**IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT**
**OF THE REPUBLIC OF SINGAPORE**

**[2024] SGHC(I) 19**

Originating Application No 1 of 2024

In the matter of Section 8 of the International Arbitration Act 1994

And

In the matter of Articles 6 and 34 of the UNCITRAL Model Law on International Commercial Arbitration as set out and modified in the First Schedule to the International Arbitration Act 1994

And

In the matter of Order 23 of the Singapore International Commercial Court Rules 2021

Between

Pertamina International Marketing & Distribution Pte Ltd

… *Claimant*

And

P-H-O-E-N-I-X Petroleum Philippines, Inc (a.k.a. Phoenix Petroleum Philippines, Inc)

… *Defendant*

Originating Application No 23 of 2023 (Summons No 21 of 2024)

In the matter of Section 19 of International Arbitration Act 1994

And

In the matter of Order 23, Rule 10 of the Singapore International Commercial Court Rules 2021

Between

Pertamina International Marketing & Distribution Pte Ltd

… *Claimant*

And

(1) P-H-O-E-N-I-X Petroleum Philippines, Inc (a.k.a. Phoenix Petroleum Philippines, Inc)
(2) Udenna Corporation

… *Defendants*

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# GROUNDS OF DECISION

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[Arbitration — Agreement — Breach]
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[Arbitration — Permanent anti-suit injunction]

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**[2024] SGHC(I) 19**

Singapore International Commercial Court — Originating Application No 1 of 2024, Originating Application No 23 of 2023 (Summons No 21 of 2024)
Sir Henry Bernard Eder IJ
25 June 2024

28 June 2024

**Sir Henry Bernard Eder IJ:**

## Introduction

1 These proceedings concern an arbitration brought under the auspices of the Singapore International Arbitration Centre ("SIAC") in SIAC Case No. ARB No. 084 of 2022 ("ARB 84") and a Final Award signed and dated 28 November 2023 ("Final Award") whereby it was determined that the defendant, P-H-O-E-N-I-X Petroleum Philippines, Inc (also known as Phoenix Petroleum Philippines, Inc) ("Phoenix"), and another third party guarantor, Udenna Corporation ("Udenna"), were jointly and severally liable to the claimant, Pertamina International Marketing & Distribution Pte Ltd ("PIMD"), in the aggregate amounts of (a) US$142,932,694.04 (including interest and legal and other costs), and (b) S$218,948.60, plus interest from 29 November 2023 (save for interest on the legal and other costs, which would commence beginning 12

December 2023). Both Phoenix and Udenna are incorporated and based in the Philippines.

2 The background is set out in my previous judgment in *Pertamina International Marketing & Distribution Pte Ltd v P-H-O-E-N-I-X Petroleum Philippines, Inc (also known as Phoenix Petroleum Philippines, Inc)* [2024] SGHC(I) 13 ("Judgment") which I do not propose to repeat.

3 I would only add that since that previous judgment:

(a) On 13 May 2024, Phoenix filed SIC/SUM 21/2024 ("SUM 21") in SIC/OA 23/2023 ("OA 23") seeking the setting aside of SIC/ORC 69/2023 ("ORC 69").

(b) On 16 May 2024, PIMD filed a further Motion to Resolve to ask the Philippine Court of Appeal ("Phillipine CA") to urgently issue a temporary restraining order and/or writ of preliminary injunction pending the resolution of the Certiorari Petition.

(c) On 22 May 2024, the Philippine CA issued its Resolution in which it (i) denied PIMD's application to enjoin the Philippine Regional Trial Court (the "Philippine RTC") from proceeding with the Philippines Action while it is considering PIMD's Certiorari Petition; (ii) directed Phoenix to file its comments on the Certiorari Petition within 10 days from the date of notice of the Resolution; and (iii) permitted PIMD to file its reply to the comment within 5 days from its receipt of this.

(d) Service of OA 1 has now been effected on Phoenix in the Philippines under the Hague Convention.

4 There are now before the Court two separate applications which overlap to a certain extent, *viz*:

(a) OA 1 is PIMD's application for (i) a declaration that the Final Award is valid, final and binding; (ii) a permanent anti-suit injunction ("ASI"); and (iii) mandatory injunctions/orders essentially to require Phoenix to withdraw the Philippine proceedings and/or to prevent Phoenix from pursuing proceedings in the Philippines to seek declarations that the Final Award and ARB 84 are void.

(b) SUM 21 is Phoenix's application filed in OA 23 to set aside ORC 69, which is this Court's order allowing PIMD to enforce the Final Award against Phoenix and Udenna in Singapore.

5 I heard these applications on 25 June 2024. At the end of the hearing, I informed Counsel of my decision *viz*, that I granted the relief sought by PIMD in OA 1 subject to: (a) slight amendment of the wording of the prayers set out in OA 1; and (b) the insertion of wording to the effect that nothing in my order has the effect of preventing Phoenix from resisting recognition or enforcement of the Final Award in the Philippines or elsewhere; and dismissed Phoenix's application under SUM 21. In addition, I ordered Phoenix to pay PIMD's costs of OA 1 and OA 23 including SUM 21, such costs to be assessed by me in due course unless otherwise agreed by the parties. These are my reasons for my decision.

6 In summary, the broad gist of Phoenix's submissions is as follows.

(a) This Court should refuse enforcement of the Final Award on the ground that there was no arbitration agreement between Phoenix and PIMD in relation to the dispute in the SIAC Arbitration. Consequently, ORC 69 should be set aside.

(b) It follows from the lack of an arbitration agreement that there is no basis for the permanent ASI that PIMD seeks in OA 1 given that PIMD seeks the permanent ASI to restrain an alleged breach of an arbitration agreement. OA 1 should be dismissed on this basis.

(c) Further and in any event, this Court should dismiss OA 1 on jurisdictional grounds because the jurisdiction of the Singapore International Commercial Court ("SICC") as conferred under the Supreme Court of Judicature Act 1969 (2020 Rev Ed) ("SCJA") does not extend to hearing OA 1, in that the SICC has jurisdiction to hear only proceedings under the International Arbitration Act 1994 (2020 Rev Ed) ("IAA"), but OA 1 is not a proceeding under the IAA.

