IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 32

Suit No 539 of 2016
(Registrar's Appeal No 295 of 2016)

Between

K.V.C. Rice Intertrade Co., Ltd

… *Plaintiff*

And

Asian Mineral Resources Pte. Ltd.

… *Defendant*

Suit No 541 of 2016
(Registrar's Appeal No 296 of 2016)

Between

Tanasan Rice Co., Ltd

… *Plaintiff*

And

Asian Mineral Resources Pte. Ltd.

… *Defendant*

JUDGMENT

[Arbitration] — [Stay of court proceedings] — [Mandatory stay under International Arbitration Act] — [Terms for grant of stay]

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Pang Khang Chau JC
19 September 2016

23 February 2017 Judgment reserved.

Pang Khang Chau JC

Introduction

1 This case concerns two registrar's appeals ("the RAs") in two separate suits ("the Suits") that were heard together before me. The Suits each concern an international contract containing a bare arbitration clause, *ie*, an arbitration clause which specifies neither the place of arbitration nor the means of appointing arbitrators. As a result, the plaintiffs faced difficulties getting an arbitration underway in the absence of cooperation from the defendant. This led them to commence the Suits. The defendant applied to stay proceedings in the Suits in favour of arbitration and the learned assistant registrar granted the stays without imposing any conditions.

2 Since the relevant provisions of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") apply only when the place of arbitration is Singapore, a bare arbitration clause which fails to designate the place of arbitration raises questions regarding the extent to which the Singapore courts and the Singapore International Arbitration Centre ("SIAC"), in its capacity as the default appointing authority under the IAA, are able to support and facilitate an arbitration pursuant to such a clause. This in turn raises the question of whether a clause of this nature should be considered "null and void, inoperative or incapable of being performed" for the purposes of s 6(2) of the IAA. The principal issue presented in this case is neatly summarised in the following observation from Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) ("*Redfern and Hunter"*), at para 4.43:

> … A clause that fails to provide either for an effective method of constituting the arbitral tribunal, or for the place of arbitration, may turn out to be inoperable. It is likely to lead to the claimant being unable to enforce the arbitration agreement. If a claimant takes its case to a national court, it may be met by an application for a stay of the proceedings on the grounds of the existence of an arbitration clause. At best there is considerable potential for delay. *At worst, there is the possibility that the claimant may find there is no effective remedy at all, since the courts will refuse to entertain an action and the arbitration clause is defective.*
>
> [emphasis added]

The parties

3 The defendant in both of the Suits is Asian Mineral Resources Pte. Ltd. ("Asian Mineral"), a company incorporated in Singapore. The plaintiff in Suit No 539 of 2016 is K.V.C. Rice Intertrade Co., Ltd ("KVC Rice") while the plaintiff in Suit No 541 of 2016 is Tanasan Rice Co. Ltd ("Tanasan Rice"). Both plaintiffs are companies incorporated in Thailand. Although they are

represented by the same counsel, I was informed by the plaintiffs' counsel that KVC Rice and Tanasan Rice are not related companies.

Background

4 The facts in both of the Suits are practically identical. The disputes arose out of contracts under which the plaintiffs each agreed to sell 5,000 metric tons of rice to Asian Mineral, to be delivered directly from Thailand to Benin, Africa. The terms of the two contracts are practically identical. The main differences are the price and one word in the arbitration clauses.

5 The plaintiffs each shipped the rice in five consignments. All ten consignments arrived in Benin on or about 10 January 2015. Asian Mineral paid for the first four consignments under each contract but withheld payment for the fifth consignments. The reason given by Asian Mineral for withholding payment was that it had reached oral agreements separately with KVC Rice and Tanasan Rice for a 15% discount off the total contract price under each contract. For KVC Rice's contract, this discount would have reduced the outstanding payment from USD 441,000 to USD 73,500. For Tanasan Rice's contract, this discount would have reduced the outstanding payment from USD 430,884.20 to USD 69,206.65. KVC Rice and Tanasan Rice both denied ever giving such discounts.

6 Asian Mineral did not tender the alleged discounted sums of USD 73,500 to KVC Rice and USD 69,206.65 to Tanasan Rice. Instead, Asian Mineral claimed not to have received the fifth consignment under either contract because the plaintiffs had, in breach of contract, sold the fifth consignments to third parties without informing Asian Mineral. Both plaintiffs denied having sold their respective fifth consignments to third parties. They

maintained that the fifth consignments under their respective contracts were duly delivered to Asian Mineral's agent in Benin.

The Relevant Arbitration Clauses

7 KVC Rice's contract with Asian Mineral contains the following arbitration clause (cl 12):

> The Seller and the Buyer agree that all disputes arising out of or in connection with this agreement that cannot be settled by discussion and mutual agreement shall be referred to and finally resolved by arbitration as per Indian Contract Rules.

The arbitration clause in Tanasan Rice's contract with Asian Mineral, also cl 12, is identical to that in KVC Rice's contract except that, instead of the word "Indian", the word "Singapore" is used. These arbitration clauses provide neither for the place of the arbitration nor the law applicable to the arbitration. They also contain no provisions specifying the number of arbitrators or the mechanism for constituting the arbitral tribunal. Further, neither contract contains a governing law clause.

8 While it may seem odd that a contract between a Thai company and a Singapore company to deliver rice from Thailand to Benin should refer to "Indian Contract Rules", and neither counsel provided any explanation for this, I note that the two directors who gave evidence on behalf of Asian Mineral in these proceedings are Indian nationals. On a related note, while plaintiffs' counsel submitted that both contracts were drafted by Asian Mineral, Asian Mineral's counsel made it a point to state categorically during arguments that this is not admitted by Asian Mineral.

Attempts by plaintiffs to pursue arbitration

KVC Rice's attempts to pursue arbitration

9 According to the plaintiffs' counsel, after numerous telephone conversations and exchanges of Whatsapp messages between KVC Rice and Asian Mineral failed to resolve their dispute, KVC Rice engaged the services of the plaintiffs' counsel, who issued a letter of demand on 10 September 2015 to Asian Mineral. Asian Mineral responded through its counsel on 30 September 2015 disputing KVC Rice's claim. After further exchanges of correspondence on 4 and 6 November 2015, the plaintiffs' counsel wrote to Asian Mineral's counsel on 18 November 2015 to propose commencement of arbitration. The letter made the following points:

(a) The arbitration clause in the contract between KVC Rice and Asian Mineral "has no meaning given that 'Indian Contract Rules' do not exist".

(b) KVC Rice did not see any point arbitrating in India given the fact that it is based in Thailand and Asian Mineral is based in Singapore.

(c) KVC Rice therefore proposed that both sides agree to arbitrate in Singapore, with Singapore law as the law applicable to the arbitration.

(d) KVC Rice proposed Mr Jaya Prakash of Pandisea Pte Ltd as the sole arbitrator.

(e) The proposed arbitration between KVC Rice and Asian Mineral should be consolidated with the proposed arbitration between Tanasan Rice and Asian Mineral, so as to save time and costs.

10 On 11 December 2015, Asian Mineral's counsel replied as follows:

> 2. Our clients do not agree to your client's request for clause 12 to be amended or replaced with the clause as set out at paragraph 5 of your 18 November Letter. In this regard and for the avoidance of doubt, our clients do not agree to your request for any arbitration proceedings commenced pursuant to the said clause to be heard on an *ad hoc* basis before Mr. Jaya Prakash as sole arbitrator in Singapore.
>
> 3. Our clients do not agree to your client's request at paragraph 7 of your 18 November Letter for the consolidation of the arbitral proceedings for this matter and for the matter concerning the dispute between Tanasan Rice Co Ltd since the parties to both proceedings are different.

