AKN and another *v* ALC and others and other appeals
[2015] SGCA 63

Case Number	: Civil Appeals Nos [P], [Q] and [R]
Decision Date	: 27 November 2015
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JA; Steven Chong J
Counsel Name(s)	: Andre Yeap Poh Leong SC, Adrian Wong Soon Peng, Ang Leong Hao (Rajah & Tann Singapore LLP) (instructed) and Ng Lip Chih (NLC Law Asia LLC) for the appellants in Civil Appeals Nos [P], [Q] and [R]; Evans Ng Hian Pheng (Rodyk & Davidson LLP) for the respondents in Civil Appeal No [P]; Davinder Singh SC, Zhuo Jiaxiang and David Fong (Drew & Napier LLC) for the respondents in Civil Appeal No [Q]; Alvin Yeo SC, Chan Hock Keng, Lin Wei Qi Wendy and Chong Wan Yee Monica (WongPartnership LLP) for the respondent in Civil Appeal No [R].
Parties	: (1)AKN — (2)AKO — … Appellants — And — (1)ALC — (2)ALD — (3)ALE — (4)ALF

Arbitration – Award – Recourse against award – Remission

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2015] 3 SLR 488.]

27 November 2015 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 Following the delivery of our judgment on 31 March 2015 in *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("the Main Judgment"), certain matters were raised by the parties and we address these in this judgment. In the Main Judgment, we allowed, in part, an appeal against the decision of a High Court judge to set aside an arbitral award in its entirety. We held that only some parts of the award should be set aside. We invited the parties to file written submissions on costs and on any consequential orders that they wished to seek. The parties raised various matters, some of which were subsequently resolved. In this judgment, we deal only with those matters that remain outstanding. For convenience, the defined terms that we used in the Main Judgment will continue to be used here.

Brief background

2 Shortly after the Main Judgment was issued on 31 March 2015, we issued the following direction on 1 April 2015:

> We refer to [139] of the judgment of the Court of Appeal dated 31 March 2015 ([2015] SGCA 18).
>
> 2 Parties are to file written submissions on costs and any consequential orders no later than 16 April 2015. Parties will thereafter be informed if any further written or oral submissions may be needed.

3 Each party duly filed a set of written submissions on 16 April 2015. The Purchasers sought the following consequential orders:

(a) An order identifying the specific paragraphs of the Award that had been set aside by us pursuant to the Main Judgment.

(b) A declaration that where specific parts of the Award had been set aside on the grounds of a breach of natural justice, that:

(i) the issues or claims in relation thereto remain to be determined between the parties in the arbitration given that by reason of that part of the award having been set aside, there was no longer a valid and binding determination or award under s 19B of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"); and

(ii) the Tribunal accordingly retained jurisdiction to make a fresh determination or award in respect of such matters.

(c) Alternatively:

(i) that the issues in question be remitted by this Court to the Tribunal for its consideration; or

(ii) that a consequential order under s 8(2) of the IAA be made (although it subsequently became apparent that it was an order under s 8A(2) that the Purchasers were seeking, in effect to extend any applicable limitation period by the time that had elapsed between the commencement of the arbitration and the Main Judgment).

4 The Purchasers also submitted that each party should bear its own costs of both the appeal and the hearing below. The Judge had awarded the costs of the hearing below to the Respondents. Oddly, the Purchasers' "alternative" submission on costs was that they should be awarded 50% of their costs of both the appeals and the hearing below.

5 The Secured Creditors submitted that they should be awarded costs of the appeal (in CA No [Q]) and the proceedings before the Judge (in OS No [M]) and that there should be no order as to remission. The Liquidator submitted he should be awarded costs of the appeal (in CA No [R]) and the proceedings before the Judge (in OS No [L]) "with (at most) a reduction of up to 20% to reflect the partial success of [CA No [R]] vis-à-vis the Tribunal's findings on issues of liability". The Liquidator also sought the following:

(a) An order specifying the portions of the Award that had been set aside as a result of the Main Judgment; and

(b) A clarification that certain orders made by the Judge (on 17 November 2014 in OS No [L]) remained in force.

6 The Funds submitted that they should be awarded costs of the appeal (in CA No [P]). They also sought an order to the effect that references to the Funds at Annex A of the Award should be deleted.

7 We wrote to the parties on 25 May 2015 indicating our determination in respect of some of the matters. The relevant part of our letter reads:

2. The court has considered the material that has been placed before it and makes the following orders in relation to costs:

a. The costs orders made by [the Judge] in relation to the matters below are to remain.

b. In CA No [P], the appellants are to pay the respondents' costs. Such costs are to be taxed if not agreed.

c. In CA No [Q] and CA No [R], each party is to bear its own costs.

3. The court declines to make any order clarifying which paragraphs of the award have been affected or set aside because it is clear and evident from the judgment of the court that was rendered earlier, which are the dispositive parts of the award that have been set aside and to this extent there is no need for any further clarification. The court does not consider that it can or should make any order in relation to the specific paragraphs of the award that concern the reasons of the Tribunal rather than its disposition of the matters presented.

4. The court declines to make any further order in respect of the orders made by [the Judge] on 17 November 2014.

8 In the same letter, we also directed that the parties, save the Funds, file further submissions on four particular points. These points arose out of the application made by the Purchasers for the declarations or orders that we have summarised at [3] above. The relevant portion of the letter reads:

5. The court requires the parties – save the respondents in CA No [P] – to furnish written submissions and any relevant authorities within 30 days and thereafter attend an oral hearing on a date after June 2015. The parties will be advised on the exact date in due course. The written submissions should not exceed 20 pages. The purpose of both the written submissions and the oral hearing is for the parties to address the court on the following questions:

a. What is the effect of parts of the award being set aside in relation to (i) the arbitral proceedings, (ii) the Tribunal's jurisdiction and (iii) the possibility of those parts being remitted to arbitration?

b. After setting aside an award, does the court have the power to remit matters to the Tribunal or is the Tribunal *functus officio*? If there is such power, what are the considerations that should direct the court as to whether or not it should exercise it? In particular, might there be justifiable doubts as to the Tribunal's ability to consider afresh and impartially the matters remitted to it having regard to the fact that it has already ruled on these matters once albeit that this has since been set aside?

c. Does the court have the power to remit such matters to a new tribunal?

d. Are the appellants precluded by the application of *res judicata*, or any related doctrine, from seeking to remit and re-arbitrate these matters?

