Coal & Oil Co LLC *v* GHCL Ltd
[2015] SGHC 65

Case Number : Originating Summons No 538 of 2014

Decision Date : 12 March 2015

Tribunal/Court : High Court

Coram : Steven Chong J

Counsel Name(s) : Gabriel Peter and Chong En Lai (Gabriel Law Corporation) for the plaintiff; Joseph Lopez, Khushboo Hashu Shahdadpuri and Chong Li Tang (Joseph Lopez LLP) for the defendant.

Parties : Coal & Oil Co LLC — GHCL Ltd

Arbitration – Award – Recourse against award – Setting aside

12 March 2015 Judgment reserved.

Steven Chong J:

Introduction

1 In the last few decades, international arbitration has emerged as an attractive and, in certain industries, the preferred form of dispute resolution. Parties opt for arbitration for various tactical, strategic, and commercial reasons including the flexibility to select the tribunal who, in their assessment, is best suited to preside over the dispute bearing in mind the complexity of the case. Finality of the arbitral award is also perceived as a significant advantage though it would be fair to say that the perception is viewed less advantageously, after the fact, by the losing party. Curial intervention is therefore available only in limited circumstances, including instances where there has been a breach of natural justice, where the award is tainted by fraud or corruption, or where the award has been made *ultra vires* the jurisdiction of the tribunal.

2 I have observed a clear trend, in recent times, of parties seeking to set aside adverse arbitral awards on the basis of alleged breaches of natural justice. Many have failed. It is perhaps opportune for me to state that an accusation against a tribunal for committing a breach of natural justice is a serious matter. The tribunal is not able to defend itself and the accusation can have an adverse impact on the arbitrator's reputation and standing in the arbitration community. The courts take a serious view of such challenges and that is why those which have succeeded are few and far between and limited only to egregious cases where the error is "clear on the face of the record" (see *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM Division*") at [125]).

3 Parties have nonetheless been creative (though ultimately unsuccessful) in attempting to expand the defined boundaries of the doctrine of breach of natural justice. Some notable examples include an assertion that the tribunal's decision to close the arbitral proceedings and subsequent refusal to reopen them upon request was a breach of the right to a fair hearing (*ADG and another v ADI and another matter* [2014] 3 SLR 481) ("*ADG v ADI*"); that dilatoriness in the release of an award was evidence of apparent bias (*PT Central Investindo v Franciscus Wongso and others and another matter* [2014] 4 SLR 978 ("*PT Central Investindo*")); and that a tribunal's refusal to admit an expert report tendered on the last day of the hearing was a breach of the right to a fair hearing (*Triulzi*

Cesare SRL v Xinyi Group (Glass) Co Ltd [2015] 1 SLR 114) ("*Triulzi*").

4 The present case represents another novel attempt to set aside an arbitral award. In brief, the plaintiff's argument is two-fold. First, the plaintiff argues that the Tribunal had breached its *duty* under Rule 27.1 ("r 27.1") of the 2007 Singapore International Arbitration Centre Rules ("the 2007 SIAC Rules") because it failed to declare the arbitral proceedings closed before releasing its award. Second, the plaintiff argues that there was inordinate delay in the release of the award because the award was only issued 19 months after the parties' final closing submissions. On the strength of the preceding, the plaintiff submits that the award should be set aside, *inter alia*, on the basis that there had been a breach of natural justice.

5 Two general issues arise from these facts. The first is the proper construction of r 27.1; the second is the applicable time limit, if any, for the release of arbitral awards.

Background facts

6 The plaintiff, Coal & Oil Company LLC ("C&O"), is a company registered in Dubai, United Arab Emirates. [note: 1] It is engaged in the business of trading coal.

7 The defendant, GHCL Limited ("GHCL"), is a company registered in the Republic of India. It was, at the material time, a customer of the plaintiff. [note: 2]

8 The facts are not in dispute and lie within a narrow compass. On 26 April 2007, the plaintiff signed an agreement to supply between 180,000 and 190,000 Metric Tons ("MT") of coal to the defendant ("the Agreement"). [note: 3] It was agreed that the coal would be delivered in three to four shipments. Clause 16 of the Agreement provided that any disputes would be submitted to arbitration in Singapore. [note: 4] The plaintiff separately contracted with Noble Resources Pte Ltd ("Noble") to obtain some of the coal it required to fulfil the terms of its contract with the defendant ("the Noble Contract"). [note: 5]

9 Between April 2007 and January 2008, the price of coal rose dramatically and Noble attempted to re-negotiate the price of coal under the Noble Contract. The plaintiff initially resisted this increase as it would affect the profitability of its contract with the defendant but Noble was insistent that the price be increased. This triggered an exchange of correspondence between the plaintiff and the defendant during which the defendant was informed that the plaintiff would not deliver the third shipment (consisting of 70,000 MT of coal) unless a price increase was agreed. [note: 6] By way of an addendum dated 17 March 2008, the defendant agreed to a price increase of US$18.50 per MT for the third shipment ("the Addendum"). [note: 7] The third shipment was loaded and paid for on 25 April 2008. [note: 8] However, on 18 May 2008, the defendant demanded that the plaintiff repay a sum of US$1,295,888 (the additional sum paid under the Addendum), arguing that the Addendum was illegal as it had been procured through coercion. [note: 9]

10 The plaintiff refused to repay the demanded sum and, pursuant to clause 16 of the Agreement, the defendant submitted the dispute to arbitration in Singapore. [note: 10] The parties agreed, from the outset, that the arbitration would be governed by the 2007 SIAC Rules. [note: 11] A sole arbitrator ("the Tribunal") was appointed by the Singapore International Arbitration Centre ("the SIAC").

11 The following is a brief chronology of the arbitration: [note: 12]

Date	Event
22 May 2009	GHCL issued a notice of arbitration to C&O
14 May 2012 – 17 May 2012	Oral hearings conducted before the Tribunal
10 July 2012	GHCL filed its closing submissions
15 July 2012	C&O filed its closing submissions
15 August 2012	GHCL filed its reply submissions
17 August 2012	C&O filed its reply submissions
5 July 2013	The SIAC informed parties that the Tribunal was in the process of drafting the award.
3 September 2013	The Tribunal wrote to inform the parties that a draft award was expected to be ready by the end of the month.
12 December 2013	GHCL wrote to the SIAC requesting for an update on the status of the award. On the same day, the SIAC wrote to inform the parties that it had written to the Tribunal on the issue and hoped to receive a draft award before Christmas.
9 January 2014	The SIAC wrote to the parties to inform them that it had yet to receive the draft award but was in contact with the Tribunal on the issue.
17 January 2014	The SIAC wrote to the parties to inform them that it had received the draft award from the Tribunal.
14 March 2014	The Award was issued.
17 March 2014	The parties received a copy of the Award via email.

12 In its Final Award dated 14 March 2014 ("the Award"), the Tribunal found in favour of the defendant and held that the Addendum was vitiated by duress and ought to be side aside. The Tribunal awarded the defendant the sum of $1,295,888 with interest. [note: 13] The parties received the Award on 17 March 2014, one year and seven months after they made their final reply submissions (on 17 August 2012).