There was no counterproposal from Asian Mineral on how to move forward with the arbitration.

Tanasan Rice's attempts to pursue arbitration

11 According to the plaintiffs' counsel, like KVC Rice, Tanasan Rice made several unsuccessful attempts to resolve its dispute with Asian Mineral through telephone conversations and Whatsapp messages. These were followed by e-mails sent on 4 July 2015 and 7 August 2015 making demands for payment. Tanasan Rice then engaged the plaintiffs' counsel, who issued a letter of demand on 1 September 2015. Asian Mineral responded through its counsel on 28 September 2015 disputing Tanasan Rice's claim. After further exchanges of correspondence on 27 October and 6 November 2015, the plaintiffs' counsel wrote to Asian Mineral's counsel on 13 November 2015 to propose commencement of arbitration. The letter made the following points:

(a) The phrase "Singapore Contract Rules" in the arbitration clause possibly referred to the contract law of Singapore.

(b) Tanasan Rice therefore interpreted the arbitration clause in its contract with Asian Mineral as providing for *ad hoc* arbitration in Singapore with Singapore law to apply.

(c) Tanasan Rice proposed Mr Jaya Prakash of Pandisea Pte Ltd as the sole arbitrator.

12 On 11 December 2015, Asian Mineral's counsel replied as follows:

> 2. Our clients do not agree to your clients' proposal for any arbitration proceedings commenced pursuant to the said clause to be heard on an *ad hoc* basis before Mr. Jaya Prakash as sole arbitrator.

13 The plaintiffs' counsel replied on 16 December 2015 as follows:

> 2. We note the position taken by your clients in relation to our client's proposal and note that your clients have also failed to provide any form of counterproposal.
>
> 3. Your clients are hereby put on notice that our clients will be commencing proceedings in the Singapore Courts. This has been necessitated by your client's wholly unreasonable position taken with respect to our clients' proposal to refer matters to arbitration and our clients therefore reserve their right to seek the costs of any stay application your clients may make on a full indemnity basis.

14 Asian Mineral's counsel replied on 13 January 2016 asserting that it had the right to reject Tanasan Rice's proposal because the arbitration clause "does not stipulate the identity or the number of arbitrator(s) to be appointed". The same letter also claimed that it was "premature" to commence arbitration because the arbitration clause required all disputes to be first "settled by discussion and mutual agreement".

15 The plaintiffs' counsel replied on 14 January 2016 that the precondition for arbitration had been met since lengthy discussions had already taken place between parties. In the same letter, Tanasan Rice also offered to meet for discussions on 29 or 30 January 2016.

16 Asian Mineral's counsel replied on 27 January 2016 (two days before the meeting dates proposed by Tanasan Rice) counter-proposing dates in March 2016. The plaintiffs' counsel replied the next day counter-proposing a meeting on either 4 or 5 February 2016 instead. Asian Mineral replied on 3 February 2016 (one day before the new meeting dates proposed by Tanasan Rice) rejecting Tanasan's proposed meeting dates.

17 Up until the commencement of the Suits, the meetings had not taken place.

The parties' arguments in the registrar's appeals

18 Under s 6 of the IAA, if a party to an arbitration agreement commences court proceedings concerning a dispute to which the arbitration agreement applies, the court is required to stay the proceedings unless it is satisfied that the arbitration agreement is "null and void, inoperative or incapable of being performed". The plaintiffs' counsel submitted that the suits should not be stayed as the arbitrations clauses in both contracts are incapable of being performed. Referring to the two arbitrations clauses as "pathological clauses", the plaintiffs' counsel argued that:

(a) The phrases "arbitration as per Singapore Contract Rules" and "arbitration as per Indian Contract Rules" do not refer to any existing or known set of procedural rules;

(b) The arbitration clauses did not designate a seat or governing law for the arbitration; and

(c) It is therefore impossible to give effect to the intention of the parties or commence an arbitration that is within their contemplation.

19 In relation to KVC Rice's contract (which contains an arbitration clause providing for "arbitration as per Indian Contract Rules"), the plaintiffs' counsel tendered a legal opinion dated 7 January 2016 by an Indian law firm which advised that no arbitration under KVC Rice's contract would lie in India nor would any Indian Courts entertain any applications for arbitration by either of the parties under Indian arbitration law. (As an aside, I was informed that, on 12 August 2016 (*ie*, after the stays of proceedings were granted and before the hearing of the RAs), Asian Mineral proposed to the plaintiffs to have both disputes resolved by *ad hoc* arbitration in India. This proposal was not accepted by the plaintiffs. It struck me as slightly odd that Asian Mineral should propose arbitration in India given the unrebutted legal opinion from an India law firm tendered by the plaintiffs' counsel.)

20 The plaintiffs' counsel also submitted, in the alternative, that if the stays of proceedings were to be upheld, the court should impose conditions on the stays so as to ensure that arbitration can proceed unhindered despite the defects in the arbitration clauses. As for the types of conditions to be imposed, the plaintiffs' counsel initially proposed that the court should impose the following conditions:

(a) Parties to appoint a sole arbitrator;

(b) Failing agreement on appointment of the sole arbitrator, parties be at liberty to request the court to appoint the arbitrator;

(c) Seat of the arbitration shall be Singapore;

(d) The arbitration proceedings shall be conducted in Singapore;

(e) The arbitration be administered under the auspices of the Singapore Chamber of Maritime Arbitration;

(f) Alternatively, the arbitration be administered under the auspices of the SIAC; and

(g) Language of arbitration shall be English.

21 I indicated to the parties that this list of conditions proposed by the plaintiffs was a non-starter, as it amounted to completely rewriting the arbitration agreement for the parties. In the end, the plaintiffs' counsel pared the list down to just one condition – that the arbitration should proceed on the basis that Singapore law is the law applicable to the arbitration, but without prejudice to the arbitrator's jurisdiction to decide on a different applicable law after he is seised of the arbitration. The plaintiffs' counsel explained that he needed the court to impose at least this condition, so that he could rely on the provisions of the IAA to have the arbitrator appointed by the SIAC if the parties cannot agree on the arbitrator.

22 The plaintiffs' counsel explained, from the bar, that he was informed by the SIAC that it would not act as appointing authority on the basis of these two arbitration clauses unless both parties agree for the SIAC to play such a role. While I do not doubt plaintiffs' counsel's statement in this regard, I was

not provided with any record or detailed description of what transpired between plaintiffs' counsel and SIAC. I am therefore unable to draw a firm conclusion as to the SIAC's exact position on the matter.

23 Asian Mineral's counsel submitted that:

(a) The arbitration clauses are not unworkable;

(b) Even though the arbitration clauses are devoid of details, such details could be agreed between the parties or be resolved via mechanism available under the law;

(c) In particular, Art 11 of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"), as incorporated into Singapore law by the IAA, provides for the President of the Court of Arbitration of the SIAC ("the SIAC President") to appoint the arbitrator if parties cannot agree on the arbitrator;

(d) The unconditional stay should therefore be upheld and there is no basis for the court to impose any conditions on the stay.