(d) Further and in any event, this Court should dismiss OA 1 on the merits because the Philippines Action is in substance not an attempt to challenge or set aside the Final Award and is simply a defensive proceeding under Philippine law intended only to have effect within the Philippines. In commencing and pursuing the Philippines Action, Phoenix is merely exercising its undoubted right to resist enforcement of the Final Award in the Philippines, albeit in a pre-emptive manner given the fact that PIMD could obtain the fruits of the Final Award without ever seeking to enforce the Final Award in the Philippines.

(e) Moreover, the issue of whether or not the Philippines Action is a proper course of action for Phoenix to take in the Philippines and as a matter of a Philippine law is, with respect, an issue for a Philippine court to resolve. In this regard, not only has the Philippine RTC denied PIMD's motion to dismiss the Philippines Action and ruled that it has personal jurisdiction over PIMD and subject matter jurisdiction over the Philippines Action, the Philippines' Court of Appeals has also denied PIMD's application to enjoin the Philippine RTC from proceeding with the Philippines Action while it is considering PIMD's appeal from the Philippine RTC's ruling.

7 Before dealing with the substance of the applications, I should mention two matters.

8 First, PIMD has referred me to [32] of my previous Judgment where I expressed the view that "the actions taken by Phoenix in the Philippines Action […] clearly constitute a breach of ORC 5 and contempt of this court". For present purposes, it is sufficient to note that although no formal proceedings have been commenced for leave to issue committal proceedings under Order 25 of the Singapore International Commercial Court Rules 2021 ("SICC Rules"), my view remains unchanged, and that Phoenix has taken no steps to purge such contempt. Notwithstanding, as at the last hearing, I propose, in the exercise of my discretion, to hear Phoenix and to consider its submissions on the two sets of applications.

9 Second, I proceed on the basis that this is a *de novo* hearing and that it follows that I am not bound by any of the conclusions expressed in the Final Award.

**SUM 21**

10 It is convenient to deal with this application first.

***Jurisdictional framework under the Model Law***

11 At the outset, it is important to understand the jurisdictional framework in which these applications come before the Court.

12 Section 3(1) of the IAA provides that "with the exception of Chapter VIII" the UNCITRAL Model Law on International Commercial Arbitration as set out in First Schedule to the IAA ("Model Law") has the force of law in Singapore.

13 Section 19B of the IAA provides in material part as follows: "An award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties..." In essence, it is Phoenix's case that the Final Award is not final and binding because it was not made "pursuant to an arbitration agreement" within the meaning of s 19B of the IAA.

14 Article 34 of the Model Law provides that recourse against an award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of that Article. Article 34(3) provides that any such application must be made within three months of the date on which the party making the application has received the award.

15 Here, it is common ground that no such application has ever been made by Phoenix and that the time limit for so doing has expired. The result is that,

as a matter of Singapore law, it is not open to Phoenix to seek recourse against the Final Award under Art 34.

16 However, Phoenix submitted, and I accept, that there is a separate question as to whether the Final Award may be enforced. That depends not on Art 34 but on s 19 of the IAA, which is the provision through which the Singapore Parliament had conferred on the courts the discretion to refuse enforcement of arbitral awards:

> **Enforcement of awards**
>
> 19. An award on an arbitration agreement may, by permission of the General Division of the High Court, be enforced in the same manner as a judgment or an order to the same effect and, where permission is so given, judgment may be entered in terms of the award.

17 In exercising the court's discretion under s 19 of the IAA, the Court of Appeal has stated that it is open to the court to consider the same grounds for resisting enforcement under Art 36(1) of the Model Law: *PT First Media TBK v Astro Nusantra International BV* [2014] SLR 372 ("*PT First Media TBK*") at [84]. This, according to the Court of Appeal, best gives effect to the purpose of the IAA which was to embrace the Model Law: *PT First Media TBK* at [50], [84] and [143(d)]. This was the conclusion the court reached despite the express provision in s 3(1) of the IAA that Chapter VIII of the Model Law does not have the force of law in Singapore: *PT First Media TBK* at [86]–[90].

18 In any event, it was common ground between the parties that I should proceed on the basis that in deciding whether or not I should grant or refuse enforcement of the Final Award, I should be guided by Art 36(1) of the Model Law which stipulates a number of grounds for refusing enforcement (and

recognition). In relevant part, Art 36(1)(a)(iii) of the Model Law provides as follows:

> **Article 36. Grounds for refusing recognition or enforcement**
>
> (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
>
> (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
>
> ...
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

19 Thus, it is open for an award to be refused enforcement if there is "proof" that an award "*deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration...*". It follows that it is open to a party to seek to resist enforcement even if that party has not itself sought recourse against the Final Award under Art 34. In my view, that is consistent with, for example, *Dallah Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763 in particular *per* Lord Mance JSC at [23] and the decision of the Court of Appeal in *PT First Media TBK*.

20 However, it is important to note that even in circumstances where a party can establish one of the grounds for resisting enforcement as specified in Art 36, the Court is not necessarily bound to refuse enforcement. The language of

s 19 of the IAA is permissive *ie*, "[a]n award on an arbitration agreement *may* ... be enforced" (emphasis added). Thus, it seems to me that it is at least open to a Court not to refuse enforcement even if one or more of the grounds for refusing enforcement under Art 36(1) of the Model Law exists.

### *The non-applicability of* **res judicata** *or issue estoppel*

21 For the avoidance of doubt, I note that PIMD contends, in the context of its own application under OA 1, that Phoenix is precluded by virtue of my previous Judgment from asserting that the Final Award is not valid and binding on the basis of *res judicata* and/or issue estoppel. So far as relevant, I deal with that below. In any event, I do not consider that anything that I decided in my previous Judgment precludes Phoenix from arguing that the Court should refuse recognition or enforcement as a matter of discretion pursuant to s.19 of the IAA or Art 36 of the Model Law. In particular, I did not decide in my previous Judgment, the issue of whether there was a relevant arbitration agreement still less whether, as a matter of discretion, I should grant or refuse recognition or enforcement of the Final Award.