The plaintiff's application

13 On 12 June 2014, the plaintiff filed Originating Summons No 538 of 2014 ("OS 538/2014"), applying under s 24 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") to set aside the Award on the following grounds: [note: 14]

(a) First, under Art 34(2)(*a*)(iv) of the UNCITRAL Model Law on International Commercial Arbitration 1985 ("the Model Law") as set out in the First Schedule to the IAA in that the issuance of the Award was in breach of the parties' agreed procedure.

(b) Second, under Art 34(2)(*b*)(ii) of the Model Law in that the Award was in conflict with the public policy of Singapore.

(c) Third, under s 24(b) of the IAA in that there was a breach of natural justice.

14 The plaintiff also prayed, in the alternative, for a declaration under Art 14(1) of the Model Law that the Tribunal's mandate had been terminated prior to 14 March 2014 (the date of the issuance of the Award) by reason of the Tribunal's failure to act without undue delay in declaring the proceedings closed and that, therefore, the Award should be set aside for want of jurisdiction. [note: 15] As the application to terminate the mandate of the arbitrator was filed out of time, the plaintiff also sought an extension of time in aid of that specific ground of the application. [note: 16]

15 At the hearing on 20 January 2015, Mr Peter Gabriel ("Mr Gabriel"), counsel for the plaintiff, informed me that the plaintiff would not be proceeding with the alternative prayer. [note: 17] I should add that if the plaintiff had pursued the alternative prayer, I would not have been minded to grant the extension of time. Order 69A r 2(3) of the Rules of Court (Cap 322, R5, 2014 Rev Ed) ("ROC") stipulates that any application to decide on the termination of the tribunal's mandate must be made "within 30 days from the date of receipt by the applicant… of the arbitral tribunal's decision or ruling." Given that the plaintiff had received the Award on 17 March 2014, the application ought to have been filed by 16 April 2014. The plaintiff was thus 57 days late in filing the application on 12 June 2014. No convincing reasons for the delay were put forward apart from the need to "study the purported Final Award", "seek legal advice", and instruct new solicitors. [note: 18] However, I note that the plaintiff was represented by their previous solicitors, M/s Rajah & Tann LLP, at least until 2 May 2014, which is well *after* the deadline for the filing of the application had passed. [note: 19] While they were represented by their previous solicitors, the plaintiff had ample time to study the Award and seek their advice. Therefore, a delay of 57 days – nearly twice the length of the time provided for in O 69A r 2(3) of the ROC – is inexcusable.

The substantive issues

16 With that, it remains for me to consider the remaining three grounds set out at [13]. As noted above at [4], all three grounds rest on the same two factual premises, each of which the plaintiff asserts is a sufficient basis for invoking any one of the three grounds for setting aside. The first factual premise is the Tribunal's purported failure to comply with r 27.1. The second is the 19-month gap of time between the final submissions tendered by the parties and the date of the release of the Award, a lapse of time which the plaintiff terms an "inordinate delay".

17 It is undisputed that the Tribunal only released the Award 19 months after the parties tendered their final written submissions. However, parties disagreed on whether the Tribunal had been in breach of r 27.1 so that is the issue to which I shall now turn.

Has there been a breach of r 27.1?

18 Rule 27.1 reads:

> 27.1 Before issuing any award, the Tribunal shall submit it in draft form to the Registrar. Unless the Registrar extends time or the parties agree otherwise, the **Tribunal shall submit the draft award to the Registrar within 45 days from the date on which the Tribunal declares the proceedings closed**. The Registrar may suggest modifications as to the form of the award and, without affecting the Tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be issued by the Tribunal until it has been approved by the Registrar as to its form. [emphasis added in bold]

The parties' arguments

19 Mr Gabriel's argument may be expressed syllogistically. First, he submits that r 27.1 *obliges* the Tribunal to first declare the proceedings closed before issuing a draft award. Second, he notes that it is common ground that the Tribunal did not declare the proceedings closed before issuing the draft award. In conclusion, he submits, the Tribunal had breached its duty by issuing the draft award without first declaring the proceedings closed and the Award must therefore be set aside.

20 It is clear that, on the face of r 27.1, the 45-day period only begins to run from the date on which the Tribunal declares the proceedings closed. It is also not in dispute that the Tribunal did not declare the proceedings closed. Therefore the key question is whether the Tribunal is *obliged* or merely *empowered* to declare the closure of proceedings. Mr Gabriel concedes that there is nothing on the face of r 27.1 which *expressly requires* the Tribunal to declare the proceedings closed. However, he argues that such an obligation may be inferred because the issuance of arbitral award always takes place in two stages: first, the tribunal declares the proceedings closed; second, the tribunal must submit the draft award to the Registrar of the SIAC within 45 days of its declaration. Mr Gabriel submits that because the "second step is a *mandatory step* and is hinged upon the declaration of close of proceedings by the Tribunal… the Tribunal as a first step *is required to declare the closure of the arbitration proceeding[s]*" [note: 20] [emphasis added].

21 Mr Joseph Lopez ("Mr Lopez"), counsel for the defendant, submits that there is no express provision in the 2007 SIAC Rules (including r 27.1) which imposes any requirement on the Tribunal to declare the proceedings closed. In fact, he submits, the scheme of the 2007 SIAC Rules provides otherwise. In this connection, he relies on r 21.5 of the 2007 SIAC Rules ("r 21.5") which reads:

> The **Tribunal may declare the hearings closed** if it is satisfied that the parties have no further evidence to produce or submissions to make. The Tribunal may on its own motion or upon the application of a party but before any award is made, reopen the hearings." [emphasis added in bold]

Mr Lopez submits that the expression "hearings" in r 21.5 is synonymous with the expression "proceedings" in r 27.1. Thus, he concludes, the 2007 SIAC Rules specifically confers a *power* (through r 21.5, which is expressed in discretionary terms) and not a *duty* on the Tribunal to declare the proceedings closed.

22 Mr Lopez gives two reasons in support of this construction:

(a) First, Mr Lopez relies on the changes wrought by the passage of the 2010 Singapore International Arbitration Centre Rules ("2010 SIAC Rules"). Rule 28.1 of the 2010 SIAC Rules (the successor to r 21.5 of the 2007 SIAC Rules) provides that that the Tribunal "*shall*, after consulting with the parties, declare the *proceedings* closed *if* it is satisfied that the parties have no further relevant and material evidence to produce or submission to make" [emphasis added]. Rule 28.2 of the 2010 SIAC Rules (the successor to r 27.1 of the 2007 SIAC Rules), remains largely unchanged and provides that "the Tribunal shall submit the draft award to the Registrar within 45 days from the date on which the Tribunal declares proceedings closed." Mr Lopez makes the following observations: first, the expression "close of hearings" in r 21.5 of the 2007 SIAC rules has been amended to read "close of proceedings" in r 28.1 of the 2010 SIAC Rules; second, there is no provision in the 2010 or 2013 versions of the SIAC Rules which provides for a declaration of the closure of the hearings – there is only provision for a declaration of the closure of the proceedings; third, the word "may" in r 21.5 was replaced with the word "shall" in r 28.1 of

the 2010 SIAC Rules. Mr Lopez infers from the foregoing that the expression "hearings" in r 21.5 had always been intended to be read interchangeably with the expression "proceedings" in r 27.1 and submits that the 2010 amendments were made, *ex abundanti cautela*, to make this clear. [note: 21]

(b) Second, Mr Lopez drew my attention to Article 3 of Schedule 1 of the 2007 SIAC Rules, which is entitled "Special Provisions for SIAC Domestic Arbitration Rules". Art 3(5) of Schedule 1 of the 2007 SIAC Rules ("Art 3(5)") provides that "a Tribunal's [summary] award or order shall be made in writing *within 21 days after close of hearing* unless extended by the Registrar" [emphasis added]. Mr Lopez notes that Art 3(5) imposes a time limit for the release of the summary award with reference to the *close of hearings* and submits that this demonstrates that, insofar as time limits for the release of awards are concerned, the expressions "close of hearings" and "close of proceedings" are synonymous and are used interchangeably. [note: 22]

Does r 27.1 impose a power or a duty to declare proceedings closed?