The issues to be decided

24 Section 5(2)(*a*) of the IAA provides that an arbitration is "international" if at least one of the parties to the arbitration agreement has its place of business outside Singapore. As the plaintiffs have their places of business outside Singapore, the stay applications in these proceedings are governed by the IAA and not by the Arbitration Act (Cap 10, 2002 Rev Ed) ("AA"). Section 6 of the IAA provides:

> **6.**—(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement *in respect of any matter which is the subject of the agreement*, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter.
>
> (2) The court to which an application has been made in accordance with subsection (1) *shall make an order*, upon such terms or conditions as it may think fit, *staying the proceedings* so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is *null and void, inoperative or incapable of being performed.*
>
> [emphasis added]

25 As the parties are in agreement that the disputes between them fall within the scope of the arbitration clauses under the respective contracts, it is not in dispute that s 6(1) of the IAA applies in this case. Consequently, a stay of court proceedings in favour of arbitration is mandatory pursuant to s 6(2) of the IAA unless the court is satisfied that the arbitration clauses are "null and void, inoperative or incapable of being performed".

26 The phrase "null and void, inoperative or incapable of being performed" is taken from Art 8(1) of the Model Law, which provides:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

The Model Law, in turn, adopted this phrase from Art II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"), which provides:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

27 The phrase "null and void" is generally understood to refer to the situation in which there is simply no binding arbitration agreement between the parties. As for the distinction between "inoperative" and "incapable of being performed", the following commentary in *Redfern and Hunter*, at para 2.182, on Art II(3) of the New York Convention is instructive:

> At first sight it is difficult to see a distinction between the terms 'inoperative' and 'incapable of being performed'. However, an arbitration clause is inoperative where it has ceased to have effect as a result, for example, of a failure by the parties to comply with a time limit, or where the parties have by their conduct impliedly revoked the arbitration agreement. By contrast, the expression 'incapable of being performed' appears to refer to more practical aspects of the prospective arbitration proceedings. It applies, for example, if for some reason it is impossible to establish the arbitral tribunal.

Given that the plaintiffs' complaints concern the practical impossibility of establishing the arbitral tribunal in the absence of the defendant's cooperation, as opposed to the existence, validity or binding effect of the arbitration clauses, the plaintiffs' counsel has rightly focused his arguments on the phrase "incapable of being performed".

28 To appreciate the plaintiffs' claim that the arbitration clauses are "incapable of being performed", it is necessary to set out more clearly the practical difficulties posed by the two bare arbitration clauses in question. I will do so by first discussing the phenomenon of bare arbitration clauses before zooming in on the difficulties surrounding the application of Art 11(3)

of the Model Law (regarding the appointment of the arbitral tribunal) to the two clauses.

The phenomenon of bare arbitration clauses

29 A well-drafted arbitration clause typically provides for the place of the arbitration, the number of arbitrators and the method for establishing the arbitral tribunal (see, *eg*, the SIAC Model Clause on the SIAC website or the UNCITRAL Model Clause set out in the UNCITRAL Arbitration Rules). Having said that, an arbitration clause which fails to provide for such details is not void or invalid. The definition of "arbitration agreement" in s 4(1) of the AA and s 2A(1) of the IAA merely requires it to be "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not". Therefore, a bare arbitration clause which merely provides for submission of disputes to arbitration without specifying the place of the arbitration, the number of arbitrators or the method for establishing the arbitral tribunal remains a valid and binding arbitration agreement if the parties have evinced a clear intention to settle any dispute by arbitration. As the Court of Appeal stated in *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936 ("*Insigma*") at [31]:

> … where the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars (see *Halsbury's Laws of Singapore*, vol 2 (LexisNexis, 2003 Reissue, 2003) at para 20.017) so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party.

30 However, where the bare arbitration clause relates to an international contract, practical difficulties may be encountered in getting the arbitral tribunal established. Let me explain why the practical difficulties with which this case is concerned are confined to international contracts. Both the AA and IAA contain provisions for the SIAC President to step in as the statutory appointing authority to appoint arbitrators where parties fail to agree on the appointment of arbitrators (see s 13 of the AA and Art 11(3) of the Model Law as incorporated into Singapore law by s 3(1) of the IAA). This means that, *in a case to which either s 13 of the AA or Art 11(3) of the Model Law applies*, the absence of provisions concerning the establishment of the arbitral tribunal would not pose significant difficulties because the parties can invoke the statutory mechanisms under s 13 of the AA or Art 11(3) of the Model Law for the SIAC President to step in to make the necessary appointments. However, the catch is that s 13 of the AA and Art 11(3) of the Model Law will apply only if the place of arbitration is Singapore (see s 3 of the AA and Art 1(2) of the Model Law). While this poses no problem in the case of arbitration clauses expressly designating Singapore as the place of arbitration, the same clarity is absent when it comes to bare arbitration clauses which provide for neither the place of arbitration nor the law applicable to the arbitration.

31 In this regard, bare arbitration clauses may be divided into the following categories:

> Category (a) – arbitration clauses in contracts where all relevant connecting factors, *eg*., place of business of the parties and place of performance of contract, point unequivocally to Singapore as the place of arbitration;

> Category (b) - arbitration clauses in contracts where all relevant connecting factors point unequivocally to some country other than Singapore as the place of arbitration; and
>
> Category (c) – arbitration clauses where the relevant connecting factors point in different directions and it is unclear whether Singapore is the place of arbitration.

The first two categories pose no real difficulties. For category (a), the lack of any foreign connecting factors means that the arbitration is governed by Singapore law and the arbitration would be a domestic arbitration to which s 13 of the AA applies. For category (b), it would be clear that neither s 13 of the AA nor Art 11(3) of the Model Law as enacted in the IAA applies, and the parties should look to the courts or statutory appointing authority of some other country to assist with the establishment of the arbitral tribunal.

32 The arbitration clauses in both KVC Rice's contract and Tanasan Rice's contract fall into category (c), as the connecting factors in both cases point in different directions - seller based in Thailand, buyer based in Singapore, performance in Thailand and Benin, and payment in Singapore. As explained at [35]-[36] below, in the case of a bare arbitration clause falling within category (c), the place of arbitration is unclear until the arbitral tribunal is established and makes a ruling on the matter. I turn now to explain the particular difficulties that may arise in relation to bare arbitration clauses falling within category (c).

Applicability of the default mechanism under IAA for appointing arbitrators when place of arbitration is unclear or not yet determined

33 Art 11(3) of the Model Law, as enacted in the IAA, provides that:

> (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, *the appointment shall be made, upon request of a party, by the court or other authority specified in Article 6*;
>
> (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, *he shall be appointed, upon request of a party, by the court or other authority specified in Article 6*.
>
> [emphasis added]

Section 8 of the IAA provides that the competent authority specified for the purposes of Art 6 of the Model Law to perform the functions under Art 11(3) is the SIAC President.

34 The combined effect of Art 11(3) of the Model Law and s 8 of the IAA is that, where an arbitration clause does not provide a mechanism for breaking a deadlock between parties on the appointment of arbitrators, the SIAC President can step in to make the necessary appointment if parties are not able to agree on the sole arbitrator or presiding arbitrator, as the case may be. The power of the SIAC President is not confined to SIAC-administered arbitrations. This is a statutory power applicable to all arbitrations in Singapore (except where excluded by the parties' agreement or by applicable procedural rules).

35 While the application of Art 11(3) presents no problem in cases where it is clear that the place of the arbitration is Singapore, the applicability of Art 11(3) is open to question in the case of a bare arbitration clause which does not designate the place of arbitration. This is because Article 1(2) of the Model Law provides that:

> The provisions of this Law, *except Articles 8, 9, 35 and 36*, apply *only* if the place of arbitration is in the territory of this State. [emphasis added]

Since Art 11 is not one of the provisions excepted from the ambit of Article 1(2), the SIAC President may act pursuant to Art 11(3) only if the place of arbitration is Singapore. What then, of that those cases whether the place of arbitration is unclear or not yet determined?