### *Factual background*

22 On this basis, it is therefore necessary to consider Phoenix's substantive case that the Final Award should be refused recognition or enforcement on the ground that the Final Award deals with a dispute not contemplated by or not falling within the terms of a relevant arbitration agreement. Based on the affidavit evidence (which was helpfully set out in the parties' written submissions and is largely uncontroversial), I would summarise the relevant factual background as follows.

23 PIMD's and Phoenix's relationship began in early October 2019 and arose out of a natural alignment of strategic interests. The Pertamina Group was one of the biggest buyers of petroleum products in Southeast Asia and could provide Phoenix with a reliable supply of such products. Phoenix was active in the Philippines petroleum fuel and LPG markets and had a strong demand for petroleum products. Phoenix would therefore satisfy PIMD's strategy to pursue downstream petroleum markets in Asia, including the Philippines.

24 The parties had various discussions and meetings in the last quarter of 2019. Minutes of a meeting on 3 October 2019 circulated by Phoenix show that the parties intended to explore three main areas of potential collaboration, including the "downstream products trading in Singapore (e.g. Fuel Oils, LPG, Main Fuels diesel/mogas)". The parties also discussed materials required for the 'trading process registration'.

25 Discussions continued throughout October 2019 and by the end of October, Phoenix drew up a draft Memorandum of Understanding for PIMD to review. In Phoenix's cover email, Mr Nagunta explained that: "Since the partnership intent is strategic and long term for the 2 companies, *this MoU will serve as umbrella agreement of identified workstreams that the two companies plan to do together in the Philippines, Singapore, and Indonesia*" (emphasis added).

*The execution of the Memorandum of Understanding dated 20 November 2019*

26 Thereafter, the Memorandum of Understanding dated 20 November 2019 ("MOU") was executed by Phoenix and PIMD. The MOU identified

regional trading of downstream petroleum products and LPG between PIMD and Phoenix as "Workstream 1" and provided in material part as follows:

(a) Recital C: "The Parties hereto intend to jointly explore, develop and implement regional strategic partnership workstreams in the Philippines, Singapore and Indonesia, which include *downstream oil and LPG trading,* downstream market entry for gas station in Philippines, and other downstream business either in Singapore and Philippines as to be mutually agreed between the Party ("Projects")" (emphasis added).

(b) Recital D: "This MOU sets out the key partnership parameters which the Parties intend to work together to evaluate, develop and form a regional strategic partnership in relation to the Projects".

(c) Recital E: "This MOU is also intended *to serve as an umbrella agreement of multi workstreams* activities in each operating country" (emphasis added).

(d) Clauses 2.1, 2.4, 3, 4.1 and 9.6:

> **2. PARTNERSHIP PRINCIPLE TERMS**
>
> 2.1 The Parties agree to work together for the identified workstreams in good faith during the term of this MOU to:
>
> (a) Acknowledge this MOU as an umbrella agreement (see the MOU framework Annex 1) that will serve as a main reference to the implementation of the Projects in the respective countries.
>
> ....
>
> 2.4 Timeframe and target to sign partnership agreement of each workstream shall be determined and

mutually agreed by the Parties after the Parties having mutually agreed on the feasibility study and commercial viability of the workstreams.

....

**3. EFFECTIVENES OF TERM**

This MOU shall become effective upon the date of execution hereof and shall remain in full force and effect for a period of 2 (two) years since the date signing date (sic) unless and until terminated sooner and by notice in accordance with clause 7.

**4. EFFECTIVITY OF EXCLUSIVITY**

4.1 It is acknowledged and agreed that the Parties are participating in this MOU are non-exclusive basis until each of identified workstreams is mutually agreed and executed by the Parties.

...

**9. NON-BINDING EFFECT AND LIMITATION OF LIABILITY**

...

9.6 Neither party shall be liable for any direct nor indirect loss, any damage, any loss of profit or loss of potential business, or fee or other expenses arising out of or in connection of this MOU. In regards to Clause 9 .1, the liability of a Party to the other for breach of this MOU shall be limited to direct actual damages only.

(e) Clause 10:

**10. GOVERNING LAW AND DISPUTE SETTLEMENT**

10.1 This MOU shall be governed by and construed in accordance with the laws of Singapore.

10.2 Any dispute arising out of or in connection with this agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre ("SIAC") one (1) arbitrators (sic) in accordance with the Arbitration Rules of the Singapore International Arbitration Centre

> for the time being in force which rules are deemed to be incorporated by reference in this Clause. The seat of any such arbitration shall be Singapore and the language of the arbitration shall be English.

*Sale Contracts*

27 After the MOU was signed, the parties began "*Workstream 1*" and commenced through trading petroleum products:

(a) On 22 November 2019, in an internal Whatsapp message between two Phoenix personnel, Mr Nagunta provided a summary of the key points of the MOU to Mr Fadullon, which included a note that Phoenix has "started with fuel oil trading and probably LPG" in Singapore.

(b) A shipment of fuel oil was delivered to Phoenix in December 2019. On 5 February 2020, Phoenix wrote to PIMD noting that "[Singapore Trading/Export Supply from Indonesia to Philippines" was a "Deal Done / on going".

28 From July 2020, through periodic tender processes, the parties would negotiate the commercial and operational terms applicable to upcoming cargoes. A letter of intent dated 21 July 2020 from Phoenix to PIMD in respect of the first of such tender processes described it being "to kick off the discussion *as per signed MoU*" (emphasis added).

29 In September 2020, Phoenix published a press release noting that "with the *strategic partnership*, PIMD […] has begun *supplying petroleum products to Phoenix Petroleum* in Philippines and Singapore. It also allows the two companies to explore and co-develop other international downstream business

opportunities in the region" (emphasis added). PIMD submitted (and I accept) that this can only be a reference to the strategic partnership under the MOU. No other contractual document had been signed at that point.

