbitration, and had been able to cross-examine the applicant's factual witnesses, it could have proven the fraud and corruption and established that the contract was thereby vitiated. Therefore, by proceeding documents-only the arbitrator failed properly to canvass the merits of the parties' dispute in the arbitration and her award. If she had done so, the outcome of the arbitration could have been different.[142]

159 I reject this argument for four reasons.

160 First, the arbitrator's decision on 4 January 2019 to proceed documents-only did not prevent the parties from adducing in the arbitration the evidence of any witness. It affected only whether the party could adduce the evidence *viva voce* or in documentary form. As far as Mr Taufik's and Mr Ong's evidence is concerned, there is no suggestion that their evidence was not available to the respondent during the evidential phase in the arbitration, *ie*, between December 2018 and January 2019. The arbitration concluded without these two witnesses' evidence because Ms Choo failed to make any attempt to secure their evidence and to place it before the arbitrator in any form. As for Mr Saiful's evidence, Ms Choo's loss of contact with Mr Saiful from June 2018 to July 2019 is not a risk which the respondent can cast upon the applicant at the enforcement stage.

161 Second, the arbitrator directed that the arbitration proceed documents-only by paragraph 4(a) of her procedural direction issued on 4 January 2019 (see [111] above). Paragraph 4(c) of the same procedural direction gave the parties a final opportunity to adduce factual witness evidence, provided they did so by 18 January 2019. The respondent therefore had the opportunity to adduce the evidence of any witness in documentary form right up until 18 January 2019.

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142 Respondent's Submissions at para 22.

Further, a procedural direction carries no finality under the Act or the Model Law. The respondent also had the opportunity to ask the arbitrator to reconsider her decision not to receive evidence *viva voce* up until 18 January 2019. The respondent did not take advantage of either of these opportunities.

162 Third, I do not consider that the decision to proceed documents-only shortened the duration of the arbitration so as to have the effect of excluding Mr Saiful's evidence. Even if it is assumed that this arbitration would have taken four months longer to conclude if the arbitrator had held a *viva voce* hearing than it did as a documents-only arbitration – an assumption which I consider to be reasonable in all the circumstances – that *viva voce* arbitration would have concluded with an award issued on 1 June 2019 instead of 1 February 2019. It was not until a month later, in July 2019, that the respondent re-established contact with Mr Saiful. Mr Saiful's evidence would still not have been available if this arbitration had proceeded *viva voce*.

163 Finally, as for the allegation that the respondent suffered prejudice by not being able to cross-examine the applicant's witnesses,[143] this allegation is so general and speculative as to be a non-starter. In any event, the applicant elected to call no factual witnesses at all in the arbitration. This is recorded in paragraph 2(c) of the arbitrator's procedural direction issued on 4 January 2019 (see [111] above). The respondent cannot complain that it suffered prejudice by being deprived of an opportunity to cross-examine the applicant's witnesses if the applicant had no intention of calling any.

164 It follows that the arbitrator's decision to proceed documents-only caused no prejudice to the respondent, even if it is assumed that that decision in some technical sense left the respondent unable to present its case in the

143 NOA at p 13, lines 24 to 32.

arbitration. The root cause of any prejudice which the respondent suffered in this arbitration is Ms Choo's confusion and misapprehension about the effect of proceeding documents-only. If that caused the respondent to wait in vain for a *viva voce* hearing that was never going to take place, that is not a risk which the respondent can cast upon the applicant at the enforcement stage.

Enforcement is not contrary to public policy

The respondent's case

165 The respondent's third ground for resisting enforcement of the award is that enforcing the award would be contrary to Singapore's public policy within the meaning of Art 36(1)(*b*)(ii) of the Model Law. Article 36(1)(*b*)(ii) is the analogue of Art 34(2)(*b*)(ii), which allows a Singapore court to set an award aside if it "is in conflict with the public policy" of Singapore. Although the two provisions are not worded identically, I take the substance of the test in the two provisions to be the same.