36 According to the *Report of UNCITRAL on the Work of its Eighteenth Session* (A/40/17, 21 August 1985) ("*18th UNCITRAL Report*"), at para 80 (reproduced in Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International, 1989) ("*Holtzmann & Neuhaus*"), at p 131):

> … As to the question of extending the applicability of articles 11, 13, and 14 to the time before the place of arbitration was determined, some support was expressed for such an extension since it was important to provide court assistance in the cases where parties could not reach an agreement on the place of arbitration. However, the prevailing view was that the model law should not deal with court assistance to be available before the determination of the place of arbitration. In support of the prevailing view it was stated that neither the place of business of the claimant nor the place of business of the defendant provided an entirely satisfactory connecting factor for the purpose of determining whether court assistance should be provided. *Moreover, a provision of that kind in the model law might interfere with other rules on court jurisdiction. It was also pointed out that even without such an extension of the applicability of the model law a party might be able to obtain court assistance under laws other than the model law.* …
>
> [emphasis added]

It is therefore clear that the drafters of the Model Law did not intend Art 11 to constitute a complete and exhaustive code on curial or official assistance in the appointment of arbitrators. For this reason, the drafters appeared content to limit the application of Art 11 to cases where the place of arbitration had already been selected. They did so in the belief that, in a case where the place of arbitration had not yet been determined, parties could look to provisions in domestic law for assistance.

37 Such provisions in domestic law exist in a number of countries, including England, France, Germany, Italy, Japan, Netherlands, Czech Republic and the United States (see Gary Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) ("*International Commercial Arbitration")* at pp 1730, 1731 and 2105). For example, s 2(4) of the English Arbitration Act 1996 provides:

> (4) The court may exercise a power conferred by any provision of this Part not mentioned in subsection (2) or (3) for the purpose of supporting the arbitral process where—
>
> > (a) no seat of the arbitration has been designated or determined, and
> >
> > (b) by reason of a connection with England and Wales or Northern Ireland the court is satisfied that it is appropriate to do so.

Another example is Article 1505 of the French Code of Civil Procedure, which provides:

> In international arbitration, and unless otherwise stipulated, the judge acting in support of the arbitration shall be the President of the *Tribunal de grande instance* of Paris when:
>
> > (1) the arbitration takes place in France; or
> >
> > (2) the parties have agreed that French procedural law shall apply to the arbitration; or

> (3) the parties have expressly granted jurisdiction to French courts over disputes relating to the arbitral procedure; or
>
> (4) ***one of the parties is exposed to a risk of a denial of justice.***
>
> [English translation taken from Jan Paulsson and Lise Bosman (eds), *ICCA International Handbook on Commercial Arbitration*, (Kluwer Law International 1984) ("*ICCA Handbook*"), Supplement No. 64 (May 2011) at p 11]
>
> [emphasis added in bold italics]

38 Unfortunately, the IAA does not contain similar provisions. It would therefore appear, at first blush, that no default mechanism is available under Singapore law to assist with the establishment of the arbitral tribunal in the case of bare arbitration clauses coming within category (c). If this is correct, the plaintiffs may find it impossible to operationalise the arbitration clauses in their respective contracts and set the arbitration in motion without Asian Mineral's cooperation.

Definition of the Issues

39 Therefore, the first issue which arises for determination is *whether, notwithstanding the absence of express provisions in the IAA empowering the SIAC President or the court to make appointments in cases where the place of arbitration is unclear or not yet determined, avenues exist under Singapore law to break a deadlock between parties concerning the appointment of the arbitral tribunal.* If the answer to the first issue is "yes", then it would be possible to have the arbitral tribunals established pursuant to the arbitration clauses in question without Asian Mineral's cooperation. Consequently, there would be no obstacles in the way of the proposed arbitrations and thus no room at all for saying that the arbitration clauses in question are "incapable of being performed".

40 If the answer to the first issue is "no", the next issue which arises for determination will be *whether the inability to establish the arbitral tribunal without the cooperation of the defendant renders the arbitration clauses in question "incapable of being performed" for the purposes of s 6 of the IAA.*

The standard of review for stay of proceedings in favour of arbitration

41 In *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373, the Court of Appeal held at [63]-[64] that:

> 63 … We agree that a Singapore court should adopt a *prima facie* standard of review when hearing a stay application under s 6 of the IAA. In our judgment, a court hearing such a stay application should grant a stay in favour of arbitration if the applicant is able to establish a *prima facie* case that:
>
> (a) there is a valid arbitration agreement between the parties to the court proceedings;
>
> (b) the dispute in the court proceedings (or any part thereof) falls within the scope of the arbitration agreement; and
>
> (c) the arbitration agreement is not null and void, inoperative or incapable of being performed.
>
> 64 Once this burden has been discharged by the party applying for a stay, the court should grant a stay and defer the actual determination of the arbitral tribunal's jurisdiction to the tribunal itself. The court will only refuse to grant a stay when it is clear on the evidence placed before it that one or more of the above three requirements have not been satisfied. The arbitral tribunal's determination of its jurisdiction will nonetheless remain subject to overriding court supervision in the form of an appeal under s 10(3) of the IAA against the arbitral tribunal's jurisdictional ruling, or in proceedings for setting aside or refusing enforcement of the award rendered by the arbitral tribunal (see, respectively, s 24 of the IAA and Art 34 of the Model Law, and s 31 of the IAA).

42 Thus the standard of review to be applied in the present application for stay is the *prima facie* standard. Therefore, in evaluating the first issue, I will be examining whether a *prima facie* case has been established that avenues

exist to break a deadlock between parties concerning the appointment of the arbitral tribunal. In evaluating the second issue, I will be examining whether a *prima facie* case has been established that the inability to establish the arbitral tribunal without the cooperation of Asian Mineral does not render the arbitration clauses in question "incapable of being performed".

Issue 1 – Whether avenues exist under Singapore law to break a deadlock between parties concerning the appointment of the arbitral tribunal where the place of arbitration is unclear or not yet determined

43 The first issue can be broken down into two sub-issues as follows:

(a) whether the IAA allows the SIAC President to appoint the arbitral tribunal where the place of arbitration is unclear or not yet determined; and

(b) if the SIAC President is unable to act, whether other mechanisms exist under Singapore law to break a deadlock between parties concerning the appointment of the arbitral tribunal where the place of arbitration is unclear or not yet determined.

Sub-Issue 1(a) - Whether the IAA allows the SIAC President to appoint the arbitral tribunal where the place of arbitration is unclear or not yet determined

44 As discussed above, the power conferred by Art 11(3) of the Model Law on the SIAC President may only be exercised where Singapore is the place of arbitration. While this means that the SIAC President cannot act in a case where it is clear that the place of arbitration is not Singapore, it does *not* necessarily follow that the SIAC President is powerless to assist in cases where the place of arbitration is unclear or not yet determined.

The view in favour of the SIAC President having the power to act

45 As the statutory appointing authority, the SIAC President has a statutory duty to carry out the role assigned to him by Art 11(3) of the Model Law in all cases coming within the scope of Art 11(3). It may therefore be argued that, in order to fulfil this statutory duty, the SIAC President will need to ascertain for himself whether the statutory duty applies in any particular case coming before him. Nothing in the IAA suggests that, in doing so, the SIAC President is confined to simply analysing the words of the arbitration agreement. To the contrary, in order to fulfil the purpose contemplated in the IAA, the SIAC President is entitled to seek more information from the parties and examine the underlying contract for connecting factors pointing to one jurisdiction or another in cases where it is not clear on the face of the arbitration agreement where the place of arbitration is. After all, the SIAC President's duty is triggered (as part of the Model Law's general applicability under Art 1(2)) if "the place of arbitration is in the territory of [Singapore]", and not only if the place of arbitration is *stated* to be in the territory of Singapore.