30 In summary. the particular sale contracts which form the subject-matter of the Final Award were concluded in the following manner. Phoenix would hold periodic tender processes for supply of its petroleum product requirements, in which it would invite various suppliers to bid to supply it with petroleum products. Between November 2019 and June 2021, sale contracts were awarded to PIMD pursuant to such tender processes in respect of 26 shipments of petroleum products, and deliveries were made for all 26 shipments.

31 In May and June 2021, as part of these tender processes, Phoenix sent invitations to various suppliers including PIMD inviting them to submit bids. After evaluating the bids submitted, Phoenix decided to award seven shipments to PIMD. Certain shipments were awarded to other suppliers that had submitted better commercial offers than PIMD had done for those shipments.

32 Confirmation of the terms of contracts awarded by Phoenix to PIMD took the form of deal recaps by way of email. Thus:

(a) In respect of Shipments 1 to 3, Phoenix invited PIMD to bid by way of an email dated 17 May 2021, then awarded the shipments to PIMD and provided the terms of supply by way of an email dated 21 May 2021. PIMD replied to confirm its agreement to the terms of supply by way of an email also dated 21 May 2021.

(b) In respect of Shipments 4 to 6, Phoenix invited PIMD to bid by way of an email dated 15 June 2021, then awarded the shipments to PIMD and provided the terms of supply by way of an email dated 21 June 2021. PIMD replied to confirm its agreement to the terms of supply by way of an email also dated 21 June 2021.

(c) In respect of Shipment 7, Phoenix awarded the shipment to PIMD and provided the terms of supply by way of an email dated 22 June 2021.

In passing, I note that these email exchanges were silent about any governing law and did not contain any arbitration clause nor any other provision relating to dispute resolution.

33 There is no dispute that these constituted binding contracts (which I refer to as the "Sale Contracts") and that the shipments made thereunder were in each case duly shipped and delivered by PIMD to Phoenix between 30 June and 31 August 2021.

34 As I understand, it is also common ground or at least not disputed by Phoenix that the amounts due and owing under these contracts total US$124,534,382.23 and that the whole of this amount was never paid and remains outstanding.

35 Thereafter, the parties began extensive discussions on various payment plans for Phoenix to satisfy the outstanding payments and even potentially restructure Phoenix's debt. In parallel, Phoenix procured a Guarantee from its

parent, Udenna (the second respondent in the arbitration). However, the restructuring was apparently unsuccessful.

36 In support of Phoenix's case, my attention was drawn by Ms Koh SC, counsel on behalf of Phoenix, to a further Memorandum of Understanding dated 1 December 2021 entered into between PIMD and Phoenix (hereinafter, the "Second MOU"). This was therefore some 6 months or so after the Sale Contracts had been executed and the shipments delivered. This second MOU was in substantially similar form to the original MOU save that it included a new Clause 2.8 which provided as follows:

> 2.8 The implementation of each Projects discussion will be further detailed in and governed by a definitive agreement (Definitive Agreement). For the purpose of this MOU, Definitive Agreement means a separate legally binding agreement entered into between the Parties and/or their Affiliates which will set out the Parties and/or their Affiliates respective rights and obligations (as the case may be) in relation to the implementation of the cooperation and the business opportunity.

37 In addition, Ms Koh SC relied heavily on the fact that sometime in the course of December 2021, PIMD prepared and sent to Phoenix draft "long-form SPAs" for each of the Sale Contracts which contained arbitration clauses for SIAC arbitration in Singapore although in the case of disputes with a value of less than US$100,000, all but one of these drafts provided for arbitration in accordance with the London Maritime Arbitrators' Association Small Claims Procedure. There is no evidence as to why this was done; and given that the Sale Contracts had been concluded some six months earlier and the shipments thereunder delivered some four months earlier, the reason for so doing is difficult, if not impossible, to understand. It may have been an administrative error. In any event, it is common ground that these drafts were never signed by

Phoenix – although, for the sake of completeness, I should mention that one long-form SPA was concluded and signed by the parties with respect to other cargoes.

*Conduct of the parties*

38 PIMD submitted that Phoenix's contemporaneous conduct and documents confirmed that it considered the disputes under the Sale Contracts as being subject to an arbitration – ostensibly arising out of or in connection with the MOU. Thus,

(a) On 28 January 2022, in an internal Phoenix WhatsApp correspondence between Mr Fadullon and Mr Nagunta discussing the payment issues relating to PIMD, Mr Fadullon noted that he was "setting things up for arbitration. If we don't put this in place basis for arbitration will be shorter" and "we have to take control of this as phoenix. Again I'm setting up for arbitration".

(b) On 8 February 2022, Phoenix made an "appeal" to PIMD not to "bring [Phoenix] to arbitration", assuring PIMD that Phoenix remained "committed to pay [their] obligations the best way and quickest way [they] can" and "acknowledge the outstanding amount of USD 125,357,411.56 (Sales of Products = USD 124,534,382.23 and Demurrage and deviation/other cost = USD 823,029.33) and reasonable overdue payment penalty for discussion".

39 As payment was not forthcoming, PIMD filed the Notice of Arbitration on 6 April 2022.

***The proper construction of the scope of the arbitration clause under Clause 10.2 of the MOU***

40 For the avoidance of doubt, there is no dispute that the arbitration clause in the MOU is valid and binding. Phoenix does not contend otherwise. Rather, it is Phoenix's case that the disputes under the individual Sale Contracts did not fall within the scope of that arbitration agreement. In support of that case, Phoenix advanced a number of points which I deal with below.

41 First, Phoenix submitted that where there are multiple agreements between the same parties, and only one of those agreements contains an arbitration clause, it does not follow as a matter of course that the arbitration clause can be extended to cover disputes under the other agreements. In this context, Phoenix relied on *Coop International Pte Ltd v Ebel SA* [1998] 1 SLR(R) 615 ("*Coop International*"). As formulated, I readily accept that submission. However, as the court in that case emphasised at [30], the question as to whether a particular arbitration agreement in one contract covers certain disputes depends upon the proper construction of the arbitration agreement. I would only add that consistent with general principles of construction of any contract, it is necessary and appropriate to consider the relevant "factual matrix".