23 Rule 27.1 has been incorporated into the parties' contract and must be interpreted purposively (see *NCC International AB v Land Transport Authority Singapore* [2009] 1 SLR(R) 985 at [37] ("*NCC International*"); *AQZ v ARA* [2015] SGHC 49 at [132]) ("*AQZ v ARA*"). Since we are considering the institutional rules of an arbitral institution, this entails a consideration of the drafting history of the rules, in a manner akin to an examination of the legislative history of an Act of Parliament (see *NCC International* at [37]).

The drafting history of r 27.1

24 In total, there have been five different editions of the SIAC Rules (excluding the Domestic Arbitration Rules released in 2001 and 2002), all of which contain provisions which govern the time limit for the release of arbitral awards and for the declaration of the closure of hearings/proceedings. These provisions exist in three different permutations.

25 The first permutation exists in the 1991 and 1997 versions of the SIAC Rules (hereinafter, "the 1991 SIAC Rules" and "the 1997 SIAC Rules" respectively). Rule 21.6 of the 1991 SIAC Rules and r 22.6 of the 1997 SIAC Rules are, save for minor differences in wording, identical. Rule 21.6 of the 1991 SIAC Rules reads:

> The **Tribunal may declare the hearings closed** if the parties have no further proof to offer or witnesses to be heard or submissions to make. **The Tribunal may on its own motion or upon application of a party but before any award is made, reopen the hearings**. [emphasis added in bold]

Rule 27.1 of the 1991 SIAC Rules and r 28.1 of the 1997 SIAC Rules deal with the time limits for the rendering of awards. Both provisions are also, save for minor differences in wording, identical. Rule 27.1 of the 1991 SIAC Rules reads:

> The Tribunal shall make its award in writing **within forty-five (45) days from the date on which the hearings are closed** and, unless all the parties agree otherwise, shall state the reasons upon which its award is based. The award shall state its date and shall be signed by the arbitrator or arbitrators. [emphasis added in bold]

26 The second permutation is found in the 2007 SIAC Rules. Rules 21.5 and 27.1 of the 2007 SIAC Rules are reproduced here for convenience:

21.5 The Tribunal may declare the hearings closed if it is satisfied that the parties have no further evidence to produce or submissions to make. The Tribunal may on its own motion or upon the application of a party but before any award is made, reopen the hearings. [emphasis in bold]

…

27.1 Before issuing any award, the Tribunal shall submit it in draft form to the Registrar. Unless the Registrar extends time or the parties agree otherwise, the **Tribunal shall submit the draft award to the Registrar within 45 days from the date on which the Tribunal declares the proceedings closed**. The Registrar may suggest modifications as to the form of the award and, without affecting the Tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be issued by the Tribunal until it has been approved by the Registrar as to its form. [emphasis added in bold]

27 The third permutation may be found in the 2010 SIAC Rules and the 2013 version of the SIAC Rules ("the 2013 SIAC Rules"). Rules 28.1 and 28.2 of the 2010 SIAC Rules are identical to rr 28.1 and 28.2 of the 2013 SIAC Rules. Rules 28.1 and 28.2 of the 2010 SIAC Rules read:

28.1 The Tribunal shall, after consulting with the parties, declare the proceedings closed if it is satisfied that the parties have no further relevant and material evidence to produce or submission to make. The Tribunal may, on its own motion or upon application of a party but before any award is made, reopen the proceedings.

28.2 Before issuing any award, the Tribunal shall submit it in draft form to the Registrar. Unless the Registrar extends time or the parties agree otherwise, the **Tribunal shall submit the draft award to the Registrar within 45 days from the date on which the Tribunal declares the proceedings closed**. The Registrar may, as soon as practicable, suggest modifications as to the form of the award and, without affecting the Tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be issued by the Tribunal until it has been approved by the Registrar as to its form.

[emphasis added in bold]

28 When the history of the SIAC Rules is examined, a clear trajectory may be discerned: there has been a gradual shift towards the imposition of stricter timelines for the release of arbitral awards through a decrease in tribunal autonomy and a concomitant increase in the supervisory role of the Registrar and the parties. Under the 1991 and 1997 of the SIAC Rules, the release of the award was entirely within the control of the tribunal. This is because the 45-day period begins to run *if and only if* the tribunal elects to declare the closure of hearings which it may, on its own motion or on the application of one of the parties, reopen. Further, the 45-day time limit may be extended by the tribunal on its own motion (see r 24.1(e) of the 1991 SIAC Rules and r 25(e) of the 1997 SIAC Rules, which grant the tribunal the general power to extend or abbreviate any time limits provided in the rules of its own motion, subject only to the caveat that it must afford the parties an opportunity to state their views). By contrast, under the 2010 and the 2013 versions of the SIAC Rules, the reckoning of time begins to run when the tribunal declares a closure of proceedings, which it is *obliged* to do *if*, after consulting with the parties, it is of the view that the parties have no further evidence or submissions to present. This declaration triggers the start of a 45-day window within which the tribunal has to render its draft award. This time limit may not be unilaterally extended by the tribunal. This is because, since the 2007 SIAC Rules, the general power of the tribunal to extend time limits has been expressly qualified by the proviso that this power does not cover extensions of time limits for the release of the award (see r 24(d) of the 2007 SIAC Rules and r 24(c) of the 2010/2013 SIAC

Rules). Under the 2010 SIAC Rules, the 45-day time limit may only be extended by the Registrar or by the agreement of the parties.

29 Any construction of the 2007 SIAC Rules must reflect its place in the historical development of the SIAC Rules, bearing in mind the careful balance the drafters wanted to strike between tribunal autonomy (in the conduct of the arbitration) and institutional oversight (through the supervisory role of the Registrar): see generally Sabiha Shiraz, "The New SIAC Rules 2007" [2007] 4 Sinarb 2 at p 3.

30 The 2007 SIAC Rules is unique in that it is the only iteration of the rules which specifically *empowers* the tribunal to declare a closure of *hearings* but imposes a timeline for the release of the award with reference to a closure of *proceedings*. To elaborate:

(a) The 1991 and 1997 versions of the SIAC Rules give the tribunal a *power but not a duty* to declare *hearings* closed. Following a declaration of the closure of *hearing*s, a tribunal has an obligation to render a draft Award within 45 days. The 1991/1997 SIAC Rules did not contemplate a declaration of the closure of *proceedings*.