46 If one were to accept that, in a case where the place of arbitration is unclear or not yet determined, the SIAC President can enquire into whether the statutory duty under Art 11(3) of the Model Law applies, the question which follows would be the standard of review to be applied in such an enquiry.

47 While an appointing authority is required to satisfy itself of its jurisdiction to make an appointment before stepping in to do so, it stands to reason that the standard of review to be applied by an appointing authority for determining the existence of its jurisdiction to make an appointment would be

much lower than the standard of review adopted by an arbitrator for determining the arbitrator's jurisdiction to conduct the arbitration. This is because:

(a) the appointing authority, unlike the arbitrator, is performing an administrative and not an adjudicatory function;

(b) the appointing authority will not have the facilities and is not expected to conduct hearings and examine witnesses for the purposes of deciding whether it has jurisdiction to make an appointment; and

(c) the primary responsibility for determining questions such as the existence, validity and interpretation of an arbitration agreement (including the place of the arbitration and the applicable law) rests with the arbitrator. It would be a usurpation of the arbitrator's role and a waste of time and expenses if the appointing authority were required to examine these issues to the same extent and using the same standard as the arbitrator.

48 For the foregoing reasons, an appointing authority should only need to be satisfied that there is a *prima facie* case that it has the jurisdiction to act. Support for this view may be found in Robert Merkin and Johanna Hjalmarsson, *Singapore Arbitration Legislation: Annotated* (Informa Law from Routledge, 2nd Ed, 2016) which cited Hong Kong case law and opined, in its commentary on Art 11, that "[p]resumably the [SIAC President] has to be satisfied that there is a *prima facie* case that an arbitration agreement exists" (at p 136). Similarly, *International Commercial Arbitration* states at p. 1729 that:

> It is difficult to avoid the conclusion that a court may consider jurisdictional objections prior to exercising its authority to appoint an arbitrator (under Article 11 of the UNCITRAL Model Law or parallel provisions of other national arbitration legislation). Before exercising judicial authority to enforce and implement a putative agreement to arbitrate, a national court both can and should confirm, at least on a *prima facie* basis, that such an agreement in fact exists; any other approach inappropriately involves an exercise of public, judicial authority without any inquiry into whether there is any basis for such action.

Although this passage from *International Commercial Arbitration* refers to national courts exercising powers of appointment under Art 11 of the Model Law, there is no reason why it should not apply to non-judicial authorities empowered to make appointments under Art 11 of the Model Law. Further, while these two passages discussed the standard of review for determining the existence of jurisdiction under Art 11 of Model Law from the paradigm of the existence or otherwise of an agreement to arbitrate, there is no reason why the standard of review should be any different when the issue of jurisdiction under Art 11 turns on the existence or otherwise of an agreement on the place of arbitration.

49 If the foregoing line of reasoning is accepted, it will not be difficult for this court to accept that the SIAC President will be able to make the necessary appointments in the present case, as explained at [51]-[57] below.

(1) Possible approaches towards interpreting the two arbitration clauses

50 To recapitulate, the arbitration clauses read:

> The Seller and the Buyer agree that all disputes arising out of or in connection with this agreement that cannot be settled by discussion and mutual agreement shall be referred to and

> finally resolved by arbitration as per [*Indian Contract Rules* / *Singapore Contract Rules*].

There are three possible ways of construing the phrase "as per Indian Contract Rules" or "as per Singapore Contract Rules" in the arbitration clauses, none of which are completely satisfactory:

(a) the phrase could be construed as subjecting the arbitration to the arbitral laws of India or Singapore, as the case may be;

(b) the phrase could be construed as subjecting the underlying purchase contract to the contract laws of India or Singapore, as the case may be; or

(c) the phrase could be regarded as one which lacks any intelligible meaning, and which should thus be disregarded when construing the arbitration clauses.

51 Against the first approach, it may be said that a reference to "Indian/Singapore Contract Rules" is clearly not a reference to "Indian/Singapore arbitration laws".

52 Against the second approach, it appears somewhat incongruent for a choice of law provision applicable to the entire contract to be tucked into the tail end of a single-sentence arbitration clause. While I am aware that a number of arbitral institutions recommend model arbitration clauses which provide an option for parties to spell out the choice of substantive law in a separate sub-clause, I note that none of them suggest merging the choice of substantive law into the very same sentence that creates the obligation to arbitrate. In the light of this, the second approach seems implausible. The

second approach is made even less plausible by the use of the phrase "resolved by arbitration as per …", which to my mind is more naturally followed by a noun indicating the procedural as opposed to the substantive law.

53 The third approach is not without precedent. It is well known and accepted that courts will disregard meaningless words in arbitration clauses in order to construe such clauses in a workable manner (see, *eg*, *Lucky-Goldstar International (HK) Ltd v Ng Moo Kee Engineering Ltd* [1993] 1 HKC 404 and *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* [2013] SGHCR 5). If the first and second approaches do not find favour, and no other sensible meaning can be attributed to the words, then the third approach should be used.

54 It is not necessary for this court to form a settled view as to which of these three approaches is to be preferred. It will be for the arbitrator (or the arbitrator in each arbitration, if the two disputes are separately arbitrated), after he is appointed, to interpret the arbitration clauses and determine how the reference to "Indian Contract Rules" or "Singapore Contract Rules" influences his decision on the applicable law. The purpose of the present enquiry is to assess whether the SIAC President is likely to be able to act as the statutory appointing authority in respect of each clause, which I shall proceed to examine in turn.

(A) THE CONTRACT WITH TANASAN RICE

55 The arbitration clause in Tanasan Rice's contract provides for arbitration "as per Singapore Contract Rules". Applying the three possible approaches discussed at [51]–[54] above:

(a) If the phrase "as per Singapore Contract Rules" is construed as subjecting the arbitration to Singapore arbitration law, the SIAC President will have jurisdiction to make appointments under Art 11(3) of the Model Law because Singapore arbitration law applies;

(b) If the phrase "as per Singapore Contract Rules" is read as subjecting the purchase contract to Singapore contract law, this should be regarded as an implied choice of Singapore law as the law applicable to the arbitration (see *Piallo GmbH v Yafriro International Pte Ltd* [2014] 1 SLR 1028 at [20], *Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pte Ltd* [2016] 1 SLR 79 at [76] and *BCY v BCZ* [2016] SGHC 249 at [65]). The same result as in (a) above should therefore obtain; and

(c) If the phrase "as per Singapore Contract Rules" is disregarded, there still appears to be sufficient material for the SIAC President to form a *prima facie* view that the law applicable to the arbitration is Singapore law. Asian Mineral is incorporated in Singapore and any award against it would, one presumes, be likely to be enforced in Singapore.

Therefore, under any of the three approaches discussed above, there are ample materials for the SIAC President to conclude that a *prima facie* case for the applicability of Art 11(3) of the Model Law has been made out.

(B) THE CONTRACT WITH KVC RICE

56 The arbitration clause in KVC Rice's contract provides for arbitration "as per Indian Contract Rules". Without pre-empting the SIAC President's decision, it would appear to me that, when considering the three competing

approaches discussed above, it would be open to the SIAC President to form the *prima facie* view that the third approach is to be preferred and, from there, to reach the same *prima facie* determination as at [56(c)] above.