42 The starting point of any contractual interpretation exercise is the words used in the contract itself. Here, the relevant words in Clause 10.2 of the MOU require that "[a]ny dispute arising out of or in connection with this Agreement… shall be referred to and finally resolved by arbitration". The words "arising out of or in connection with" are broad and expansive: see, for example, *Tjong Very Sumito and Others v Antig Investments Pte Ltd* [2009] SGCA 41 ("*Tjong Very*

*Sumito*"), where the Court of Appeal considered that a clause referring to disputes "arising out of or in connection with" an agreement encompassed disputes arising under a fourth supplemental agreement which did not itself contain an arbitration clause. In coming to this conclusion, the Court of Appeal (at [66]) applied the proposition stated in Emmanuel Gaillard and John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) at para 520 with respect to a situation in which:

> … where only the heads of agreement, or framework agreement, contains an arbitration clause to which the other related contracts refer. This case presents no difficulty. The parties' intention is clear: they sought to refer all disputes arising out of the whole set of contracts to arbitration, before a single arbitral tribunal constituted in accordance with the heads of agreement.

43 As submitted by PIMD, the Court's approach in *Tjong Very Sumito* is aligned with the weight of authority and the major textbooks to the general effect that arbitration agreements should apply equally to disputes under related agreements, particularly where the related agreements do not contain different dispute resolution provisions. By way of example, the authorities state as follows:

(a) Gary B Born, *International Commercial Arbitration* (Wolters Kluwer, 3rd Ed, 2021) at §9.02:

> Where only one in a series of contracts, or in several related contracts, contains an arbitration agreement, that agreement should ordinarily be interpreted to encompass disputes over related contracts; absent contrary indications, this is consistent with the parties' reasonable expectations and facilitates efficient, neutral dispute resolution.

(b) Bernard Hanotiau, *Complex Arbitrations: Multi-Party, Multi-Contract, Multi-Issue – A Comparative Study* (2nd Ed, 2020) at para 641:

> In the cases that will be examined below, the courts have generally concluded that if two agreements between the same parties are closely connected and one finds its origin in the other, or is the complement or the implementation of the other, the absence of an arbitration clause in one of the contracts does not prevent disputes arising from the two agreements from being submitted to an arbitral tribunal and decided together.

(c) *Dicey, Morris and Collins on the Conflict of Laws* (Lawrence Collins gen ed) (Sweet & Maxwell, 16th Ed, 2022) at para 12-082:

> It is generally to be assumed that just as parties to a single agreement do not intend as rational business people that disputes under the same agreement be determined by different tribunals, parties to an arrangement between them set out in multiple related agreements do not generally intend a dispute to be litigated in two different tribunals.

44 As submitted by PIMD, such interpretation accords with the normal presumption of one-stop adjudication set out in *Fiona Trust & Holding Corp v Privalov* [2007] Bus LR 1719 ("*Fiona Trust*") and as adopted in Singapore in the context of multi-contract relationships in *Allianz Capital v Andress Goh* [2023] SGHC(A) 18 ("*Andress Goh*") (at [35] to [45]). The assumption was originally articulated by Lord Hoffman in *Fiona Trust* who stated (at [13]):

> … the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal.

45 As further submitted by PIMD, viewed through a commercial lens, it is readily understandable why parties who have included an arbitration clause in their framework or umbrella agreement may subsequently enter into ancillary contracts without expressly incorporating the arbitration clause. Often, there is simply no perceived need to 're-agree' a term which has already been expressly stated in the framework or umbrella agreement, and the parties will instead focus their efforts on negotiating the key commercial or operative elements of each transaction (for example, the type or volume of goods, sale price, and delivery date).

46 Here, the Sale Contracts arose out of or, at least, were connected with the MOU because they came into existence pursuant to the parties' implementation of the Projects as defined in the MOU. It is fair to say that the Sale Contracts contain no reference to the MOU and that there is no specific evidence of the parties referring to the MOU when the parties entered into the Sale Contracts but that seems to me the natural inference. As stated above, Recital C of the MOU refers to "*regional strategic partnership workstreams in the Philippines, Singapore, and Indonesia, which include downstream oil and LPG product trading…*" (emphasis added). Both Recital E and Clause 2.1(a) of the MOU state that the MOU acts as "umbrella agreement of multi workstream activities in each operating country". Phoenix also acknowledged the connectedness of the trading activities, which gave rise to the Sale Contracts, with the MOU, as seen from Phoenix's explanation to Udenna's Mr Fadullon where he stated in his summary of the key points of the MOU that "In [Singapore], we have started with fuel oil trading and probably LPG".

47 Again, as submitted by PIMD, there is also nothing in the MOU, Sale Contracts, or the parties' conduct which displaces the foregoing conclusion. The Sale Contracts do not contain their own arbitration agreement (or any dispute resolution provision for that matter). Insofar as may be relevant, it seems to me contrary to common business sense that large commercial parties based in different jurisdictions might enter significant international trade contracts without agreeing a suitable forum for the resolution of disputes. Moreover, again so far as may be relevant, it is perhaps noteworthy that the parties did not enter into a separate arbitration agreement (or other dispute resolution mechanism) following the crystallisation of the dispute; and (if it is relevant) Phoenix's post-contractual conduct reinforces this conclusion: Udenna's internal documents show Mr Fadullon telling Mr Nagunta that he was "setting things up for *arbitration*" (emphasis added) in relation to the Sale Contracts (see above at [38(a)]), which can only be a reference to arbitration under the MOU's arbitration agreement since the Sale Contracts do not contain any arbitration agreement.

48 Second, Phoenix submitted that each of the Sale Contracts is an independent contract unrelated and unconnected to any other contract between Phoenix and PIMD, in the sense that each Sale Contract related to a separate and distinct shipment involving a unique quantity of petroleum products and a unique price. In one sense, I readily accept that each Sale Contract was discrete. However, that is not inconsistent with the Sale Contracts being entered into as part of and pursuant to the "umbrella agreement" contained in the MOU and that any dispute in respect of such Sale Contracts arises *"out of"* or at least *"in connection with"* the MOU.