166 The respondent submits that I should refuse to enforce the award because it is tainted by Mr Saiful's conspiracy with the applicant to defraud the respondent by offering corrupt gratifications to Mr Taufik and Mr Ong to procure the contract (see [35] above).[144] As the respondent's counsel put it in his oral submissions, this puts a "question mark" over the award.[145]

167 The respondent's argument on this ground is not that a mere allegation of fraud and corruption suffices to succeed in resisting enforcement under Art 36(1)(*b*)(ii). Its argument invites me to find as a fact on the balance of

144 Ms Choo's Affidavit, para 40.

145 NOA at p 18, lines 11 to 14.

probabilities on the evidence before me in this application that there actually was fraud and corruption in the formation of the contract. In other words, the respondent's third ground fails *in limine* if I find that Mr Saiful did not procure the contract by fraud and corruption.

168 Given the serious and contentious nature of the respondent's allegations, I decline to make a finding either way on those allegations on affidavit evidence alone. I prefer to deal with the respondent's third ground on the assumption that the facts set out in Mr Saiful's WeChat messages and affidavit are true (see [35] above). I therefore assume – taking the respondent's case at its highest and without deciding the issue – that the contract was procured by fraud and corruption.

169 The respondent's argument is that the scope of Art 36(1)(*b*)(ii) is not confined to an issue of Singapore's public policy which arises from the conduct of the arbitration or from the contents of the award. The respondent does not suggest, quite rightly, that there is anything about the arbitration or the award which can on any view be considered to be contrary to any aspect of Singapore's public policy. The respondent's argument is that an award may be refused enforcement under Art 36(1)(*b*)(ii) if an issue of Singapore's public policy arises from the parties' dispute *even if* the arbitration and the award are completely consistent with Singapore's public policy.

170 Applied to the facts of this case, the respondent's argument is that the fraud or corruption which I have assumed to exist in the formation of the parties' contract *in itself* suffices to justify refusing enforcement of the award under Art 36(1)(*b*)(ii) of the Model Law.

171 I reject this argument for three reasons. First, there is no authority for it. Second, this argument undermines the finality of arbitration awards. Third, this argument undermines the policy of minimal curial intervention.

172 I deal with these three reasons in turn.

No authority

173 It is notable that the respondent cites no direct authority for this argument. The only indirect authority which the respondent cites is *Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd* [2010] 1 SLR 573 ("*Swiss Singapore*").[146] But the party resisting enforcement in *Swiss Singapore* did so on the ground that the claimant had committed perjury and suppressed evidence in the arbitration out of which the award arose (at [2]).[147] The alleged contravention of public policy in *Swiss Singapore* therefore had everything to do with the conduct of the arbitration and nothing to do with the merits of the parties' substantive dispute.[148] *Swiss Singapore* does not assist the respondent, even indirectly.

174 It is not surprising that the respondent can find no authority for this argument. The conditions in which this argument can even be made, let alone succeed, are very narrow. Thus, for example, it is very unlikely that a public policy issue which arises from the parties' dispute would remain alive to be raised at the enforcement stage where a Singapore court is asked to enforce an award arising out of an arbitration conducted with Singapore law as its *lex arbitri* in which a Singapore-seated tribunal has resolved the parties' dispute by

146 Respondent's Submissions at para 24; NOA at p 17, lines 16 to 23.

147 NOA at p 17, lines 16 to 23.

148 NOA at p 17, lines 27 to 28.

applying Singapore law. That is for the simple reason that any issue of Singapore's public policy arising from the parties' dispute will be an issue which is accommodated within the principles of Singapore's substantive law or its *lex arbitri* and which will ordinarily be raised and resolved in the arbitration itself. That would generally preclude the party resisting enforcement from raising the issue again at the enforcement stage.