(b) The 2010 and 2013 versions of the SIAC Rules impose a *duty* on the Tribunal to declare *proceedings* closed if, after consulting with the parties, it is satisfied that they have no further evidence or submissions to present. Following a declaration of the closure of *proceedings*, a tribunal has an obligation to render a draft Award within 45 days. The 2010/2013 SIAC Rules do not refer to the closure of *hearings*.

31 The key question is therefore whether the 2007 SIAC Rules, being silent on the issue, ought to be construed as imposing a *duty* on the tribunal to declare proceedings closed (as Mr Gabriel has suggested) or whether it should be construed as conferring a mere power. I am of the view that the latter construction is preferable for four reasons.

32 First, the former construction would not be consonant with the drafting history of the rules. Under the 2010 and 2013 SIAC Rules, the tribunal's duty to issue a declaration of the closure of proceedings only arises once it has (a) consulted the parties; and (b) *personally formed a view* that the parties have no further evidence to tender or submissions to make. However, there is nothing in the 2010 or 2013 versions of the SIAC Rules which suggest that the tribunal has a duty to consult parties on this issue to begin with. Therefore, under the 2010/2013 SIAC Rules, it is entirely possible that the proceedings may never be declared closed. This situation would arise if (a) there were no consultation between the tribunal and the parties as to whether the latter has any further evidence to tender or submissions to make; and/or (b) if the tribunal does not form the view (following such consultation) that the parties have no further relevant material evidence to produce or submissions to make. The plaintiff's construction of r 27.1, if accepted, would mean that the 2007 SIAC Rules are even stricter than its successor since it would impose an *unqualified* obligation to issue a declaration of closure without the duty to first consult with the parties and the duty to, after such consultation, be subjectively satisfied that parties do not have further evidence or submissions to present.

33 The plaintiff's construction is not only impractical (since the parties are clearly the ones who are best placed to advise the tribunal if they have further material to present), it would also give rise to difficulties. It would be unsafe to impose a duty on tribunals to issue a declaration of closure of the proceedings without a predicate duty of prior consultation with the parties (which is present in the 2010/2013 SIAC Rules). Imposing an unqualified duty to issue a declaration of closure might encourage hasty tribunals to close proceedings prematurely, opening awards to collateral attacks on the basis that the rules of natural justice have been violated. An aggrieved party might be encouraged to apply to set aside an award on the basis that proceedings had been closed

prematurely, thereby denying him an adequate opportunity to present his case. This concern is not new. Rule 21.6 of the 1991 SIAC Rules (the predecessor of r 21.5 of the 2007 SIAC Rules) appears to have been derived from Art 29 of the United Nations Commission on International Trade Law Arbitration Rules 1976, *UN General Assembly Resolution 31/98*, (UN Doc. A/RES/31/98, 15 December 1976) ("*UNCITRAL Rules 1976*"). Article 29 of the UNCITRAL Rules 1976 reads, "[t]he arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed." At its Ninth Session, the Committee of the United Nations Commission on International Trade Law ("the UNCITRAL Committee") was fully cognisant of the danger that aggrieved parties might apply to set awards aside on the basis that they had been denied an opportunity to present their case because of the premature closure of the hearings. That was why the representatives in the UNCITRAL Committee drafted Art 29 carefully to require tribunals to consult the parties in the arbitration *before* exercising its power to declare hearings closed: see *Summary Record of the 16th Meeting of the United Nations Commission on International Trade Law, Ninth Session (*A/CN.9/9/C.2/SR.16, 26 April 1976) at paras 83 to 85.

34 Second, the plaintiff's construction is also not consonant with the *raison d'être* of r 27.1. In my view, the declaration of closure functions as a case-management tool. As explained by Mark Mangan, Lucy Reed and John Choong in their book, *A Guide to the SIAC Arbitration Rules* (Oxford University Press, 2014) ("*A Guide to the SIAC Arbitration Rules*"), at para 12.11:

> [t]he closure of the proceedings [as provided for in r 28.1 of the 2010/2013 SIAC Rules] prevents an endless stream of submissions or new documents from the parties. It also signals to the parties (and the Secretariat) that they can expect to receive the award in relatively short order. *In practice, tribunals will usually only declare the proceedings closed when the drafting of the award is well advanced or is expected to be completed within 45 days, as required* by Rule 28.2. [emphasis added in italics]

It follows that the declaration of closure of proceedings is essentially a tool for case-management. It serves two main purposes. First, it benefits the tribunal by preventing the drafting process from being derailed by last-minute submissions from parties. Second, it serves as a signal to parties that the arbitral process is coming to an end and that a final disposition of their legal rights is forthcoming.

35 The plaintiff's argument, if accepted, would elevate a case-management tool into a condition precedent for the release of the award. To my mind, imposing a *duty* on the tribunal to declare proceedings closed is inconsistent with the case-management function of a declaration of closure. Tribunals have wide powers of case management (see *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [60]; *TMM Division* at [115]). This is particularly so for parties who elect to arbitrate in Singapore under the SIAC Rules, which grant tribunals wide and flexible case-management powers (see *ADG v ADI* at [111]). To impose a duty of declaration would effectively limit a tribunal's freedom of action, which is the very opposite of what case-management powers are intended for.

36 Third, the plaintiff's construction is not commercially sensible. The plaintiff is unable to provide any satisfactory explanation *why* the declaration of closure is normatively important enough to the arbitration process that such a duty should be imposed. The plaintiff's submission that the declaration of closure is "a fundamental requirement as per the agreement of the parties" [note: 23] is question-begging. As the plaintiff acknowledges, r 27.1 is silent as to whether the Tribunal has a *duty* or a mere *power* to issue a declaration of closure of proceedings so the plaintiff bears the burden of proving why the former construction is more commercially sensible and is to be preferred. It is difficult to understand why the drafters of the SIAC Rules, being mindful of the need to avoid impeding the

arbitration process with pointless formalities, would require arbitral tribunals to first declare proceedings closed before issuing an award.

37 It is also telling that the plaintiff is unable to provide a definitive answer on when the Tribunal's obligation to issue a declaration of closure arose in this case. In its written submissions, it identified five possible dates when the Tribunal ought to have declared hearings closed: (a) 17 August 2012 (the date the plaintiff filed its final reply submissions); (b) 5 July 2013 (when the SIAC informed the parties that the Tribunal was in the process of drafting the award); (c) 15 August 2013 (45 days before 30 September 2013, the first expected completion date of the award); (d) 10 November 2013 (45 days before 25 December 2013, the revised expected completion date for the award); and (e) 3 December 2013 (45 days before 17 January 2014, when the Registrar was said to have received the draft of the Award). [note: 24] During the oral hearings, Mr Gabriel could only offer the tentative response that the declaration ought to have been made within a reasonable time. When pressed, he eventually submitted that the Tribunal ought to have declared the proceedings closed either on 3 December 2013 (45 days before 17 January 2014, when the draft award was received by the SIAC) or 45 days *after* 17 January 2014. [note: 25]

38 In my view, the plaintiff's inconclusive and unsettled position on this issue just reinforces my point that the central difficulty with the plaintiff's submission is that there just does not seem to be any compelling reason *why* the requirement of a declaration of closure is so critical. The plaintiff is asserting the existence of an arid procedural requirement that does not add anything substantive to the arbitration process. I do not think the drafters of the 2007 SIAC Rules would have intended such a result. This is usefully contrasted with the requirement (also found in r 27.1) that any award must first be approved by the Registrar before it can be released. That requirement serves an integral function by allowing the Registrar to maintain the quality of awards released under the auspices of the SIAC (see *A Guide to the SIAC Arbitration Rules* at paras 12.12–12.19).