49 Third, Phoenix submitted that the MOU was unrelated and unconnected to the Sale Contracts because the Sale Contracts were concluded following a competitive tender process in which other suppliers put in bids and Phoenix selected the most competitive bid; that the competitive nature of the tender process, in which PIMD was on a level playing field with the other suppliers, is inconsistent with and even antithetical to the "strategic partnership" relationship contemplated in the MOU in which PIMD would be in a position of special advantage; and that as was the case with the distributorship and settlement agreements in *Coop International*, in no sense could the Sale Contracts be said to be an extension or variation of the MOU. I readily accept that the Sale Contracts could not be said to be an "extension" or "variation" of the MOU. However, to repeat, that is not inconsistent with the Sale Contracts being entered into as part of and pursuant to the "umbrella agreement" contained in the MOU and that any dispute in respect of such Sale Contracts arises "out of" or at least "in connection with" the MOU.

50 Fourth, Phoenix submitted that the Sale Contracts did not refer at all to the MOU, just as the settlement agreement in *Coop International* did not refer to the distributorship agreement; and that this reinforces the point above that the competitive nature of the tender process that led to the Sale Contracts militates against any notion that the Sale Contracts were somehow connected to the MOU. According to Phoenix, had the parties envisaged that the Sale Contracts were an implementation of the partnership relationship contemplated in the MOU, PIMD would have invoked that partnership understanding to advance its own interests: the fact that it did not do so strongly suggests that the parties did not have in mind the MOU at all when they concluded the Sale Contracts.

51 As to these submissions, it is correct that the Sale Contracts did not refer to the MOU. However, I do not consider that that is necessarily surprising. Certainly, the absence of a reference to the MOU does not necessarily justify the "inference" that the parties did not have the MOU in mind when they concluded the Sale Contracts. In any event, it does not seem to me that this point necessarily assists with answering the critical question as to whether the disputes arose *"...out of or in connection with"* the MOU. There is no evidence before me to show that the absence of any reference to the MOU had been made deliberately to displace the *Fiona Trust* presumption.

52 Fifth, Phoenix submitted that given that PIMD's position evidently is that Phoenix is liable to make good its alleged loss by paying the amounts stipulated in the Final Award, PIMD necessarily accepts that the dispute in the ARB 84 is not a claim for direct or indirect financial loss "arising out of or in connection with" the MOU. As contended by Phoenix, this is because if the dispute is characterised as such a claim, then Phoenix would not be liable to PIMD at all by reason of Clause 9.6 which provided as follows:

> Neither Party shall be liable for any direct nor indirect loss, any damage, any loss of profit or loss of potential business, or fee or other expenses arising out of or in connection of [sic] this MOU. *In regards to Clause 9.1, the liability of a Party to the other for breach of this MOU shall be limited to direct actual damage only.*
>
> [emphasis added]

On this basis, Phoenix submitted that it follows that the dispute in ARB 84 is not one "arising out of or in connection of" the MOU within the meaning of the arbitration agreement in Clause 10.2, and therefore falls outside the scope of the arbitration agreement.

53 I do not accept that submission. PIMD's case is not that the Sale Contracts are part of the MOU (and therefore would be governed by, *inter alia,* Clause 9.6). PIMD's case is that the arbitration agreement in the MOU extends to cover disputes in respect of other future arrangements and other dealings which arise *out of or are connected* to the MOU. The arrangements and dealings under the Sale Contracts are therefore separate from the MOU but there has already been an agreement to arbitrate any disputes which arise out of or in connection with the MOU. Further, Clause 9.6 is an exclusion of liability clause, and unlike an arbitration clause where the approach is to construe the words "*arising out of or in connection with*" as widely as possible pursuant to the *Fiona Trust* presumption, the interpretive approach for an exclusion of liability clause operates differently in that it is to be construed strictly. As such, even though both clauses utilise the same words, they do not necessarily carry the same meaning. In any event, I do not understand why Clause 9.6 is even potentially relevant with regard to PIMD's claims which are the subject-matter of the Final Award and which, as I understand, are simple debt claims. In any event, even if an expansive reading of Clause 9.6 is taken, this is at most a potential defence Phoenix could have argued, *ie*, that the Sale Contracts are subject to a limitation of liability (potentially subject to the Unfair Contract Terms Act 1977 (2020 Rev Ed)). However, these arguments were not run as a defence by Phoenix. Instead, Phoenix (a) never denied liability in any forum; and (b) did not participate in the arbitration.

54 Sixth, Phoenix submitted that the fact that PIMD drafted long-form SPAs containing arbitration clauses with each of the Sale Contracts demonstrates that the parties never considered that the arbitration agreement in the MOU applied to the Sale Contracts. According to Phoenix, this is because

the arbitration clauses in the draft long-form SPAs were incompatible with the arbitration agreement in the MOU, in that the latter provided for arbitration administered by the SIAC but all but one of the former provided for arbitration administered in accordance with the London Maritime Arbitrators' Association Small Claims Procedure. Thus, Phoenix submits rhetorically: Had PIMD truly believed that the arbitration agreement in the MOU applied to the Sale Contracts, it would not have proposed different arbitration clauses, much less conflicting ones, to govern the Sale Contracts. As I said at the hearing, the reason why these draft SPAs were prepared many months after the Sale Contracts had been executed and the shipments delivered is difficult, if not impossible, to understand. In any event, this part of Phoenix's argument is double-edged because what is common ground is that these draft long-form SPAs were never executed. The fact of the matter is that the Sale Contracts as concluded did not contain any arbitration agreement or other provision for dispute resolutions. The omission of such provisions is potentially explicable on the basis that it was, on reflection, thought that the arbitration agreement in the MOU would apply to any disputes. I recognise that this is entirely speculative and almost certainly legally irrelevant. But it serves to counter the point relied upon by Phoenix. Similarly, I do not consider that the fact that the parties entered into the second MOU in December 2021 with the additional Clause 2.8 assists with regard to the determination of the question as to whether the disputes in respect of the Sale Contracts fell within the scope of the original MOU.