The view against the SIAC President having the power to act

57 One possible objection to the view in favour of the SIAC President having the power to act in the present case is that this would pre-empt and usurp the arbitral tribunal's authority to determine the place of arbitration. This objection may be addressed by recalling that the SIAC President's *prima facie* enquiry is undertaken for the limited purpose of ascertaining whether he should exercise his powers of appointment and does not bind the arbitral tribunal. It remains open to the arbitral tribunal, after undertaking a full review of the matter, to come to a different view from the SIAC President on the place of arbitration.

58 A second possible objection is that it would appear to be inconsistent with the *travaux préparatoires* of the Model Law (or "*travaux*" for short) quoted at [37] above for the SIAC President to undertake such an enquiry. According to this objection, the drafters of the Model Law had intended that "the model law should not deal with court assistance [*which, in the context of Art 11(3), would include assistance of the statutory appointing authority*] to be available before the determination of the place of arbitration" (*Holtzmann & Neuhaus* at p 131). Therefore, it could be argued that, unless the SIAC President can point to another source of power besides Art 11(3) of the Model Law, it would not be legitimate for the SIAC President to make appointments while the place of arbitration remains unclear or not yet determined.

59 While s 4 of the IAA permits references to be made to the *travaux* for the purposes of interpreting the Model Law, it is important, when referring to the *travaux*, to treat the *travaux* as a guide to the object and purpose of the provisions of the Model Law and not take isolated phrases from the *travaux* out of context to be parsed as though they are words in a statute. A closer reading of the *travaux* will reveal that it is not inconsistent with the sentiments of the drafters of the Model Law for the SIAC President to undertake a limited enquiry for the purposes of checking whether an express or implied designation of the place of arbitration could be discerned, *prima facie*, from the parties' agreement.

60 In this regard, we begin the examination of the *travaux* with the meeting of UNCITRAL held on 6 June 1985, which was reported in the *18th UNCITRAL Report,* at paras 107-110 as follows (reproduced in *Holtzmann & Neuhaus,* at pp. 131-132):

> 107. As agreed in the context of the discussion on the territorial scope of application and any possible exceptions thereto (see above, paras. 76-77), the Commission considered whether court assistance in the appointment process, as provided for in article 11(3), 11(4) and 11(5), should be made available even before the place of arbitration was determined, since it was the determination of the place of arbitration which triggered the general applicability of the (model) law in a State that had enacted it.
>
> 108. Under one view, the model law need not contain any such provision since it was difficult to find an acceptable connecting factor and, above all, there was no pressing need in view of the infrequency of cases where parties had agreed neither on a place of arbitration nor on an appointing authority and since even in such rare cases the existing applicable law or laws might come to their assistance with a coherent system.
>
> 109. *The prevailing view, however, was that a practical problem existed and the model law should provide for such assistance in order to facilitate international commercial*

> *arbitration by enabling the diligent party to secure the constitution of the arbitral tribunal.* As to which should be the connecting factor, the following proposals were made: (a) place of business of defendant, (b) place of business of claimant, (c) place of business of either claimant or defendant.
>
> 110. *The Commission, after deliberation, tentatively concluded that a State adopting the model law should make available the services of its Court referred to in article 6 for appointing an arbitrator under article 11 in those cases where the defendant had his place of business in "this State" and, possibly, in those cases where the claimant had his place of business in "this State," provided that the court in the defendant's country did not perform that function.*
>
> [emphasis added]

61 Thus the prevailing view in UNCITRAL at the meeting on 6 June 1985 was that the Model Law should provide for the application of Art 11 in cases where the place of arbitration had not yet been determined. After the 6 June 1985 meeting, the UNCITRAL Secretariat drafted a provision which read:

> … articles 11, 13 and 14 apply even where the place of arbitration is not yet determined, provided that the respondent [or the claimant] has his place of business in the territory of this State.

This draft was discussed at UNCITRAL's meeting on 19 June 1985, the report of which I have reproduced at [37] above and quoted from at [59] above. But this report is not the only official record of the said meeting. UNCITRAL also published, as part of its official records, a summary record of each meeting of the UNCITRAL setting out in gist what each participant at the meeting had said. The summary record of the 19 June 1985 meeting (reproduced in *Holtzmann & Neuhaus* at pp. 125-128), shows that:

> (a) The Italian representative spoke strongly in favour of the new draft provision and proposed that the relevant connecting factor should be the place of business of the respondent.

(b) The United States representative agreed with the Italian representative that it would be useful if the Model Law could provide for cases where the parties had not agreed on the place of arbitration. However, he could not agree that the connecting factor should be the respondent's place of business. (He had favoured using the claimant's place of business as the connecting factor at the meeting on 6 June 1985). He reluctantly concluded that, without a working group to deal with the complexities of the problem, it was not feasible come to a decision on the draft provision.

(c) The Soviet Union representative expressed regret that so little time was left to deal with this very important issue. (19 June 1985 was the last and final day of substantive discussions on the Model Law at UNCITRAL. Thereafter, the drafting group met on 20-21 June 1985 to clean up the draft Model Law, and the Model Law was formally adopted by UNCITRAL on 21 June 1985.) He expressed agreement with the United States representative that "the case where the place of arbitration had not yet been agreed upon should remain outside the scope of the model law".

(d) The Tanzania representative shared the Soviet Union representative's regret that there was not sufficient time to study the implications of the present issues.

(e) The Japanese representative indicated that he "agreed with the Soviet Union representative that if the place of arbitration were not yet decided, *rather than declare that court assistance was not available* under articles 11, 13 and 14, it would be better to leave the matter to the law of the State concerned" [emphasis added].

62 The foregoing survey of the individual views expressed by the drafters of the Model Law at the 19 June 1985 meeting helps to throw light on the sentiments sought to be expressed by the phrase "model law should not deal with court assistance to be available before the determination of the place of arbitration" in the *18th UNCITRAL Report* quoted at [59] above. Read with the foregoing context in mind, it is clear that the drafters of the Model Law did not take a firm policy position against allowing the courts or statutory appointing authority to appoint arbitrators during the period where the place of arbitration was unclear or not yet determined. On the contrary, there appeared to be general agreement that, as a matter of policy preference, such powers should be available. In the end, no provision along these lines were adopted because the drafters could not agree on the connecting factors to be used in determining which countries' courts or statutory appointing authorities should exercise the powers under Art 11(3) of the Model Law during the period where the place of arbitration was unclear or not yet determined. It is therefore evident, from the summary record of the 19 June 1985 meeting, that the clear sentiment of the drafters were that the Model Law should not be regarded as precluding the courts or statutory appointing authority from doing so.

Conclusion on Sub-Issue 1(a)

63 As the applicable standard of review is the *prima facie* standard (see [43] above), it is not necessary, for present purposes, for me to reach a firm conclusion on which of the two views outlined above is to be preferred. Instead, the question which I need to resolve is whether a *prima facie* case exists in favour of the view that the SIAC President is able to act. Based on the analysis at [46]-[63] above, I am persuaded that this question should be answered in the affirmative.

64 In any event, the foregoing analysis may be of secondary importance given the position adopted by Asian Mineral in these proceedings. Specifically, Asian Mineral's counsel argued, both in written submissions and during oral argument before me, that the SIAC can indeed appoint the arbitrator in the absence of mutual agreement on the present facts. This point was made in the course of Asian Mineral's counsel's attempts to persuade me that the arbitration clauses were workable and that the stays should therefore not be lifted. Having adopted that position before me to its own benefit, I would not expect Asian Mineral to resile from it in correspondence with the SIAC subsequently. On that assumption, it appears to me that there are no obstacles in the way of SIAC President making the necessary appointments in the event that parties cannot reach agreement on the appointment of the arbitrator.