39 Fourth, the former construction would render r 21.5 superfluous. Even assuming that – in the specific context of rr 21.5 and 27.1 – "hearings" and "proceedings" refer to different events (which, as I will elaborate later at [40]–[43], is not the case), the point is that "proceedings" generally encompass "hearings." Thus, if proceedings are closed, hearings, being a subset of proceedings, must surely be closed as well. If a tribunal already has a *duty* to close proceedings under r 27.1 (thereby closing hearings in the process), r 21.5 would be rendered otiose since tribunals would never have need to exercise its *power* to close hearings if they are already duty bound to declare closure of proceedings. Mr Gabriel has not provided any explanation as to why there would be a need for tribunals to separately have the *power* to close hearings in juxtaposition with a *duty* to close proceedings. Hypothetically, one might suggest that "hearings" refers only to an event for the making of oral submissions and the taking of oral evidence. On this theory, a tribunal might wish, in declaring hearings closed, to signal that it does not wish to hear further oral arguments but is still open to receiving written submissions. However, there is nothing in the 2007 SIAC Rules which explicitly states that the expression "hearings" bears this restricted meaning.

Are hearings and proceedings synonymous?

40 Having decided that r 27.1 does not impose any duty on the Tribunal to declare the closure of the proceedings, it is strictly not necessary to consider Mr Lopez's additional argument (which is premised on r 21.5) as alluded to at [22] above. However, given the parties' submissions on this issue, I will go on to make some observations on this subject though I should add that acceptance of the argument would merely provide an additional reason to conclude that r 27.1 confers a power and not a duty on tribunals to declare the closure of proceedings. However, the converse is not true in

that should the argument not find favour with me, it does not in itself establish that r 27.1 imposes a duty, and not a power, on tribunals to declare the closure of the proceedings. It would still not address the absence of any express provision in the 2007 SIAC Rules which imposes a duty on tribunal to declare the closure of proceedings.

41 For the purposes of examining Mr Lopez's argument, it is not essential to find that the expressions "hearings" and "proceedings" are used synonymously *throughout* the 2007 SIAC Rules. Semantically speaking, these two expressions can bear different meanings, particularly where the context demands it. For example, r 21.3 of the 2007 SIAC Rules reads, "[i]f any party to the *proceedings* fails to appear at a *hearing* without showing sufficient cause for such failure, the Tribunal may proceed with the arbitration and may make the award based on the submissions and evidence before it" [emphasis added]. In this context, the expression "proceedings" seems to refer to the arbitration as a whole whereas "hearings" refers only to a physical meeting in which oral evidence is taken and oral submissions are made.

42 Therefore, context is key. The relevant inquiry is whether "hearings" *in r 21.5* is intended to have a different meaning to "proceedings" *in r 27.1*. Such an inquiry is best aided by examining the evolution of the relevant rules through the different iterations of the SIAC Rules.

43 It is clear from the drafting history of rr 21.5 and 27.1 and their equivalents (see [24]–[31] above) that the only version which does not use the same expression consistently in both rules is the 2007 SIAC Rules. The 1991/1997 versions use the same expression "hearings" in both rules while the 2010/2013 versions use the expression "proceedings". In other words, the equivalent of rr 21.5 and 27.1 in the 1991/1997 SIAC Rules refer to the same event – the close of hearings; similarly, the equivalent of rr 21.5 and 27.1 in the 2010/2013 SIAC Rules refer to the same event – the close of proceedings. The question is whether a distinction was intended to be made between the expression "hearings" and "proceedings" in rr 21.5 and 27.1 of the 2007 SIAC Rules. No logical reasons have been offered for any distinction and I think none exist (see also [39] above). In my view, purposively construed, the expressions "hearings" and "proceedings" are, in the context of rr 21.5 and 27.1, synonymous. I also note that, in the 2010/2013 SIAC Rules, the provision granting the Tribunal the power to close proceedings (r 28.1, the successor to r 21.5 of the 2007 SIAC Rules) can now be found immediately before the provision providing for the 45-day time limit for the release of the award (r 28.2, the successor to r 27.1 of the 2007 SIAC Rules). The consolidation of these two provisions in the same rule gives me further reason to believe that it was always intended that both provisions would refer to the same event.

44 However, with that being said, I do not think that Mr Lopez's argument based on Art 3(5) (see [22(b)] above) is convincing. Art 3(5) provides that a summary award issued under Schedule 1 of the 2007 SIAC Rules has to be submitted within 21 days of the "close of hearing". Mr Lopez submits that the fact that Art 3(5) provides that a tribunal is to issue its award within 21 days of the close of hearing is further evidence that the time limit for the issuance of an arbitral awards is measured by reference to the close of hearings and not proceedings. I do not agree. As Mr Gabriel pointed out, Art 3(5) must be read in context. Article 3 governs the issuance of a summary award in *domestic arbitrations* conducted under the 2007 SIAC Rules, and not international arbitrations, which is the case on our facts. It specifically provides for a special hearing before the summary award is made. In this context, the reference to "hearing" in Art 3(5) is a reference to the *oral hearing in respect of an application for summary judgment*. The purpose of the rule is to ensure that all such applications for summary awards are swiftly disposed of (within 21 days of the end of the special oral hearing). Article 3(5) cannot be used to support a general point about time limits for the release of awards in arbitrations.

45 Furthermore, it is also clear from a review of all the editions of the SIAC Rules – be it the 1991, 1997, 2007, 2010, or the 2013 versions – that none of them impose an unqualified duty to declare the closure of hearings or proceedings. The 2010/2013 SIAC Rules come the closest. But even then, the obligation to declare a closure of the proceedings is subject to two conditions precedent as explained at [32] above. If this interpretation is right (and no other satisfactory reason has been offered to persuade me otherwise), then it must support the defendant's construction that the Tribunal indeed has the *power* and not a *duty* to declare the closure of the *proceedings*.

46 In conclusion, I hold that, on a true construction of r 27.1, the Tribunal had the *power* and not a *duty* to declare the proceedings closed before releasing the Award. Thus, the Tribunal was not in breach of r 27.1 in this case when it elected – as it was entitled to under the wide case-management powers it is afforded under the 2007 SIAC Rules – not to issue to issue a declaration of closure of the proceedings before releasing the Award

The grounds for setting aside

47 Given my finding that there was no breach of r 27.1, I need only consider whether the remaining factual premise – *viz*, the interval of 19 months from the date of the parties' final submissions and the release of the Award – justifies the setting aside of the Award on the three grounds invoked. However, for completeness, I shall consider each of the three grounds with reference to both the r 27.1 issue as well as the delay issue to demonstrate that a breach of r 27.1 would not, in any event, have justified the setting aside of the Award.

Breach of agreed procedure

48 Article 34(2)(*a*)(iv) of the Model Law provides that "an arbitral award *may* be set aside" [emphasis added] if proof is furnished that the arbitral procedure leading up to the issuance of the award was not in accordance with the agreement of the parties. As a preliminary point, I observe that the court retains a discretion *not* to set an award aside even if one of the prescribed grounds for setting aside has been made out (see *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*CRW (CA)*") at [100]). This reflects the plain language of Art 34(2) of the Model Law, which states that a court "may" set an award aside if one of the stated grounds is present, not that it has to.