9 The parties, except for the Funds which were no longer directly involved in the proceedings, duly complied with this and filed written submissions on 24 June 2015. The parties appeared before us for a further hearing on 12 August 2015, at the conclusion of which we reserved judgment, which we now deliver.

The parties' arguments

10 Of the various questions posed, only one received a common answer. This was the third, namely whether the court, after having set aside an arbitral award, has the power to refer matters to arbitration before a *new* tribunal. All the parties agreed that the court has no such power, citing *BLC and others v BLB and another* [2014] 4 SLR 79 ("*BLC*") at [119] where this court noted as follows:

> In our view, even assuming that the case was an appropriate one for remission because it concerned a stand-alone issue, ***the clear language of Art 34(4) does not, with respect, permit the remission of the award (without more) to a newly constituted tribunal*** . It has been observed in Blackaby *et al*, *Redfern and Hunter on International Arbitration* (OUP, 5th Ed, 2009) (at para 10.34) that Art 34(4) is in fact "an equivalent provision to that of remitting the award to the tribunal for *reconsideration*" [emphasis added]. That the matter must be remitted to the same tribunal is also supported by Art 32(3) of the Model Law which provides that the mandate of an arbitral tribunal terminates, *inter alia*, on the issuance of the final award, subject only to the provisions of Art 33 *and Art 34(4)*. [emphasis in original; emphasis added in bold italics]

11 In the light of the settled position we say no more about this, save to note that it was not suggested by parties, nor is it our view, that the court has some power, beyond or aside from Art 34(4) of the Model Law, to *remit* matters to a tribunal in cases governed by the IAA or the Model Law. Hence, any issue of remitting an award to a tribunal must be situated within the context of that provision.

12 In most other respects, the parties (with the Purchasers on one side and the Secured Creditors and Liquidator on the other) took opposed positions. These differences pertained to (a) the effect of setting aside the Award and (b) the question of remission to the Tribunal.

13 In respect of the former, at some risk of oversimplifying the submissions, the Purchasers take the view that once a court has set aside an award, it ceases to exist. From this, the Purchasers develop their case by contending that arising from the fact that *the award no longer exists*, it should be treated as though *the award had never been made* and therefore, the jurisdiction of the tribunal revives, whether on the direction of the court or otherwise. On this basis, they contend that in such circumstances, the parties may canvass again the matters that had been the subject of the award before the same tribunal. As a result, the Purchasers' primary "prayer" was for a declaration that various issues, notably those which were the subject of those parts of the Award that we had set aside, remain outstanding and unresolved and therefore that the Tribunal retains the jurisdiction to deal with these issues. Their secondary "prayer" was for an order for remission. As against this, the Liquidator and the Secured Creditors argue that when an arbitral award has been set aside, although the award no longer has any legal effect, the tribunal's mandate, having been exhausted upon the making of the award, does not revive by operation of law save possibly in the limited circumstances provided for in the IAA (read with the Model Law) in the context of remission and so the tribunal remains *functus officio*. They contend that the fact that the award is invalidated upon its being set aside is a separate matter altogether from what consequences should flow from the fact that proceedings have in fact been held and did in fact result in an award, even if that award has since been set aside.

14 In respect of remitting the matter back to the Tribunal, which, as mentioned, was framed as an alternative submission, the Purchasers argue that we could and should remit matters to the Tribunal even after having set aside portions of the Award. The Liquidator and the Secured Creditors, on the other hand, argued that we have no power to do so, and further, even if we did, this was not an

appropriate case for remission.

Issues

15 We propose to deal with the issues that remain to be determined as follows:

(a) First, can the court remit any matter, which is the subject of an award that has been set aside (in whole or in part), to the same tribunal that made the award?

(b) Second, what are the various consequences of setting aside an arbitral award?

(c) Third, what is the relevance of *res judicata* once an award has been set aside?

16 Although we have framed the issues in broad terms, we consider them in the context of the matters before us and by reference to the submissions of the parties. Furthermore, although we refer generally to "remission" and "setting aside", our analysis in this judgment is confined to cases governed by the IAA and the Model Law.

Our decision

Remission after setting aside?

17 By "remission", we mean the court referring certain matters arising from an arbitral award back to the very same arbitral tribunal which made the award. The relevant provision in the IAA – or specifically in the Model Law – which enables this is Art 34(4), which reads:

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

18 It is common ground that this is the only *express* provision in the Model Law or the IAA that permits the court to remit an award and it is to the very same tribunal which made that award. The effect of remission is to confer further jurisdiction on that tribunal, enabling it to consider the matters remitted (see, *eg*, David Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration* (Sweet & Maxwell, 23rd Ed, 2007) at para 8–175). Such conferment is necessary because in the ordinary course of events, upon having issued a final and binding award in respect of any given matter, a tribunal would have exhausted its mandate in respect of those matters and would no longer be able to vary, review or amend its award. This much is made clear in s 19B of the IAA, which reads:

Effect of award

19B.—(1) An award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties and on any persons claiming through or under them and may be relied upon by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction.

(2) *Except as provided in Articles 33 and 34(4) of the Model Law, upon an award being made, including an award made in accordance with section 19A, the arbitral tribunal shall not vary, amend, correct, review, add to or revoke the award*.

(3) For the purposes of subsection (2), an award is made when it has been signed and

delivered in accordance with Article 31 of the Model Law.