55 Seventh, Phoenix submitted that even if the arbitration agreement in the MOU could be said to encompass the kind of dispute that was before the tribunal in ARB 84, the fact is that the MOU, and thus the arbitration agreement in

Clause 10.2, had expired by the time PIMD commenced ARB 84 on 6 April 2022 and that therefore, the MOU and the arbitration agreement in Clause 10.2 ceased to be binding on Phoenix and PIMD after that date. I do not accept that submission. It is not disputed that the Sale Contracts which were the subject of ARB 84 were all entered into prior to 20 November 2021. A dispute resolution clause survives the substantive contract so as to resolve whatever disputes that may subsequently come to light even after the expiry of the main contract: *BXH v BXI* [2019] SGHC 141 at [84].

56 Finally, Ms Koh SC submitted that the wording in Clause 10.2 of the MOU should be interpreted to mean "Any dispute arising out of or in connection with a *breach* of this MOU..." (emphasis added). I do not accept that submission. That is not what the words in Clause 10.2 say and to interpret the words in such a way would, in my view, be to rewrite the language chosen by the parties and substantially to narrow the scope of the arbitration clause.

57 For all these reasons, I reject Phoenix's submission that the disputes forming the subject-matter of ARB 84 did not fall within the scope of Clause 10.2 of the MOU. It follows that Phoenix's application under SUM 21 must be rejected.

**OA 1**

58 Against the background above, I turn to consider PIMD's various applications under OA 1.

***PIMD's application for a declaration that the Final Award is final, valid and binding on Phoenix***

59 I deal first with PIMD's application in prayer 4 of OA 1 for a declaration that the Final Award is final, valid and binding on Phoenix. Given that there has been no application to set aside the Final Award within the 3-month deadline and in light of my conclusion above, it necessarily follows, in my view, that PIMD is entitled to the declaration sought.

***PIMD's application for a permanent ASI***

60 I deal next with PIMD's application for a permanent ASI and other injunctive relief. As to such applications, there are two main issues, *viz*:

(a) does the SICC have jurisdiction to grant a permanent ASI? and

(b) if so, should such permanent ASI be granted as a matter of discretion, in the present case?

61 I deal with these two points in turn.

*Does the SICC have jurisdiction to grant a permanent ASI?*

62 As to the first point of whether the SICC has jurisdiction to grant a permanent ASI, I summarised the main thrust of the argument advanced by Phoenix at [36]–[37] of my previous Judgment. In summary, Phoenix submitted that this Court, *ie*, the SICC, has no jurisdiction to grant a permanent ASI and that, for that reason alone, OA 1 should be dismissed in its entirety. It is fair to say that Ms Koh SC did not address this point in her oral submissions, However, in its written submissions, Phoenix submitted that the only plausible source of the SICC's jurisdiction to hear OA 1 is under s 18D(2)(*a*) of the SCJA. This confers on the SICC jurisdiction to hear any "proceedings relating to international commercial arbitration" that the General Division may hear and

that satisfy the conditions prescribed in the SICC Rules. There can, in my view, be no doubt that the present proceedings relate to international commercial arbitration. However, Phoenix relied upon O 23 r 3(1) of the SICC Rules which specifically provides that the SICC may hear "only proceedings relating to international commercial arbitration that the General Division may hear *under the IAA*" (emphasis added).

63 Further, Phoenix submitted that an application for a permanent ASI is not one made "under the IAA" and therefore necessarily falls outside the jurisdiction of the SICC. In support of that particular submission, Phoenix relied upon what it submitted is well-established proposition that the power of the Singapore courts to grant a permanent ASI, even when it is granted to restrain a breach of an arbitration agreement, is *not* found in or derived from the IAA as was recognised in *R1 International Pte Ltd v Lonstroff AG* [2014] 3 SLR 166, where the High Court (at [40]) unequivocally rejected the notion that the "power to grant permanent ASIs to assist arbitration can be derived from s 12A of the IAA". To be clear, although Phoenix submitted that this Court does not have jurisdiction to grant a permanent ASI, it accepted that this Court does, at the very least, have jurisdiction to grant an interim ASI. It was for that latter reason that it was unnecessary to deal at the last hearing with the question as to the jurisdiction of this Court to grant a permanent ASI.

64 However, that question needs to be addressed now. In my view, the answer is relatively straightforward. In short, there is a difference between the basis for the court's jurisdiction to deal with a matter, and the court's powers to grant relief once the court's jurisdiction to deal with the matter is established. Once the SICC has the jurisdiction to deal with a case under section

18D(2)(*a*) of the SCJA (as it plainly does here), the SICC is thereby clothed with all the powers of the General Division of the High Court to grant appropriate relief including a permanent ASI in aid of the arbitration proceedings, and the court can therefore go on to exercise the power under s 4(10) of the Civil Law Act 1909 (2020 Rev Ed). In reaching this conclusion, I draw comfort from the fact that a similar conclusion was reached by Thorley IJ in *Gate Gourmet Korea Co, Ltd and others v Asiana Airlines, Inc* [2023] SGHC(I) 23 albeit without much analysis.

*Should this Court grant a permanent ASI in the exercise of its discretion?*

65 I addressed the question of whether this Court should grant an interim ASI at paragraphs [49]–[67] of my previous Judgment. In my view, it is unnecessary to repeat what I said there. I would only add a few words by way of further clarification and elaboration.

66 On this present application, Phoenix has strongly submitted that this Court should decline to grant a permanent ASI since, according to Phoenix, the proceedings which it has initiated in the Philippines are unobjectionable because they are, according to Phoenix, by way of seeking to resist enforcement in a "proactive, pre-emptive manner"; that whether or not Phoenix is entitled to do that is a matter of Philippines law; and that the Philippine courts are a far more appropriate forum than the Singapore courts to determine that question.