49 As stated by Belinda Ang Saw Ean J at [54] of *Triulzi*:

> … It cannot be the case that any breach of an agreed arbitral procedure, even that of a technical provision or minor formality, will invariably result in an award being set aside. Most supervising courts inquire into the *materiality* of the procedural requirements that were not complied with and the nature of the departures from the parties' agreed arbitral procedure … [emphasis in original]

50 I note that different jurisdictions have taken different approaches to this inquiry. Some have elected to cast this inquiry in terms of the "seriousness of the breach" (see the observations of the Hong Kong Court of Appeal in *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1)* [2012] 4 HKLRD 1 at [105]). Other jurisdictions require proof of "substantial prejudice": see *Karaha Bodas Company, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 190 F Supp 2d 936 (SD Tex, 2001) where (in considering an application to set aside an arbitral award under the New York Convention on the basis that there had been a departure from the agreed arbitral procedure) the court held, at 945, that the applicant "must show that… the violation actually caused [that party] substantial prejudice". In the United Kingdom, s 68 of the Arbitration Act 1996 (c 23) (UK) ("UK

Arbitration Act") permits challenges to an award on the basis that the tribunal had failed to conduct the proceedings in accordance with the procedure agreed by the parties, provided this failure "has caused or will cause *substantial injustice* to the applicant" (s 68(2) UK Arbitration Act) [emphasis added].

51 At the end of the day, I agree with Belinda Ang J (see [65] of *Triulzi*) that this inquiry is necessarily fact-specific. The key is that the procedural breach complained cannot be of an arid, technical, or trifling nature; rather, it must be a material breach of procedure serious enough that it justifies the exercise of the court's discretion to set aside the award. This will often, though not invariably, require proof of actual prejudice (*ie*, where the procedural breach complained of could reasonably have said to have altered the final outcome of the arbitral proceedings in some meaningful way): see *Triulzi* at [66]; *AQZ v ARA* at [136].

52 In my view, a failure to issue a declaration of the closure of proceedings would not satisfy the test. The plaintiff's complaint is precisely the sort of arid procedural objection that would not occasion the setting aside of an award. It is important to note that the plaintiff is *not* arguing that proceedings ought to have been declared closed at any particular point in time. Rather, its submission is simply that the tribunal ought to have declared proceedings closed before releasing a draft award (whenever that might have been) and that a failure to do so "cannot be remedied" by the court. In short, the plaintiff asserts that it is an incurable defect. As I have noted above at [36]–[38], my difficulty with this submission is that the plaintiff has not shown *why* the event of a declaration of closure is of such critical importance such that non-compliance justifies the setting aside of the award.

53 In its submissions, the plaintiff relies on the decision of this court in *Ting Kang Chung John v Teo Hee Lai Building Constructions Pte Ltd* [2010] 2 SLR 625 ("*John Ting*"). *John Ting* concerned an arbitration carried out under the Singapore Institute of Architects Arbitration Rules 1999 ("SIA Arbitration Rules"). Under Art 14.1 of the SIA Arbitration Rules, an award has to be released within 60 days of the "close of hearing". However, the award was only released on 15 April 2005 – one year and four months after the hearings had closed. The defendant in *John Ting* applied to set the award aside on the basis that the arbitrator lacked jurisdiction to issue the award while the arbitrator applied for a *post hoc* extension of time to render the award under s 15 of the Arbitration Act (Cap 10, 1985 Rev Ed). Quentin Loh JC (as he then was) held, at [32], that the arbitrator's failure to adhere to the agreed time limit meant that the award was issued without jurisdiction and was therefore void and of no effect. The plaintiff in the instant case argues, by analogy with *John Ting*, that the failure of the Tribunal to first declare the proceedings closed meant that the subsequent issuance of the Award was made without jurisdiction and should therefore be declared void and set aside. [note: 26]

54 However, I do not think that *John Ting* assists the plaintiff. The true *ratio* of *John Ting* is that the mandate of an arbitrator expires after the time limit for the release of an award has expired. Thus, any award issued after that is issued without jurisdiction. This is made clear by the following extract from [32] of *John Ting*:

> The **Arbitrator's error in overlooking a time limit within which to issue his award was a very serious error**… Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partasides *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 4th Ed, 2004) warns at para 8-66:
>
> > A limit may be imposed as to the time within which the arbitral tribunal must make its award. ***When this limit is reached, the authority or mandate of the arbitral tribunal is at an end*** **and it no longer has jurisdiction to make a valid award...**.

> … I am of the view that the statement in *Law and Practice of International Commercial Arbitration*, quoted above, is the correct analysis.
>
> [emphasis in original in bold italics; emphasis added in bold]

55 The holding in *John Ting* is confined only to breaches of agreed time limits for the issuance of the award because such breaches have critical implications on the *mandate* of the tribunal. *John Ting* does not stand for the general proposition that the failure to comply with *any* procedural requirement *ipso facto* means that an award is issued without jurisdiction and, without more, should be set aside. I should also point out that the defendant in *John Ting* actually wrote to the tribunal on 7 April 2004 (long before the award was released) expressing the view that the time limit for the making of the award had already expired. Notwithstanding this letter, the arbitrator in *John Ting* did not reply and only wrote to the parties one year later, on 15 April 2005, stating that the award was ready for collection.

56 As regards the delay issue, the 2007 SIAC Rules do not provide for any time limits for the release of arbitral awards apart from that contained in r 27.1 and Art 3(5) of Schedule 1 (which only applies to domestic arbitrations). As noted at [20] above, the 45-day time limit provided under r 27.1 does not begin to run until the Tribunal declares the proceedings closed, which it did not do in this case. Given this, the assertion that the Award was rendered out of time (and therefore in breach of the parties' agreed procedure) simply cannot stand.

57 If one looks at the institutional rules of other arbitral institutions, it is clear that time limits, where they exist, are expressed in very clear terms. To take two examples, Art 24(1) of the International Chamber of Commerce Arbitration Rules 1998 ("1998 ICC Rules") states:

> The **time limit within which the Arbitral Tribunal must render its final Award is six months. Such time limit shall start to run from the date of the last signature by the Arbitral Tribunal or by the parties of the Terms of Reference** or, in the case of application of Article 18(3), the date of the notification to the Arbitral Tribunal by the Secretariat of the approval of the Terms of Reference by the Court.
>
> [emphasis added in bold]

Rule 46 of the International Centre for the Settlement of Investment Disputes Rules 2006 ("2006 ICSID Rules") provides:

> **The award (including any individual or dissenting opinion) shall be drawn up and signed within 120 days after closure of the proceeding.** The Tribunal may, however, extend this period by a further 60 days if it would otherwise be unable to draw up the award.
>
> [emphasis added in bold]

58 It also bears mention that, when the 2007 SIAC Rules were issued, only the rules of three major arbitral institutions provided for mandatory time limits for the release of awards: the 1998 ICC Rules, the 2006 ICSID Rules, and the London Maritime Arbitrators Association Terms 2006 ("2006 LMAA Rules"). This was in keeping with the prevailing wisdom at that time that it was preferable not to prescribe a time limit for the release of an award for it merely gives intransigent parties an opportunity to frustrate the arbitration through the use of delaying tactics until compliance with the time limit becomes impossible (see Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 4th Ed, 2004) at para 8-68)).