(4) This section shall not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this Act and the Model Law.

[emphasis added]

19 This position is also reflected in Art 32 of the Model Law at least insofar as the final award terminating the arbitration is concerned. That provides:

Article 32. Termination of proceedings

(1) The *arbitral proceedings are terminated by the final award* or by an order of the arbitral tribunal in accordance with paragraph (2) of this Article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(*a*) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute;

(*b*) the parties agree on the termination of the proceedings;

(*c*) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The *mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of Articles 33 and 34(4)*.

[emphasis added]

20 As is evident from s 19B(2) of the IAA and Art 32 of the Model Law, Art 34(4) is the only avenue by which the court may direct the tribunal to review its award. Art 33, which is also referred to in s 19B(2), pertains generally to the correction of typographical or computational errors. If there was any lingering doubt as to whether there might be some form of residual power vested in the courts beyond Art 34(4) to remit matters to the same tribunal in relation to matters governed by the IAA or the Model Law, such doubt cannot survive Art 5, which expressly limits the extent of the court's power to intervene in an arbitration as follows:

In matters governed by this Law, no court shall intervene except where so provided in this Law.

21 The effect of Art 5, as noted by us in *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 at [36] (citing with approval Howard M Holtzmann & Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation Publishers, 1989) ("*Holtzmann & Neuhaus*") at p 216), is to "confine the power of the court to intervene in an arbitration to those instances which are provided for in the Model Law and to 'exclude any general or residual powers' arising from sources other than the Model Law" (see also *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 at [22]–[23]). Article 5 has also been explained as guaranteeing the "reader and user that he will find all instances of possible court intervention in [the

Model Law], except for matters not regulated by it" (see *UNCITRAL Model Law on International Commercial Arbitration: note by the Secretariat* (UN Doc A/CN.9/309), which was issued following the adoption of the Model Law by the UNCITRAL on 21 June 1985, at para 16).

22 As to the ambit of the court's power to remit matters to the same tribunal, two things are clear. First, as we have noted at [18] above, the *only* express source of such power is found in Art 34(4). Second, Art 34(4), on its face, confers a *limited* power. In particular, Art 34(4) on its terms does *not* empower the court to remit any matter *after* setting aside an award.

23 Counsel for the Purchasers, Mr Andre Yeap SC ("Mr Yeap"), in his written submissions, contended that Art 34(4) "implicitly recognises" the court's power to remit matters even after it has set aside the award. He elaborated on this during the oral arguments by stating that there are *no legal limits* to the court's power to remit pursuant to Art 34(4); rather, all questions of remission, whether before or after setting aside, are matters that fall within the general discretion of the court.

24 He raised three main points in support of his argument:

(a) First, the history of Art 34(4) was said to confirm this approach.

(b) Second, the express language of Art 34(4) which "is an enabling provision rather than a limiting provision" was said to confirm this approach.

(c) Third, it was said that vesting a more expansive power to remit in the courts "furthers the policy [of] minimum curial intervention by leaving matters as far as possible to the [tribunal]".

25 We deal briefly with the latter two points first. In relation to the second point, although Art 34(4) might be enabling or permissive (presumably with particular emphasis on the word "may" contained in Art 34(4)) in that it enables the court to remit matters in certain circumstances, we cannot see how this advances Mr Yeap's position. The extent to which it enables the remission must be as prescribed by the words of the section. In this regard, it is evident that to avail itself of this power, the court must be satisfied that it is appropriate to suspend the setting aside proceedings in order to give the tribunal an opportunity to take such steps as may be required to eliminate the grounds for setting aside. This is plainly a curative provision which enables the court, faced with the fact there has been some defect which could result in the award being set aside, to take a course that might forestall that consequence. Though this is discretionary, we see no basis for concluding just from the use of the word "may" that there are *no* limits to the power to remit that is conferred by the provision.

26 As to the third point, the argument that an expansive reading is cognisant with the policy of minimal curial intervention is, with respect, misplaced. First, a policy of minimal curial intervention nonetheless calls for such intervention whenever it is warranted; and where it *is* warranted, there is no basis for suggesting that the court should seek somehow to negate or mitigate the effects of its intervention by referring the matter back to the same tribunal. Aside from this, the argument seems to us to be internally inconsistent. An expansive reading of Art 34(4) would mean *more* intervention – not less – for the simple reason that the court would be able to confer further jurisdiction on tribunals in *more* cases and this would almost necessarily be contrary to the legitimate expectations of at least one of the parties, namely the one with a grievance that has been found to be valid. Finally, in our judgment, the expansive interpretation that Mr Yeap urged upon us was simply incapable of being applied without doing violence to the language used in Art 34(4) and indeed, as we shall momentarily see, without breaking faith with the intent of the drafters of the Model Law.

27 We turn now to the history of Art 34(4). In support of his contention that the history of Art 34(4) spoke in favour of an expansive approach, Mr Yeap placed particular emphasis on an excerpt from the work of Mr Chan Leng Sun SC which, according to Mr Yeap, suggests that the *travaux préparatoires* of the Model Law indicate that Art 34(4) "was intended to preserve the national courts' option to remit an award where it was deemed appropriate": see Chan Leng Sun SC, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011) at para 6.219. The full paragraph from the work in question reads:

> **Nonetheless, it is clear from the *travaux preparatoires* of the UNCITRAL Working Group that Article 34(4) of the Model Law 1985 was intended to preserve national courts' option to remit an award where it was deemed appropriate**. The UNCITRAL Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration was ***more explicit on the intent of Article 34(4)*** :
>
> > Paragraph (4) envisages a procedure which is similar to the 'remission' known in most common law jurisdictions, although in various forms. Although the procedure is not known in all legal systems, it should prove useful in that in enables the arbitral tribunal to cure a certain defect and, thereby, ***save the award from being set aside by the Court*** .
> >
> > Unlike in some common law jurisdictions, the procedure is ***not conceived as a separate remedy but placed in the framework of setting aside proceedings*** . The Court, where appropriate and so requested by a party, would invite the arbitral tribunal, whose continuing mandate is thereby confirmed, to take appropriate measures for eliminating a certain remediable defect which constitutes a ground for setting aside under paragraph (2). ***Only if such 'remission' turns out to be futile at the end of the period of time determined by the Court, during which recognition and enforcement may be suspended under article 36(2), would the Court resume setting aside proceedings and set aside the award*** .
>
> [emphasis added in bold and bold italics]

28 The portion of the quote that we have highlighted in bold was emphasised by Mr Yeap in his written submissions. However, later in the same paragraph, which, to be fair, was also excerpted in Mr Yeap's written submissions, it becomes clear from the portions in bold italics that the "explicit intent" of Art 34(4) was that remission was conceived as an *alternative* to setting aside (see the UNCITRAL Analytical Commentary extracted in the previous paragraph).

29 Turning to the history of Art 34(4), it is equally difficult to find support for Mr Yeap's proposition. In one of the earlier drafts, the equivalent provision, which, at the time, was numbered Art 41(4), read (excerpted in *Holtzmann & Neuhaus* at p 933):

> If the court sets aside the award, [it may order that the arbitration proceedings continue for re-trial of the case] [a party may within three months request re-institution of the arbitration proceedings], unless such measure is incompatible with a ground on which the award is set aside.

30 When this draft was reviewed by the UNCITRAL Working Group on International Contract Practices ("the Working Group") in its fifth session, the following was noted (*Report of the Working Group on International Contract Practices on the Work of its Fifth Session*, UN Doc A/CN.9/233 at paras 190–193, excerpted in *Holtzmann & Neuhaus* at pp 936–937):

> 190. Divergent views were expressed as to the appropriateness of retaining a rule along the lines of paragraph (4). Under one view, the provision should be deleted since it dealt in an insufficient

manner with procedural questions which were answered in a way not easily reconciled with the different concepts of the various legal systems. It was also pointed out that setting aside should be regarded as a remedy separate from remission to the arbitral tribunal and that the wording between the second square brackets and the following provisio lacked clarity.

191. However, there was more support for retaining a provision along the lines of paragraph (4), subject to various modifications …

…

193. The Working Group, after deliberation, requested the Secretariat to prepare a revised draft …

31 The later draft (excerpted in *Holtzmann & Neuhaus* at p 938) read:

(3) The Court, when asked to set aside an award, may also order, where appropriate [and if so requested by a party], that the arbitral proceedings be continued. Depending upon the [reason for setting aside] [procedural defect found by the Court], this order may specify the matters to be considered by the arbitral tribunal and may contain other instructions concerning the composition of the arbitral tribunal or the conduct of the proceedings.

32 This, in turn, was reviewed by the Working Group which noted the following in its sixth session (*Report of the Working Group on International Contract Practices on the Work of its Sixth Session*, UN Doc A/CN.9/245 at paras 154–155, excerpted in *Holtzmann & Neuhaus* at p 940):

154. Divergent views were expressed as to whether paragraph (3) should be retained. Under one view, the draft provision was useful in that it provided some guidance on procedural questions which were relevant in the case of remission. Under another view, the provision should be deleted since remission was not known in all legal systems and, in particular, the idea of orders or instructions to an arbitral tribunal was not acceptable. Under yet another view, the option of remission should be retained, without the giving of orders or instructions as envisaged in the second sentence; it was stated in support that this device *would allow to cure a procedural defect without having to vacate the award*.

155. The Working Group, after deliberation, *adopted this latter view* and requested the Secretariat to revise the provision accordingly.

[emphasis added]

33 Based on this brief venture into the history of Art 34(4), not only can it be said that there is no support for the expansive approach proffered by Mr Yeap, it is apparent that the power to remit was conceived of as an *alternative* to setting aside. This is also supported by the views of certain commentators, to which we refer below (at [37]).

34 We therefore disagree with Mr Yeap on this point. In our judgment, the court has no power to remit an award *after* it has been set aside. Not only is this founded on the plain words of Art 34(4), but it also accords with good sense. Remission is a curative option that is available to the court in certain circumstances where it considers that it may be possible to avoid setting aside the award. For that reason, remission, in the correct sense, will always be to the same tribunal that made the award that is under the consideration of the court. For completeness, we briefly consider two decisions of the High Court that might be thought to stand for a different understanding and in particular to

support the existence of a power to remit an award *after* it has been set aside.

Previous High Court decisions

35 First, in *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80 ("*Front Row*"), the High Court set aside part of an award and thereafter "ordered that the part of the [a]ward so set aside be tried afresh by a newly appointed arbitrator" (at [54]). In our judgment, this was not so much an order to remit to a new arbitrator as it was a consequential order to the parties to commence fresh arbitration (see also, Sundaresh Menon (ed), *Arbitration in Singapore: A Practical Guide* (Sweet & Maxwell, 2014) at para 14.094). It should be noted that in *Front Row*, it was clear that the arbitrator had wholly failed to consider an issue because he thought it had been abandoned. It was therefore the case that that part of the dispute had never in fact been determined on the merits. Moreover, the matter was not being referred back to the same tribunal and hence it was not an issue of remitting the award at all.

36 Second, in *Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 633, the court set aside certain portions of an award and thereafter purported to remit certain matters to the same tribunal that had made the award. However, the parties in that case were agreed that the arbitrator was not *functus officio* (at [115]). The court also noted (at [117]) as follows:

> In this case, I have found that there was no evidence of apparent bias on the part of the Tribunal. Accordingly, there is no reason for me to order that the Arbitration continues before a fresh tribunal. The Arbitrator is fully apprised of this complicated case and is therefore eminently suited to continue to conduct the proceedings. In the continued proceedings, it may be advisable that the Arbitrator not enter into or entertain lengthy correspondence from the parties raising issues and points of law on matters that are not the subject of any pending application before the Arbitrator.