65 For the foregoing reasons, I find that Sub-Issue 1(a) should be answered in the affirmative.

Sub-Issue 1(b) - Whether other mechanisms exist under Singapore law to break a deadlock between parties concerning the establishment of the arbitral tribunal where the place of arbitration is unclear or not yet determined

66 Notwithstanding the conclusion I reached on Sub-Issue 1(a) above, I appreciate that, as alluded to at [64] above, it remains possible for the SIAC President to take the view that he has no power to act. I therefore turn now to consider, in the alternative, whether other mechanisms exist under Singapore law to break a deadlock between parties concerning the appointment of the arbitral tribunal where the place of arbitration is unclear or not yet determined, in the event that the SIAC President declines to act.

67 As a matter of first impression, I would think that, in any jurisdiction with a strong policy in favour of arbitration, the courts should have the residual jurisdiction to assist with the appointment of arbitrators as a last resort, to ensure that the parties' intention to have their dispute settled by arbitration is not defeated. In this regard, it has been observed in *International Commercial Arbitration* at p 1733 that:

> … In cases where the parties have not agreed upon an arbitral seat (or the lex arbitri), the absence of arbitration legislation in any state permitting the judicial appointment of an arbitrator could prevent constitution of an arbitral tribunal. *Just as judicial overreaching can disrupt the arbitral process, so judicial unwillingness to deal with such "orphan" cases could do so as well.*
>
> *In those rare cases where the parties have not agreed upon an arbitral seat, or a mechanism for selecting a seat, then national courts with the closest connection to the parties' transaction should have and should exercise the authority to appoint an arbitrator.* One classic example of such a case arose in French courts, in *National Iranian Oil Co. v. State of Israel*, where the parties had neither agreed upon an arbitral seat nor a procedural law of the arbitration. …
>
> [emphasis added]

68 The French case cited in the foregoing passage is the famous case of *National Iranian Oil Co v State of Israel, Judgment of 29 March 2001*, 17(6) Mealey's International Arbitration Reports A-1 (2002) (Paris Court of Appeal). In that case, the parties had an arbitration clause that specified that the claimant and the respondent would each nominate one arbitrator. The two arbitrators were then to agree to nominate a third arbitrator, failing which the President of the International Chamber of Commerce in Paris was to appoint the third arbitrator. However, the clause did not designate a place of arbitration or a procedural law and provided no way to break the deadlock which resulted when the respondent refused to nominate an arbitrator.

69 Had Art 1505(4) of the French Code of Civil Procedure (see [38] above) existed at the time the case was decided, it would have provided a statutory basis for the court to step in. But the case pre-dated the enactment of the said Art 1505(4), and the relevant provision at the time, Art 1493(2), read as follows:

> If in an arbitration ***taking place in France or subjected by the parties to French procedural law*** difficulties arise in the constitution of the arbitral tribunal, the interested party may bring the matter before the President of the *Tribunal de Grande Instance* of Paris as provided in Art. 1457, unless the parties agree otherwise.
>
> [English translation taken from *ICCA Handbook*, Supplement No. 58 (March 2010) at p 9]
>
> [emphasis added in bold italics]

Neither precondition set out in the provision had been met. There was a connecting factor with France in that the appointing authority for the presiding arbitrator was physically located in France, but this was not a recognised basis under the statute. Thus, the court faced some difficulty finding a way forward. As summarised in *International Commercial Arbitration* (at p 1733):

> The French courts initially declined to appoint an arbitrator (when the respondent refused to make its nomination of a co-arbitrator), because then-applicable Article 1493(2)'s jurisdictional requirements were not satisfied. Nonetheless, when it became clear that the claimant could not obtain judicial appointment of an arbitrator in Israel, the French courts reconsidered the matter and, relying on the fact that the appointing authority for the presiding arbitrator was physically located in France, appointed the requested co-arbitrator.

This allowed the tribunal to be constituted and the arbitration to proceed, despite the lack of a statutory basis for the appointment.

70 In *Judgment of 1 February 2005, National Iranian Oil Co. v. Israel*, 3 Rev. Int'l Arb. 693, 694 (2005), the First Civil Division of the French Court of Cassation dismissed Israel's appeal from the Paris Court of Appeal's decision and explained that:

> [T]he impossibility for a party to access the court (or arbitral tribunal) entrusted with the settlement of that party's claim to the exclusion of all other state jurisdictions, and thus to exercise a right pertaining to international public policy, established by the principles of international arbitration and Art. 6(1) of the European Convention on Human Rights, is a denial of justice justifying the international jurisdiction of the president of the Paris Court of First Instance within the context of the state court's mission to assist and cooperate in the constitution of an arbitral tribunal when there is a connection with France.
>
> [English translation taken from *International Commercial Arbitration* at p 1731, fn 537]

Thus, the court was empowered to act "if no other means of appointing an arbitrator and permitting the arbitration to proceed appeared to exist" (see *International Commercial Arbitration* at p 1731).

71 Although this reasoning emanated from a civil law jurisdiction and drew support from European human rights law, its fundamental logic appears to me to be sound and consistent with Singapore's public policy (which includes strong support for the smooth functioning of international arbitration) and jurisprudence (which recognises the common law right – or, if not a right, at least a vital guiding principle – of access to justice, including the maxim *ubi jus ibi remedium*). For this reason, I would think that, in a case where there was truly no other way to prevent injustice to a would-be claimant, a Singapore court would be prepared to step in to directly appoint an arbitrator, *provided the dispute had some connection with Singapore*. While it would not be open to a Singapore court to adopt wholesale the reasoning of the French

courts (in particular, the reasoning based on European human rights law), I am of the view that such a decision could be justified either on the basis of contract law (by applying the principles of interpretation articulated by the Court of Appeal in *Insigma* at [30]-[34], with the appropriate use of implied terms, if needed) or as an exercise of the court's inherent jurisdiction to prevent injustice.

72 One possible objection to the Singapore courts doing so lies in the fact that, in enacting Art 11(3) of the Model Law as part of Singapore law, s 8(1) of the IAA expressly excluded the courts from exercising the powers under Art 11(3) of the Model Law to appoint arbitrators where parties fail to agree. The question therefore arises as to whether s 8(1) of the IAA has the effect of stripping the courts of all residual jurisdiction to come in aid of arbitration through the appointment of arbitrators. An answer to this question can be found in the Hong Kong High Court's decision in *Comtec Components Ltd v Interquip Ltd* [1998] HKCFI 803 ("*Comtec*"). In that case, the plaintiff resisted an application for stay of proceedings in favour of arbitration by arguing that the arbitration agreement was "incapable of being performed" because the Hong Kong International Arbitration Centre ("HKIAC") had in August 1996 declined to appoint an arbitrator as they were "not satisfied that *prima facie* the parties have signed a contract with an Arbitration clause". In granting the stay, Findlay J noted that the law had changed since August 1996, dispensing with the need for an arbitration agreement to be signed, and held at [9]-[10]:

> There is no reason to believe that, under the new law, the HKIAC would regard an agreement signed by the parties as necessary.
>
> In any event, I do not believe that the initial refusal by the HKIAC to make an appointment makes the arbitration

> agreement incapable of being performed. The parties are free to agree on an arbitrator. If they cannot do so, they should approach the HKIAC once more; it may be persuaded to reconsider its attitude in the light of the changed law. This is especially so now that an arbitrator has the power to rule on his own jurisdiction, including in respect of the existence and validity of the agreement. *In the last resort, this court, I believe, has a residuary jurisdiction to make an appointment to implement the intention of the parties that their disputes should be resolved by arbitration.*
>
> [emphasis added]

73 Like Singapore, Hong Kong had, in enacting Art 11(3) of the Model Law, excluded the Hong Kong courts from exercising the powers of appointment under Art 11(3) and reposed those powers exclusively in the HKIAC (see s 13(2) of Hong Kong's Arbitration Ordinance). Given that *Comtec* was decided under statutory provisions that are *in pari materia* with the relevant provisions of the IAA, I would respectfully adopt Findlay J's opinion that the courts retain "a residuary jurisdiction to make an appointment to implement the intention of the parties that their disputes should be resolved by arbitration".