In fact, as recently as in 2012, Professor Gary B. Born was able to comment that most institutional rules do not contain time limits for the release of arbitral awards and that those which do, such as the 1998 ICC Rules and the 2006 LMAA Rules, formed the exception rather than the rule (see Gary B. Born, *International Arbitration: Law and Practice* (Kluwer Law International, 2012) at p 292).

59 Since 2012, however, many arbitral institutions have updated their rules and, in the latest round of updates, more institutions have introduced time limits for the release of awards where none existed previously. Some notable examples include the American Arbitration Association – International Commercial Dispute Resolution Arbitration Rules 2014, which provides that an award is to be released no later than 60 days from the closing of the hearing and the Japan Commercial Arbitration Association Rules 2014, which provides that an award shall be made within three months of the appointment of the arbitrator. This is a relatively recent phenomenon. However, what is clear is that in each of the arbitral institutions where time limit is imposed, such time limits are expressly prescribed by its arbitral rules.

60 In summary, the issuance of the Award is not tainted by the breach of any procedure agreed upon by the parties under the 2007 SIAC Rules.

Public policy

61 Article 34(2)(*b*)(ii) of the Model Law provides that an award may be set aside if it is in conflict with public policy. In *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*") at [59], the Court of Appeal made it clear that it is only in exceptional cases where the "upholding of an arbitral award would '*shock the conscience*' …, or is '*clearly injurious to the public good*' or … '*wholly offensive* to the ordinary reasonable and fully informed member of the public' …, or where it *violates the forum's most basic notion of morality and justice*" [emphasis added] that it would be set aside on the grounds of public policy. However, despite the very high threshold that has been set, public policy, together with the rules of natural justice, still appear to be the last refuge of the desperate, as far as applications to set aside arbitral awards are concerned. This case is no exception.

62 The plaintiff argues that "an act of the arbitral Tribunal which is contrary to the agreement of the parties [*ie*, r 27.1] is against the public policy of Singapore… [and] must 'shock the conscience' or is 'clearly injurious to the public good' or [is] 'wholly offensive to the ordinary reasonable and fully informed member of the public' or 'violates the forum's most basic notion of morality and justice.'" [note: 27] To put it mildly, there is more than a bit of hyperbole in that statement. In essence, the plaintiff's submission is that all breaches of agreed procedure are, *ipso facto*, contrary to public policy. This argument is deeply flawed because it completely ignores what *public policy* is intended to capture: matters of *general* – rather than particular – interest. The procedural breach complained of is one that governs only the conduct of the arbitration *inter se* and does not have wider public ramifications. I do not see how this is an issue which engages the interests of the wider community or one which rises to the level of gravity that the notion of "public policy" contemplates.

63 The plaintiff also argues that "Singapore's public policy demands that any arbitration and its award are presented in a fair and expeditious manner" and that the delay of 19 months in this case constitutes a violation of public policy. With respect, the plaintiff's argument is misconceived. It trades on a conflation of the concept of *public interest* with that of *public policy*. The public interest is the wider concept. It embraces everything that is conducive to the public good ranging from the comparatively minor (clean streets) to the vital (a robust criminal justice system). An innumerable number of things could be described as not being in the public interest. However, the concept of "public policy" in the context of the setting aside of an arbitral award, as noted at [61] above, is

much narrower. Violations of "public policy" only encompass those acts which are so egregious that elementary notions of morality have been transgressed. While delay in the release of an arbitral award might not necessarily be in the public interest, it cannot, in itself without more, constitute a violation of public policy.

64 In *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd* [2000] 1 SLR(R) 510 ("*Hong Huat*"), the court had to consider whether an arbitral award that was released more than ten years after the hearings had concluded should be set aside. The Court of Appeal held that the delay, while "grossly inordinate" and apt to "undermine faith in arbitration", was not, *per se*, a sufficient basis for setting aside an award which had already been rendered (see *Hong Huat* at [57]). The Court of Appeal observed that the aggrieved party ought to have taken action – prior to the issuance of the award – to remove the arbitrator pursuant to s 18 of the Arbitration Act (Cap 10, 1985 Rev Ed). Having elected not to do anything, it had to live by its decision.

65 If a ten year gap between the end of the hearings and the release of the award was not a sufficient basis for setting aside an award then, *a fortiori*, a 19-month delay cannot be a sufficient basis for setting aside the award. If the delay were truly intolerable, the plaintiff ought to have applied under Art 14 of the Model Law for the mandate of the arbitrator to be terminated *before* the Award was released. However, it did not do so. It is only making the argument now because the Award that was issued was adverse to the plaintiff and not because of any delay. As bluntly observed by the court in *Hong Huat* at [57], an application at this late stage "smacks of the [plaintiffs]… saying, set it aside because it is not in our favour."

Natural justice

66 In *Soh Beng Tee*, the Court of Appeal held at [29] that a party seeking to set aside an arbitral award as having contravened the rules of natural justice has to show the following:

(a) which rule of natural justice was breached;

(b) how it was breached;

(c) in what way the breach was connected to the making of the award; and

(d) how the breach prejudiced its rights.

67 As noted in *Soh Beng Tee* at [43], the rules of natural justice are encapsulated in the two Latin maxims *audi alteram partem* and *nemo judex in causa sua*. The former guarantees the right to be heard while the latter provides that adjudicators must be unbiased and disinterested. The plaintiff argues that "[t]he failure to declare the closure of the arbitral proceeding [sic] coupled with the inordinate delay in submitting the draft Final Award to the SIAC are obvious procedural irregularities. As a result, the arbitration proceeding was unnecessarily delayed and prolonged." During the oral hearing before me, Mr Gabriel cited the decision of the Court of Appeal in *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*LW Infrastructure*") and argued that the Tribunal ought to have invited parties to submit on its failure to comply with r 27.1 before issuing the award. Mr Gabriel submitted that the Tribunal's failure to invite submissions to

address the r 27.1 issue was tantamount to a denial of the plaintiff's right to be heard. [note: 28]

68 I have difficulty following Mr Gabriel's argument. The gist of his submission is that the plaintiff had not been given the chance – *before* the award was issued – to submit that the award should not be issued. However, the problem with this submission is that before the Award was released, there could not, by definition, have been any breach of r 27.1. Furthermore, the Tribunal had no reason to believe, at the time it issued the Award, that there was anything procedurally improper over which it ought to have invited submissions. The plaintiff seems to be suggesting that every tribunal should always, prior to releasing an award, invite submissions on why the award should not be released. This suggested practice – of inviting prophylactic submissions to forestall criticisms of a breach of natural justice – is seriously misconceived.