175 An issue of Singapore public policy arising from the parties' dispute could remain or become a live issue at the enforcement stage primarily in two situations. One is where the party resisting enforcement was unaware of the facts giving rise to the issue at the time of the arbitration and therefore could not have raised it in the arbitration. An example would be a party who is completely unaware that a contract was procured by fraud or corruption until after a tribunal has issued its award against it. The second is where the parties' dispute is resolved under a substantive law *other than* Singapore law or where the award is issued under a *lex arbitri* other than Singapore's *lex arbitri*. An example would be where the subject-matter of the parties' dispute is arbitrable under a foreign *lex arbitri* but is not arbitrable under Singapore's *lex arbitri*. Even then, in both situations, the public policy issue which remains alive would have to come within the very narrow confines within which the public policy ground is allowed to operate (see *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [59]).

176 In these relatively rare circumstances, it is possible that an arbitration and an award may be completely consistent with Singapore's public policy but there remains alive at the enforcement stage an issue of Singapore's public policy arising from the parties' dispute.

177 This is not such a case. It falls into neither of the two situations I have posited. It is therefore not surprising that the respondent is unable to find authority to support its argument in a case such as this one.

Finality of awards

178 The respondent's argument on Art 36(1)(*b*)(ii) undermines the finality which s 19B of the Act confers on awards. There is no countervailing justification for doing so where the party resisting enforcement had the opportunity to place the issue of Singapore's public policy before the arbitrator to be resolved in the arbitration.

179 That is precisely what happened here. Ms Choo's 23 November 2018 made the following allegation (see [102] above):

> I strongly believe that the buyer is here for some earning but not to claim of the losses AS I couldn't see the buyer real INTENTION to get into order. I am not too sure but for references it might at which arrangement of buyer and Saiful appear into my company into this order. This should be under investigation but not on the table here.
>
> [all grammatical errors in original]

180 The applicant, no doubt assisted by its direct communication with Ms Choo after the notice of termination in May 2018 (see [16] above) and before issuing the notice of arbitration in July 2018 (see [22] above), was able to decipher this paragraph and understand it, correctly in my view, as an allegation that the applicant had colluded with Saiful or had conspired with him to defraud the respondent. The applicant therefore assigned the number "4" to this

paragraph of Ms Choo's email[149] and pleaded to it as follows in paragraph 4 of the applicant's reply submission:[150]

> Paragraph 4 [of Ms Choo's 23 November 2018 email] is denied. There is no collusion and/or conspiracy to defraud [the respondent] between [the applicant] and Saiful. [The respondent's] allegations are purely speculative and are unsubstantiated by evidence. Given that [the respondent concedes] that their allegations are 'not on the table here', it is unclear what purpose this paragraph serves, other than to colour the Arbitrator's mind to be prejudiced against [the applicant]. [The applicant has] a legitimate and genuine claim for losses, which are set out and particularised at paragraphs 12 – 14 of the Claim.

181 As a result of Ms Choo's investigations after receiving the notice of termination in May 2018 (see [17] above), the respondent knew that there was – on its case – fraud or corruption in the formation of the contract. Ms Choo knew this even though she lost contact with Mr Saiful in June 2018. Ms Choo's own evidence is that this loss of contact prevented her only from securing Saiful's evidence to *prove* the fraud and corruption, not that it prevented her from realising the existence of the fraud and corruption.[151] Yet, the respondent deliberately chose in its defence in the arbitration, as set out in Ms Choo's 23 November 2018 email, *not* to place the issue of fraud and corruption in the contract before the arbitrator for her decision. Instead the respondent chose to reserve this issue expressly for "investigation" elsewhere. The applicant was therefore perfectly entitled to decline to engage the respondent on this issue in the arbitration. And the arbitrator obviously could not decide an issue which both parties withheld from her.

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149 Mr Martin's affidavit at p 165.

150 Mr Martin's affidavit at p 163.

151 Ms Choo's Affidavit at para 37.

182 The applicant submits that it suffices to dispose of this ground that the arbitrator dealt in her award with the validity of the contract and expressly found that it was valid and binding.[152] The applicant therefore submits that there is a finding of fact and law by the arbitrator on the validity of the contract which now binds the respondent. I do not accept the applicant's submission to the extent that it is a submission that the award raises a cause of action estoppel which precludes the respondent from raising the issue of fraud and corruption now. It is true that the arbitrator found in the award that the parties entered into a valid and binding contract. But that finding must be read against the pleadings in the arbitration. For the reasons I have given, those pleadings did not place the issue of fraud and corruption in the contract before the arbitrator for determination.