Conclusion on Sub-Issue 1(b)

74 In the light of the foregoing, I conclude that, even in a situation where the SIAC President declines to appoint the arbitrators for whatever reason, the court retains a residual jurisdiction to ensure that the arbitration under both the KVC Rice contract and the Tanasan Rice contract may proceed notwithstanding any deadlock between the parties on the appointment of arbitrators. Sub-issue 1(b) should therefore also be answered in the affirmative.

Issue 2 - Whether the inability to establish the arbitral tribunal without the cooperation of the defendant renders the arbitration clauses in question "incapable of being performed"

75 Case law and scholarly commentary have proffered various views on how the phrase "incapable of being performed" should be applied. Some commentators have observed there are generally two tests, one narrower and one broader, to be found in the literature – see. e.g., the following passage from Michael Pryles, "The Kaplan Lecture 2009*"* (2010) 27 Journal of International Arbitration 105, at 115:

> *Mustill and Boyd* describe "incapable of being performed" in the following terms:
>
> > "Incapable of being performed" connotes something more than mere difficulty or inconvenience or delay in performing the arbitration. *There must be some obstacle* ***which cannot be overcome even if the parties are ready, able and willing to perform the agreement****: for example, where the mechanism for constituting the tribunal breaks down in a way which the Court has no ability to repair, or where a sole arbitrator named in the agreement cannot or will not act.* The fact that the claim is time-barred does not in itself render the arbitration incapable of being performed: the arbitration can proceed, although it will inevitably result in the claim being dismissed. Where the effect of the time lift is not to bar the claim but merely to bar the right to arbitrate the position is, however, less clear. It might be argued in such a case that the arbitration agreement was not "incapable of being performed," but merely "incapable of being invoked." But we consider that this argument is unsound, and that the plaintiff should be permitted to pursue his claim by action, as was presumably the intention of the parties in agreeing to a time bar which barred the right to arbitration without extinguishing the claim.
>
> On the other hand, Kroll suggests a broader test:
>
> > Arbitration agreements are considered to be "incapable of being performed" where the arbitration cannot effectively be set in motion. According to the Bermudan Court of Appeal this is only the case when the "party

> submitting the agreement … not capable of performance [can] demonstrate that even given the willingness of both parties to perform it, the agreement cannot be performed." It is beyond doubt that, in those cases, the arbitration agreement is "incapable of being performed." However, in other cases the test promulgated by the Bermudan Court appears to be too narrow, at least when it is taken literally. Its underlying rationale is that no party should be allowed to rely on its own obstructive behaviour to evade obligations freely entered into by concluding an arbitration agreement. *On the other hand, however, it is usually not possible to force a party to cooperate in the constitution of the tribunal. Therefore the test for the non-obstructing party must be* ***whether the arbitration proceedings can be effectively set into motion even without the cooperation of the other party.*** *In light of this test, the "incapable of being performed" defence should also not be equated with the English doctrine of frustration, as was done in some decisions.*
>
> [emphasis added in italics and bold italics]

76 The passage quoted from *Mustill and Boyd* appears to require the "incapable of being performed" exception to be tested against the scenario where both parties are ready, able and willing to perform the arbitration agreement, whereas the passage quoted from Kröll allows the exception to be tested against the scenario where one party (*ie,* the party seeking a stay of court proceedings) does not cooperate in setting the arbitration in motion. Given my conclusion on Issue 1, it is not necessary for me to express a preference between the two approaches nor is it necessary for me comment on whether these two approaches in truth represent two different tests or are merely different aspects of a single test. Once Issue 1 has been answered in the affirmative, Issue 2 simply does not arise.

Conclusion

77 In the light of the conclusions I have reached in relation to Issues 1 and 2, it is my decision that the stay of proceedings should remain for both suits.

Terms and conditions of the stay

78 The next question I need to consider is whether the stay should be subject to any terms and conditions. The statutory basis for imposing terms and conditions is s 6(2) of the IAA, which provides that a stay of proceedings is to be ordered by the court "upon such terms or conditions as it may think fit". As noted in *The "Duden"* [2008] 4 SLR(R) 984 at [12]-[16]:

> (a) There are no statutory limits to the types of terms or conditions which the court may impose on a stay of proceedings under the IAA.
>
> (b) Even though this discretion to impose terms and conditions is unfettered, it has to be exercised judiciously.
>
> (c) The key guiding principle is that the courts should be slow to interfere in the arbitration process.
>
> (d) However, the court should not be reluctant to intervene by exercising its statutory power to impose conditions where the justice of the case calls for it.

In *The "Duden"*, a stay of proceedings was granted on condition that the applicant for the stay would not raise the defence of time bar in the arbitration proceedings.

79 I would also add that, the conditions imposed should seek to support and give effect to the parties' intention, and should avoid rewriting the parties' agreement to impose on them an arbitration that was not within the contemplation of either party. For this reason, I reject all of the conditions that plaintiffs' counsel asked me to impose. Instead, I will impose one limited condition on the stay in both of the Suits.

80 The condition which I impose is that Asian Mineral will raise no objections to the SIAC President's jurisdiction to appoint an arbitrator under Art 11(3) of the Model Law in the event that the parties cannot reach agreement on the appointment. This condition will uphold the parties' intention to arbitrate, and mitigate any risk of the arbitration being held up by deadlock. It is also a condition required by fairness and justice. In support of the stay, Asian Mineral had taken a firm position before me that there are no obstacles to the SIAC President making an appointment pursuant to the Model Law in the present case. It would be both unfair and unjust if, after securing the stay on this basis, Asian Mineral is allowed to adopt a different stance before the SIAC President.

81 There is no need to impose any conditions concerning the conduct of the arbitration, the place of arbitration or the applicable law because once the arbitrator is appointed, he will have the power to decide on these matters.

82 In addition, I also make it a term of my order staying proceedings in the Suits that, if the SIAC President declines to make an appointment of arbitrator when requested by either party to do so, either party may apply to court for further orders or directions, including orders for lifting the stay, appointment of arbitrator(s) or any other directions to help move the

arbitration forward. This recognises the possibility, alluded to at [68] above, that the SIAC President may take the view that he should decline to act. In that eventuality, this term of the stay order will ensure that this court remains seised of the matter, and avoid either dispute falling into the sort of "arbitration purgatory" described in the quotation from *Redfern and Hunter* at [1] above or becoming one of the "orphan" cases referred to in the quotation from *International Commercial Arbitration* at [69] above.

Costs

83 In the light of the terms and conditions I have imposed, the plaintiffs have partially succeeded in these appeals and largely obtained what they had sought before me in the alternative. I therefore order all parties to bear their own costs of these appeals. The costs orders made below are to remain.

Pang Khang Chau
Judicial Commissioner

P Jeya Putra and Thomas A. Chuang (AsiaLegal LLC) for the plaintiffs;
Bazul Ashab and Jason Goh (Oon & Bazul LLP) for the defendant.