69 The case of *LW Infrastructure* does not assist the plaintiff. *LW Infrastructure* concerned a domestic arbitration over a dispute arising from a construction contract. The Arbitrator, having found for the defendant, awarded post-award interest on the judgment sum. The defendant then wrote to the tribunal to seek a supplemental award for pre-award interest as well. This request was made pursuant to s 43(4) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("s 43(4)") which states that "a party may, within 30 days of receipt of the award and *upon notice to the other party*, request the arbitral tribunal to make an additional award as to claims presented during the arbitration proceedings but omitted from the award" [emphasis added]. The tribunal did so three days later by issuing a supplemental award ordering that a further sum of S$274,114.61 (representing pre-award interest) be paid. The plaintiff protested immediately and applied to set aside the award on the basis that there had been a breach of natural justice since it had not been given an opportunity to be heard on the applicability of s 43(4). The Court of Appeal, in accepting this argument and setting aside the award, held that the phrase "upon notice to the other party" in s 43(4) encompassed within it the requirement that the opposing party be afforded an opportunity to tender submissions on whether a supplemental award should be rendered under s 43(4). The tribunal's failure to invite submissions on this issue constituted a breach of the rules of natural justice.

70 As is clear, the decision of the Court of Appeal in *LW Infrastructure* turned on the particular wording of s 43(4). In that case, it was clear that the plaintiff had a right to be heard before a supplemental award (which increased the appellant's liability) could be issued. However, the plaintiff does not – under the 2007 SIAC Rules – have a corresponding right to be heard before the Tribunal makes a decision on whether it ought to declare the proceedings closed before releasing the Award. As I have pointed out at [32] above, no version of the SIAC Rules imposes a duty on the tribunal to consult the parties on whether proceedings should be closed. The closest – the 2010/2013 SIAC Rules – only provides that *if* a tribunal wants to declare the proceedings closed it must first consult the parties on whether they have any evidence to tender or submissions to make. However, the 2010/2013 SIAC Rules do not impose a duty of consultation if the tribunal does not intend to declare the proceedings closed. In the circumstances, I hold that the plaintiff has not succeeded in showing a breach of natural justice so its application under s 24(b) fails *in limine*.

71 Furthermore, I am not convinced that the plaintiff has successfully shown that he has been prejudiced. In *LW Infrastructure* at [54], the Court of Appeal held that, where a court wants to consider whether prejudice has arisen from a denial of the right to a fair hearing,

> … [T]he real inquiry is whether the breach of natural justice was merely technical and inconsequential or whether as a result of the breach, the arbitrator was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to his deliberations. Put another way, the issue is whether the material *could reasonably* have made a difference to the arbitrator; rather than whether it *would necessarily* have done so. [emphasis

in original]

The key here is that the prejudice shown must relate to the *outcome of the present arbitration*.

72 In the instant case, the plaintiff asserts three heads of prejudice: first, that its intended arbitration against Noble (which it had yet to initiate, pending the release of the Award) might be met with the defence of prescription/laches; second, that, due to the delay, it would have difficulty locating witnesses for the arbitration against Noble; and third, that it was made liable to pay a large sum in interest as a result of the delay in the release of the Award. [note: 29] The first two reasons have nothing to do with the outcome of the *present* arbitration. In any case, there is no reason why the plaintiff need have waited until the conclusion of this arbitration before taking action against Noble since any contemplated action Noble would involve different parties and different contracts. Any prejudice suffered by the plaintiff as a result of its own decision (which has not been proved) is not causally connected with this arbitration. The final reason – the payment of the additional interest – is a *consequence* of the outcome of the arbitration rather than a factor which would have affected its outcome. Furthermore, as pointed out by the court in *Hong Huat* at [59], for as long as the Award had not been rendered, the plaintiffs would have had use of the money and could have invested it profitably. Thus, the plaintiff cannot assert that it had been prejudiced by the imposition of interest for the period of time during which the Award was outstanding.

73 The plaintiff's remaining argument is grounded on the assertion that the 19-month delay in the issuance of the Award is a procedural irregularity that amounts to a breach of natural justice. The plaintiff has not identified which particular rule of natural justice has been infringed in this case and I do not see how the rules of natural justice have been breached here. First, I do not see how the delay could have impaired the plaintiff's right to a fair hearing. The plaintiff calculates the delay in terms of the lapse of time between the date the parties' filed their final submissions (in August 2012) and the date of the release of the Award (in March 2014). Given that the Award was prepared on the basis of the submissions of the parties – all of which had already been tendered by August 2012 – there is no possibility that the plaintiff had been prejudiced in the preparation of its case. It is not the case that the plaintiff had applied for, but had been refused leave, to adduce additional evidence after August 2012. Second, I do not see how dilatoriness on the part of the Tribunal can be evidence of bias. As noted by this court in *PT Central Investindo* at [68], delay in the release of an award affects both parties equally. Thus, it is difficult to envision how an inference of bias can be drawn against a tribunal on the basis of dilatoriness in the release of an award.

74 In short, I find that there was no rule of natural justice was breached. Further, I am not convinced that the plaintiff has successfully shown the requisite prejudice required to justify the setting aside of the Award on the basis of a breach of natural justice.

Conclusion

75 I find that the issuance of the Award was in accordance with the parties' agreement and that there is no basis under either public policy or the rules of natural justice for the Award to be set aside. In the premises, I dismiss the plaintiff's application.

Costs

76 Taking into account the novelty of the issues before me and the arguments and authorities submitted by both counsel, I award the defendant costs fixed at $20,000 inclusive of disbursements. This award of costs is also consistent with the parties' submissions on costs. It leaves me to thank both counsel for their able assistance in the presentation of their respective cases.

[note: 1] Plaintiff's Outline Submissions dated 30 December 2014 ("Plaintiff's Outline Submissions") at [3].

[note: 2] Plaintiff's Outline Submissions at [4]; Defendant's Written Submissions dated 7 January 2015 at [6].

[note: 3] Final Award in the matter of *GHCL Limited v Coal & Oil Company LLC* (SIAC Arb No. 59 of 2009/CV) ("The Award") at [3].

[note: 4] The Award at [6].

[note: 5] The Award at [14(g)].

[note: 6] The Award at [85].

[note: 7] The Award at [43].

[note: 8] The Award at [50].

[note: 9] The Award at [51].

[note: 10] The Award at [52].

[note: 11] The Award at [7].

[note: 12] Plaintiff's Outline Submissions at [5]; Defendant's Written Submissions at [10].

[note: 13] The Award at [138].

[note: 14] OS 538/2014 at [1]; Plaintiff's Outline Submissions at [6a]

[note: 15] OS 538/2014 at [2] and [3]; Plaintiff's Outline Submissions at [6b]

[note: 16] OS 538/2014 at [4]

[note: 17] Notes of Evidence dated 20 January 2015 at p 3.

[note: 18] Plaintiff's Outline Submissions at [45].

[note: 19] Defendant's Written Submissions at [44].

[note: 20] Plaintiff's Outline Submissions at [11]–[12].

[note: 21] Defendant's Written Submissions at [82]–[85].

[note: 22] Defendant's Written Submissions at [83].

[note: 23] Plaintiff's Outline Submissions at [12].

[note: 24] Plaintiff's Outline Submissions at [6(b)(i)].

[note: 25] Notes of Evidence dated 20 January 2015 at p 2, lines 13–25.

[note: 26] Plaintiff's Outline Submissions at [15].

[note: 27] Plaintiff's Outline Submissions at [37].

[note: 28] Notes of Evidence dated 20 January 2015 at p 3, lines 1–4; Plaintiff's Oral Submissions – Bullet Points at [30]–[31].

[note: 29] Plaintiff's Outline Submissions at [40]–[41].