37 In the paragraph that preceded this extract (namely, [116] of the judgment), the court cited a quote from Robert Merkin and Johanna Hjalmarsson, *Singapore Arbitration Legislation: Annotated* (Informa, 2009) at p 118 as follows:

> The remedy where an application is upheld is the setting aside of the award. *However, the court may as an alternative remit the award to the same arbitrators* for further consideration (art. 34(4)). If the court is of the view that the arbitrators are unfit to continue the hearing, the correct approach is the setting aside of the award and the appointment of a fresh tribunal. If the court decides to remit the matter to the arbitrators, it is a matter for them to decide how to proceed. [emphasis added]

The court, having cited this passage, did not express any disagreement with the view – which we have emphasised – that remission is an *alternative* to setting aside.

38 It is difficult to discern the exact basis of the decision to "remit" the matter. Perhaps, it proceeded on the basis that there was no reason to constitute a new tribunal, and that the matter *could* be heard by the same arbitrator (see [115]–[117] of the judgment). Further, the point that remission could not be ordered after setting aside might have been missed because, as we have noted, the parties had agreed that the arbitrator in that case was not *functus officio*. In any event, if the judgment is understood as standing for the proposition that remission may be ordered after setting aside, then it is incorrect and should be regarded as overruled at this point.

Conclusion

39 We accordingly hold on the first issue, that remission is a carefully defined concept in the IAA (and Model Law), and that it operates as an *alternative* to setting aside in the manner we have described at [25] above. In this case, as we have already upheld the setting aside of certain portions of the Award, the question of remission does not and, for that matter, *cannot* arise. On this basis, at least the alternative relief sought by Mr Yeap, which we have summarised at [3(c)(i)] above, is not available. We deal with the limitation period point (summarised above at [3(c)(ii)]) below (at [64]–[67]).

What are the various consequences of setting aside an award?

40 There remains Mr Yeap's primary prayer, which is for the declaration at [3(b)] above, and which seeks, in effect, to establish that because the Award has been set aside, at least in part, there remains an obligation upon the parties, pursuant to their arbitration agreement, to submit the affected matters in dispute to arbitration before the Tribunal. It seems to us that this raises the question as to what the various effects are, of a court's decision to set aside an award, upon:

(a) the award itself;

(b) the arbitration agreement; and

(c) the mandate of the tribunal which made that award.

41 The immediate effect of setting aside an award is generally undisputed – the award ceases to have legal effect at least in so far as its status in this jurisdiction is concerned. The Purchasers contend that beyond this, the arbitration revives at the point immediately before the award was made. On this basis, would the parties be able to return to the same tribunal to "reopen" and "reargue" the portions of the award that had been set aside? If that were the case, there would seemingly be no need for an order remitting the matter to the tribunal for reconsideration in the circumstances we have outlined at [25] above. Perhaps, this was why Mr Yeap sought remission as an alternative to his primary position.

42 It is generally not for us at this stage to determine in a pre-emptive way what the parties may or may not do, or what arguments they may or may not attempt, before a tribunal. Those are ordinarily matters for the parties and, in the first instance at least, for any tribunal from which they might seek relief. But Mr Yeap sought a declaration from us and, in dealing with his application, we express our views on these matters insofar as they pertain to the issues that have been presented to us. We imagine Mr Yeap has taken this course with a view to avoiding unnecessary costs should it emerge that his preferred position is not viable as a matter of law.

43 In support of the declaration they seek, the Purchasers argue that when an award is set aside, it "will have no legal effect and it is as if the award was never made". They go on to argue that "[a]s such, the parties to the Arbitration are entitled to re-open and … have the issues in dispute covered by the portions of the Award [that have been] set aside re-heard". Two questions flow from this:

(a) Does this mean that following *any* successful setting aside application, the parties may return (or be compelled to return) to arbitration? And if so, is it simply a matter of the jurisdiction and mandate of the tribunal, whose award has been set aside, reviving whether by operation of law or otherwise?

(b) Further, what is the relevance of finality in such proceedings (whether as a matter of *res judicata* or abuse of process)?

In this section, we focus on the former; the latter we discuss in the next section.

44 In our judgment, the starting point of our analysis on the former question takes us back to what we have said in the context of the power to remit. As noted at [18] above, where the power to remit is exercised by the court, its effect is to confer jurisdiction on the tribunal to consider the matter afresh to the extent permitted by the remitting order. But for such conferment, the tribunal would have no jurisdiction to do so because once it has rendered an award, it has no further jurisdiction, power or mandate to deal with the matters addressed in the award. This is also the effect of s 19B(2) of the IAA and Art 32(3) of the Model Law.

45 This point was also carefully considered by Belinda Ang Saw Ean J in *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2014] 1 SLR 1221 ("*L W Infrastructure (HC)*") where she referred to the decisions of the Supreme Court of Western Australia in *Alvaro v Temple* [2009] WASC 205, of the English Court of Appeal in *Interbulk Ltd v Aiden Shipping Co Ltd (The Vimeira) (No 1)* [1985] 2 Lloyd's Rep 410, and of the Supreme Court of New South Wales in *Mark Blake Builders Pty Ltd v Davis* (NSW 9403294) ("*Mark Blake*"). She referred to an extract at p 19 of *Mark Blake* (at [41]), the extract of which reads as follows:

> Thus in the end the extent of the arbitrator's jurisdiction turns upon the Court's order – to what extent was the arbitrator's jurisdiction expressly or impliedly revived? … Depending on the terms of the order, it may be necessary to look to the court's reasons in order to decide the extent of revival … But *the arbitrator does not have jurisdiction going beyond what is necessary to give effect to the order of the court.* [emphasis added)

46 She then continued at [42]:

> I make a few observations in light of the above cases. It is clear that an order for remitter must be scrutinised with care and where an award is remitted for an arbitral tribunal to correct a mistake or address an issue, such an order will generally only revive the tribunal's jurisdiction so far as is necessary for it to make that correction or address that issue (as evidenced by the court's restrictive interpretation of the order for remitter in the *Vimeira* cases). There is no general entitlement on the part of the tribunal to revisit issues and decisions *carte blanche*.