183 Having said that, I accept that the extended doctrine of *res judicata* operates on the facts of this case to much the same effect as cause of action estoppel. *Res judicata* is a collective term for three distinct but interrelated principles: (a) cause of action estoppel; (b) issue estoppel; and (c) the "extended" doctrine of *res judicata* or the defence of "abuse of process" (*The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 at [98], citing *Goh Nellie v Goh Lian Teck* [2007] 1 SLR(R) 453 ("*Goh Nellie*") at [17]–[25]). This third principle is also known as the principle in *Henderson v Henderson* (1843) 3 Hare 100.

184 The first two of these three interrelated principles apply where an issue has previously been determined as between the same parties. The third principle,

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152 Mr Martin's affidavit at pp 181 to 182 (see [15]–[16] of the award).

ie, the extended doctrine of *res judicata* applies where an issue has not been raised previously for determination as between the parties but ought to have been raised (*Cheong Soh Chin and others v Eng Chiet Shoong and others* [2018] SGHC 130 at [26] and [32]).

185 I have found that the respondent expressly declined to place the issue of fraud or corruption in the formation of the contract before the arbitrator for determination in the arbitration. The applicant and the arbitrator therefore did not have to deal with the issue and did not in fact deal with the issue. On the facts of this case, therefore, only the extended doctrine of *res judicata* can apply. This requires the court to examine whether, having regard to the substance and reality of the earlier proceedings (*ie*, the arbitration), the issue in question (*ie*, whether there was fraud and corruption in the formation of the contract) ought reasonably to have been raised in those earlier proceedings rather than in the later proceedings (*ie*, this application) (see *Goh Nellie* at [53]).

186 The respondent's failure to place this issue before the arbitrator suffices to bring the issue within the extended doctrine of *res judicata*. The respondent is precluded from raising the issue of fraud or corruption in the formation of the contract on this application as a ground for refusing enforcement of the award in much the same way as a cause of action estoppel would preclude it from doing so. I therefore agree with the applicant that the respondent cannot now raise this issue as a ground for refusing enforcement, albeit for a different reason than that advanced by the applicant.

187 The respondent, having declined to put the issue of fraud and corruption in the formation of the contract before the arbitrator in the arbitration, cannot now seek to put the issue before me on this application in order to resist

enforcement on the public policy ground. Any other approach would undermine the finality which s 19B of the Act confers on the award.

Minimal curial intervention

188 The respondent's argument on Art 36(1)(*b*)(ii) also undermines the principle of minimal curial intervention. The principle is enacted in Art 5 of the Model Law and is a mainstay of Singapore's law of arbitration (see *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 at [37]).

189 The public policy ground in Art 36(1)(*b*)(ii) – and by extension also in Art 34(2)(*b*)(ii) – cannot be interpreted so widely that it can routinely be invoked on an enforcement or setting-aside application by a public policy issue arising from the parties' dispute, as opposed to a public policy issue arising from the arbitration or the award.

190 Where a party could have raised the public policy issue before the tribunal – or, even worse, did raise it before the tribunal but lost on it – allowing that party to raise the public policy issue again under Art 36(1)(*b*)(i) or under Art 34(2)(*b*)(ii) would amount *de facto* to creating a new ground for nullifying an award, in addition to the specific grounds enumerated in Art 36 of the Model Law. That is prohibited by Art 5 of the Model Law and the principle of minimal curial intervention.

Conclusion

191 For all the foregoing reasons, I hold that the respondent has failed on each of the three grounds it has advanced to resist enforcement of the award. I

have therefore dismissed with costs the respondent's application to set aside the *ex parte* order granting the applicant leave to enforce the award.[153]

Vinodh Coomaraswamy
Judge

Kevin Kwek, Gina Tan and Chong Li Tang (Legal Solutions LLC) for the applicant;
Leslie Yeo and Jolene Tan (Sterling Law Corporation) for the respondent.

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