67 I do not accept that submission. The fact is that PIMD has (at least, as yet) not commenced any proceedings for enforcement of the Final Award in the Philippines. Moreover, as I said in my previous Judgment at [33], the proceedings brought by Phoenix in the Philippines go much further than an

attempt to resist enforcement: they seek a declaration that both the Final Award and ARB 84 itself are void. As such, I do not consider that the Philippines proceedings can properly be characterised merely as. an attempt to resist enforcement. Nor do I accept that the Philippine courts are a far more appropriate forum than the Singapore courts to determine those issues; nor whether Phoenix should be entitled to pursue proceedings of such type in the Philippines. Again, to repeat what I said in my previous Judgment, this Court has supervisory jurisdiction of ARB 84 and the Final Award. As such, it falls to this Court to supervise and, if appropriate, maintain the integrity of the Final Award. That is consistent with both the Model Law and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958), 330 UNTS 38 (entered into force 7 June 1959, accession by Singapore 21 August 1986) (the "New York Convention") which, as a matter of international comity, I would expect the Philippines courts to recognise and respect.

68 In support of this part of Phoenix's case, Ms Koh SC relied heavily on the decision of the Court of Appeal in *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 ("*Sun Travels*"). In particular, she drew my attention to the passages in that judgment at [89] and [97]–[99] where the court set out the considerations which underpin the need for caution in anti-enforcement injunction cases particularly where the foreign court has already issued a judgment and, in such a situation, the need to show "exceptional circumstances" in order to warrant the exercise of the court's jurisdiction: see *Sun Travels* at [107]–[113]. The case is also instructive because although the court considered that the action being taken in the foreign court was plainly "impermissible", nevertheless the conclusion by the Singapore court was to refuse the relief sought. I bear well in mind all that was said in *Sun*

*Travels* and Ms Koh SC's submissions in relation thereto. However, it is my conclusion that the circumstances in the present case are very different from *Sun Travels* and point strongly in favour of the exercise of the court's discretion in favour of PIMD for the following reasons.

69 First, the starting point is that, as I have now found, the disputes which were the subject matter of ARB 84 fell within the scope of the arbitration agreement contained in Clause 10.2 of the MOU. As such, it was governed by Singapore law and Singapore was the seat of the arbitration. It follows that, as a matter of Singapore law, if Phoenix wished to have recourse against the Final Award, its only active remedy was to seek to set it aside in the Singapore courts (*ie*, the designated court pursuant to Art 6 of the Model Law) pursuant to Art 34 of the Model Law. It necessarily follows that the active steps taken by Phoenix by commencing and pursuing proceedings in the Philippines to persuade the Philippine Courts that the arbitration and the Final Award were void was contrary to Art 34 and therefore impermissible as a matter of Singapore law. For the avoidance of doubt, I should repeat and emphasise that this is not to say that Phoenix could not seek to resist recognition or enforcement of the Final Award in the Philippines (or elsewhere) in the world. However, the important point is that PIMD has not sought, even now, to enforce the Final Award in the Philippines; and, as I have said repeatedly, the proceedings commenced and pursued by Phoenix in the Philippines cannot, in my view, properly be categorised as merely an attempt to resist enforcement.

70 Second, although comity is obviously an important consideration, it loses some significance in cases involving exclusive jurisdiction clauses and arbitration agreements: see *Sun Travels* at [75] – although as there stated, that

is not to say that comity can never be engaged. Thus, where a party seeking relief is guilty of delay and the foreign court has already issued a judgment, the seat court may well refuse to grant relief – as the Court of Appeal did in *Sun Travels*. Even in cases where the foreign court has not issued a judgment, I would readily accept that, in cases where there has, for example, been substantial delay, a court may, in the exercise of its discretion, decide to refuse to grant injunctive relief. However, here it cannot, in my view, be said that PIMD is guilty of delay. Further, unlike *Sun Travels*, the Philippines Court has not issued a judgment on the merits. In particular, it has not determined the central issue which I have now determined *viz*, that the disputes the subject matter of ARB 84 fell within the scope of the arbitration agreement in Clause 10.2 of the MOU and that the Final Award is final, valid and binding.

71 Third, it seems to me important to bear in mind that the continued pursuit of the proceedings in the Philippines by Phoenix is, as I have a held, a breach of the order I made on 18 January 2024 *ie*, SIC/ORC 5/2024 and a contempt of this court. As such, it does not seem to me that Phoenix can properly pray in aid the fact that the proceedings in the Philippines have progressed since 18 January 2024 in support of its case that such progress is a relevant factor to be taken into account in its favour. For that reason and contrary to Ms Koh SC's most forceful submissions, I do not consider that the decision of the Philippines Court of Appeal on 22 May 2024 is of assistance to Phoenix or tilts the balance in favour of Phoenix so far as the present application in this Court is concerned. I should mention that after conclusion of the hearing and the announcement of my decision on 25 June 2024 in respect of the present applications, my attention has been drawn to a recent decision of the Court of Appeal in *Gonzalo Gil White v Oro Negro Drilling Pte Ltd and others* [2024] 1 SLR 307 ("*Oro Negro*"). This

case was not referred to in the course of my hearing on 25 June 2024 and I have therefore not had the benefit of the parties' submissions in relation thereto. I simply note it for the sake of completeness and observe that it appears to be consistent with the conclusions which I reached in the present case before becoming aware of its existence.

72 For all these reasons, it is my conclusion that SUM 21 should be dismissed and the relief sought by PIMD in OA 1 should be granted subject to adjustment of the wording as indicated above (at [5]).

73 Having said all that, I should repeat and make plain that nothing in this judgment is intended to preclude any proper attempt by Phoenix to resist recognition or enforcement of the Final Award under the New York Convention in the Philippines or elsewhere if and when PIMD may commence recognition and enforcement proceedings anywhere in the world. I emphasise the word "proper" because having now dealt with the substance of Phoenix's argument as to the scope of Clause 10.2 of the MOU, it seems to me that it is at least arguable that that issue cannot be raised again elsewhere by Phoenix by way of resistance to recognition or enforcement of the Final Award on the basis of transnational estoppel However, I heard no argument on that point. If necessary, it may have to be considered at some other time.

Sir Henry Bernard Eder
International Judge

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