47 In our judgment, this is correct and it is entirely consistent with the views we have taken of the power to remit at [25], [34] and [39] above. Because the tribunal is conferred fresh or further jurisdiction by the court to reconsider matters that it might have already dealt with, the extent of such jurisdiction depends on the terms of the court's order. We note in passing that, at least in the context of the Arbitration Act (Cap 10, 2002 Rev Ed), this was also the view taken in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [27], where this court noted as follows:

> … it would be appropriate to observe in passing that while it is true that an arbitrator is usually *functus officio* once he makes his award, his jurisdiction is immediately revived by the terms of the remission to the extent of the remission …

48 If this is the position where the court determines, in the context of an application to set aside an award, that there is some *remediable* defect in the award which is capable of being cured by an order to remit the award in lieu of having to set it aside (see the extract from the UNCITRAL Analytical Commentary quoted at [27] above), then does the analysis change where the defect is not "remediable" but is more serious so much so that the award is not amenable to an order of remission for reconsideration but must instead be set aside? Mr Yeap's submission is that such indeed is the

case, so that where the defect is sufficiently serious, the mandate of the tribunal is wholly restored and revived, without the need for any order of the court and without any limit or constraint. In short, if the defect is sufficiently serious, then framing Mr Yeap's submission in the words of Belinda Ang J (see [46] above), there would be a "general entitlement on the part of the tribunal to revisit issues and decisions *carte blanche*".

49 This is plainly counter-intuitive and we agree with Belinda Ang J who observed in *L W Infrastructure (HC)* at [42] that this "would appear rather odd". In our judgment, Mr Yeap is wrong in his submission that the effect of setting aside an award is to wholly restore and revive the tribunal's jurisdiction. It is true that the effect of setting aside an award is that the award ceases to have any legal effect, at least in the jurisdiction of the seat court. But the fact that the award is annulled or ceases to have legal effect or even existence is a different matter from the question of the tribunal's mandate and also from the status of the arbitration agreement. The tribunal's mandate, as noted above, ends with the making of its award unless it is restored pursuant to an order remitting the award for the further consideration of the tribunal.

50 Where a final award is made, this consequence is expressly provided for in Art 32(3) of the Model Law, subject only to the exceptions that have been expressly mentioned there. This is what is meant by the expression that the tribunal is *functus officio*. This too was explained by Belinda Ang J in *L W Infrastructure (HC)* at [28]–[29]. And where a final award is made in respect of *some* matters only, then the effect is the same in relation to those matters by virtue of s 19B(2) of the IAA. This was described as "partial *functus officio*" in *L W Infrastructure (HC)* at [32].

51 There is simply nothing to warrant the conclusion that where an award has been set aside, the tribunal which made that award would somehow resume the ability and mandate to determine afresh the matters that had been dealt with in the award. But, as alluded to above, this goes to the mandate of that particular tribunal. The fact that the award has been set aside would not, in and of itself, affect the continued validity and force of the arbitration agreement between the parties, save in the situation where the award was set aside on the ground that there was no arbitration agreement between the parties. In *L W Infrastructure (HC)*, Belinda Ang J described this as "Situation 2" and observed as follows (at [48]):

> Similarly, where an arbitral award is "beyond power" in the sense that the tribunal *lacks jurisdiction* to deal with the dispute altogether (for instance, where there is no valid agreement to arbitrate, where a party to the arbitration agreement was under some incapacity or where the arbitral tribunal has not been properly appointed) ... that would clearly be the end of the enquiry and the tribunal would obviously not be vested with jurisdiction to deal with the matter merely because the award has been set aside by the court. [emphasis in original]

52 We agree with this analysis. But save in this situation, the arbitration agreement will generally survive the setting aside of an award. On this basis, it may be open, subject to certain other limitations, to which we will briefly turn, for a party which has successfully obtained an award in the arbitration and then seen that set aside by the court, to start a fresh arbitration. This follows given that:

(a) The dispute has not yet been resolved since the award has been set aside; and

(b) The arbitration agreement remains binding on the parties as to how they will resolve their disputes.

53 This much is also reflected in the views of the academic commentaries insofar as they have

dealt with the subject at all. We mention here just some of them:

(a) Nigel Blackaby, Constantine Partasides, *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) state at 618–619:

> When an award is set aside, it is unenforceable in the country in which it was made and it will usually be unenforceable elsewhere. In this situation, the party who won the arbitration but lost the challenge is in an unenviable position. If, for example, the award has been set aside completely on the basis that the arbitration agreement was null and void, a further resort to arbitration (on the basis of the void agreement) would be out of the question. Resort to litigation might be considered, but there could well be problems of time limits – to say nothing of more substantive difficulties, such as (for example) the absence of a valid contract.
>
> If the award has been set aside for procedural defects (for example, lack of due process) the party who won the arbitration but lost the challenge is still in an unenviable position. *The arbitration agreement will usually (but not always) still be effective. Providing the claim is not time-barred, the dispute must be submitted to arbitration and the process started over again.* This is a daunting prospect for even the most resilient claimant.
>
> [emphasis added]

(b) Julian Lew, Loukas A Mistelis and Stefan Michael Kröll, *Comparative International Arbitration* (Kluwer, 2003) state as follows at Chapter 25:

> 25-53 When a court accepts the challenge the award is annulled or vacated and is not enforceable in the country in which it was made. It will usually be unenforceable in other countries although it may occasionally be enforceable in some countries. Challenge may nullify the award in its entirety or in part.
>
> 25-54 After the award has been set aside the main question is whether the parties are still bound by the arbitration agreement or whether the ousted jurisdiction of state courts is revived. If a court decided that the arbitration agreement is invalid the parties are no longer bound by it. If, however, the award has been challenged on any procedural, jurisdictional or substantive grounds the situation is different. In such circumstances the question is whether or not a new arbitration can be started.
>
> 25-55 Several arbitration laws deal with this issue but suggest different solutions …
>
> …
>
> 25-61 *If an award is set aside for reasons other than invalidity of the arbitration agreement, the agreement would survive the award and the parties would still be bound to have their disputes settled by arbitration.* Often it will be a case of remission of the matter or it may be a new arbitration before a new tribunal.
>
> [emphasis added]

(c) Gary B Born, *International Commercial Arbitration Vol III* (Wolters Kluwer, 2nd Ed, 2014) ("*Born*") states as follows at p 3392:

> A further issue is what the effect of an annulment decision is on the parties' arbitration agreement and the arbitral tribunal. With regard to the former, the annulment of an award should have no effect on the parties' underlying agreement to arbitrate. *That agreement subsists even if an arbitral tribunal engaged in procedural misconduct or manifestly misapplied the law or exceeded the scope of its authority.*
>
> With regard to the effect of annulment on the arbitrators, the short answer will generally be that the tribunal is *functus officio* and an annulment does not change this or bring the tribunal back into legal existence. …
>
> [emphasis added]

54 Against this background, we return to the possible limitations that we alluded to at [52] above, which might stand in the way of a party seeking to commence fresh arbitration proceedings after an award was set aside. This is by no means an exhaustive list but it seems to us that there are at least three possibly significant matters that would have to be considered, quite apart from practical considerations of cost and time, which are mentioned in some of the extracts from the academic commentaries that we have referred to:

(a) It is possible that a limitations defence might have accrued by the time the fresh set of proceedings is commenced. This possibility also has been alluded to in some of the academic commentaries that we have referred to above. We note that it is possible for this to be addressed in appropriate circumstances pursuant to s 8A(2) of the IAA, which empowers the court in the exercise of its discretion to extend time for the commencement of proceedings by excluding from consideration the period between the commencement of the arbitration and the setting aside of the award. We comment further on s 8A(2) below (at [64]–[67]).

(b) We have said that the arbitration agreement will generally survive the setting aside of the award. This would entail, however, the recommencement of fresh arbitration proceedings and in general, one would expect a new tribunal to be constituted. It is of course possible for both parties to agree to reconstitute the previous tribunal as the new one. But in the absence of such agreement, there remains the possibility that objections might yet be taken by one of the parties to any attempt by the other to re-appoint a member of the previous tribunal, on the grounds that there exist justifiable doubts as to the impartiality of the prospective appointee by reason of his or her prior involvement in the matter and in the award that has been set aside. This will plainly be a fact-sensitive inquiry and we say no more about this.

(c) We think it is inevitable that in attempting to commence a fresh arbitration, consideration will have to be given to the issue of *res judictata*. We deal with this in the next section of this judgment.

What is the relevance of *res judicata* and abuse of process?

Res judicata *and abuse of process*

55 We recently had the occasion to deal with the doctrine of *res judicata* and abuse of process in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] SGCA 50 ("*TT International*"). We noted there that the underlying policy is that "litigants should not be twice vexed in the same matter, and that the public interest requires finality in litigation" (at [98]). We also dealt with the three "*res judicata* principles" – cause of action estoppel, issue estoppel and the

"extended" doctrine of *res judicata* – against the backdrop of the decision of the UK Supreme Court decision in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* [2014] AC 160 ("*Virgin Atlantic*") (*TT International* at [99]–[103]). In particular, and of relevance to this matter, we explained the "extended" doctrine of *res judicata* as follows (*TT International* at [101]):

> … There is then the litigant who seeks to argue points which were not previously determined by a court or tribunal because they were not brought to the attention of the court or tribunal in the earlier proceedings even though they ought properly to have been raised and argued then. The law recognises that in this … situation, the litigant – in the absence of "special circumstances" – should also not be permitted to argue those points in order that there might be finality in litigation, and this is where the "extended" doctrine of *res judicata* comes in.

56 The "extended" doctrine of *res judicata*, which derives from *Henderson v Henderson* (1843) 3 Hare 100; 67 ER 313 (see *TT International* at [101]), has been acknowledged in Singapore to be part of the doctrine of the abuse of process (see *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit and another appeal* [2000] 1 SLR(R) 53 at [22]–[23]; *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 at [51]–[53]; *Zhang Run Zi v Koh Kim Seng and another* [2015] SGHC 175 at [59]–[60]; and *Tan Bee Hoon (executrix for the estate of Quek Cher Choi, deceased) and another v Quek Hung Heong and others* [2015] SGHC 229 at [18]–[23]).

Res judicata *in arbitration*

57 Just as finality is of significance to the courts, so too is it of importance to arbitration. Thus, the courts will typically not rehear matters that have already been determined in arbitration (see, *eg*, *Econ Piling Pte Ltd and another (both formerly trading as Econ-NCC Joint Venture) v Shanghai Tunnel Engineering Co Ltd* [2011] 1 SLR 246 at [37]; s 19B of the IAA as analysed in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 at [137]–[142]; see also an elaboration of what "matters that have already been determined" refer to in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [45]–[53]).

58 Further, the court may disallow a party to raise certain points in court which it could and should have raised in arbitration (see, *eg*, *Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)* [2011] 4 SLR 997 at [30]–[46] and *Dallal v Bank Mellat* [1986] 1 QB 441 (in particular at 462–463)).

59 Whether as a function of substantive or procedural law, there is strong support for the view that barring special circumstances, the "extended" doctrine of *res judicata* operates to preclude the reopening of matters that (a) are covered by an arbitration agreement, (b) are arbitrable, and (c) could and should have been raised by one of the parties in an earlier set of proceedings that had already been concluded (see David Williams QC, "The Application of the *Henderson v Henderson* Rule in International Arbitration" (2014) 26 SAcLJ 1036 at para 11; see also *Born* at pp 3745–3746 and 3764 and Filip De Ly and Audrey Sheppard, "ILA Recommendations on *Lis Pendens* and *Res Judicata* and Arbitration" (2009) 25(1) Arbitration International 83 at 85).

The relevance of* res judicata *in this case

60 Turning to the facts at hand, we had set aside the portions of the Award relating to (a) the loss of profits claim; and (b) the Lost Land Claims. The question is: what is the effect of this?

61 In respect of the former, we did so on the basis that the award of damages for loss of an opportunity to earn profits was made in breach of natural justice because not only had the parties throughout the course of the arbitration proceeded on the basis that the Purchasers' claim was for *actual* loss of profits, the Secured Creditors and the Liquidator were not afforded the opportunity to address the case on loss of opportunity, either when it was raised or at all: see the Main Judgment at [69] and [75]–[79]). The point of critical importance is that the Tribunal had in fact rejected the case that *had* been put forward by the Purchasers, seeking recovery in respect of actual loss of profits. The Tribunal then allowed an alternative claim that had never squarely been advanced by the Purchasers and had certainly never been addressed by the other parties. We set aside the alternative claim founded on a loss of opportunity but this does not displace the fact that the primary claim had been rejected by the Tribunal. Pausing there, it seems to us clear beyond doubt that if the Tribunal had stopped there, it would have been impossible for the Purchasers to revive the issue or start a fresh arbitration seeking relief for the same claim on an alternative basis.

62 In these circumstances, the fact that the Tribunal had, on its own initiative, gone on to find for the Purchasers on an alternative ground, which we have set aside, cannot in our judgment, give rise to *any* possibility of the Purchasers reviving this claim by a fresh set of proceedings. To do so, would in our judgment, constitute a blatant abuse of process. To put it another way, this dispute insofar as it was raised has been dealt with by the Tribunal in its finding that there was no actual loss. Accordingly, there is simply no basis on which a fresh reference to arbitration could take place on this issue.

63 In respect of the second aspect of the Award that we set aside – the Lost Land Claims issue – our basis for this was that "the Tribunal in effect plainly overlooked merits of the Secured Creditors' case as to whether the Purchasers' indemnity claim was premature because it mistakenly thought the Secured Creditors had conceded that they would not be able to transfer the Disputed Land to the Purchasers in any event … [and this therefore] comes within the narrow ambit of *Front Row*" (the Main Judgment at [105]). In short, because the Tribunal never engaged with the merits of the Secured Creditors' case, it seems to us that neither the strict nor the extended doctrines of *res judicata* are engaged.

64 It follows that the Purchasers may, if they wish, commence fresh arbitration proceedings before a new tribunal on the Lost Land Claims. Here, we return to the Purchasers' (alternative) prayer for an order under s 8A(2) of the IAA, to the effect that the period between the commencement of the arbitration and the date on which the relevant part of the Award had been set aside should be excluded for the purpose of computing the applicable time pertaining to limitation periods. As against this, the Secured Creditors oppose this on the ground that the Purchasers have failed to show that any such order is either necessary or appropriate in the circumstances, while the Liquidator contends that the Purchasers, in not having made an application before the High Court, are precluded from doing so now. The Liquidator's argument proceeds as follows:

(a) First, s 8A(2) expressly states that "[t]he *High Court* may order" [emphasis added]. This court therefore has no power to make an order under s 8A(2).

(b) Second, and as an alternative, even if this court had the power to make an order under s 8A(2), such power should only be exercised (again by virtue of the wording of s 8A(2)), when an application had first been made to the High Court.

65 We should note that the Liquidator's primary interest was in the loss of profits claim but the points he has raised in his arguments are nonetheless relevant to the issue before us even in relation to the Lost Land Claims. In our judgment, there is some force in what he has said. We note that the

use of the words "High Court" in s 8A(2) stands in distinction to other provisions of the IAA (*eg*, ss 6 and 7) where the more general word "court" is used. In fact, in s 6(5), "court" is explicitly defined (for the purposes of ss 7 and 11A) to refer to any court in which proceedings are instituted. In s 10, the High Court and the Court of Appeal are mentioned specifically and distinctly.

66 Unfortunately, the application under s 8A(2), and for that matter, the Liquidator's rebuttals, were not addressed in detail by the Purchasers in their written submissions. During oral submissions, Mr Yeap, when asked if the Purchasers would face any difficulty should the court choose not to exercise its power under s 8A(2) (assuming such power was conferred by s 8A(2)), said that he thought his clients would not be prejudiced. We asked that he reconsider his position on the matter and restate his position during his reply. When it came to his reply, Mr Yeap asked, "for the sake of caution", that we make an order (under s 8A(2)).

67 In our judgment, s 8A(2) avails only where an application has been made to the High Court. Of course, where that is declined, the matter can be pursued in an appeal brought before the Court of Appeal. This is not unlike the position where an application is brought to set aside an award. This obviously could not be brought directly to the Court of Appeal. In the present context, as no application was made to the Judge = pursuant to s 8A(2), we consider that to be the end of the matter.

Conclusion

68 For these reasons, we make only the following declaration:

> Arising from the setting aside of that part of the Award that concerns the Lost Land Claims, those claims and any relevant defences remain to be determined between the relevant parties.

69 Save as aforesaid, we make no further orders or declarations beyond those contained in our letter to the parties dated 25 May 2015 (see above at [7]). The Liquidator will have his costs of this application against the Purchasers, to be taxed if not agreed. Insofar as the Secured Creditors are concerned, we make no order as to their costs.