Chapter 2

The Arbitration Agreement

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Part I: Introduction

Arbitration is based on consent. This chapter is devoted to a study of the agreement in which the parties express their consent to submit their existing or potential disputes to the jurisdiction of an arbitral tribunal. What law governs the arbitration agreement? What conditions of form or substance does the agreement have to fulfil to be valid? How should courts interpret the agreement in case of ambiguity? How do courts determine its scope, in particular in the context of complex arbitrations? These are the main issues that will be dealt with in the following sections.

1. The Dual-Track Regime

1.1 As explained in the previous chapter, Singapore has a dual-track regime for arbitration. The Arbitration Act (Cap 10) ('AA') governs domestic arbitrations and the International Arbitration Act (Cap 143A) ('IAA') governs international arbitrations.

1.2 However, parties to an arbitration may choose the applicable arbitration regime. Parties to an 'international arbitration' may 'opt out' of Part II of the IAA pursuant to its s 15. Conversely, parties to a 'domestic arbitration' may 'opt in' to the IAA pursuant to s 5(1) of its Part II.

1.3 The IAA essentially gives the force of law to the 1985 UNCITRAL Model Law on International Commercial

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Arbitration (the 'Model Law')[1] and also gives effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the 'New York Convention').

1.4 The AA and IAA were both amended in 2012 (the 'Amendment').[2] As far as this chapter is concerned, two of the changes the Amendment has made to the arbitration regime are relevant. The first concerns the definition of an 'arbitration agreement', and the second relates to the court's power to review 'negative' jurisdictional rulings. Both of these developments will be explained in further detail below.

2. Separability of the Arbitration Clause

2.1 In accordance with international practice, both the IAA and the AA confirm the principle of separability of the arbitration clause. They provide that an arbitration agreement is independent of the other terms of the contract.[3] The arbitration clause is not therefore affected by the fact that the agreement in which it is included is terminated, void or ineffective.[4]

1 Section 3(1) of the IAA provides that 'Subject to this Act, the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore.'

2 By the International Arbitration (Amendment) Act 2012 (No 12 of 2012) and Foreign Limitation Periods Act 2012 (No 13 of 2012). These amendments to the IAA entered into force on 1 June 2012.

3 Section 21(2) of the AA and Article 16(1) of the Model Law. Section 21 of the AA provides that '(1) The arbitral tribunal may rule on its own jurisdiction, including any objections to the existence or validity of the arbitration agreement, at any stage of the arbitral proceedings. (2) For the purpose of subsection (1), an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract'. Article 16(1) of the Model Law provides that 'The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.'

4 Section 21(3) of the AA and Article 16(1) of the Model Law. Section 21(3) of the AA provides that: 'A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure (as a matter of law) the invalidity of the arbitration clause.'

3. The *Kompetenz-Kompetenz* Principle

3.1 Singapore law also recognises the principle of *Kompetenz-Kompetenz*,[5] according to which arbitral tribunals have competence to decide on their own competence or, in other words, have full power to decide on their own jurisdiction and on the existence and validity of the arbitration agreement.

3.2 If the arbitral tribunal decides that it has jurisdiction, a dissatisfied party may apply to the High Court within 30 days of receipt of the tribunal's ruling to have the matter reviewed.[6] An appeal from a decision of the High Court to the Court of Appeal is permitted only with leave of the High Court.[7] Prior to the Amendment, under both the IAA and the AA, there was no possibility of judicial review of an arbitral tribunal's decision that it has no jurisdiction. However, such decisions may now be reviewed by the High Court[8] (and are likewise subject to further appeal to the Court of Appeal only with leave of the High Court)[9] in the same manner as decisions by an arbitral tribunal that it has jurisdiction.

Part II: The Law Governing the Arbitration Agreement

3.2A The determination of the law governing the arbitration agreement is a complex issue and a full consideration of this subject is beyond the scope of this chapter. It is sufficient to note two points for the time being. First, there are various aspects of the arbitration agreement and each may be governed by a different law. For instance, the capacity of a party to enter into the arbitration agreement

5 Section 21(1) of the AA and Article 16(1) of the Model Law, quoted above at footnote 3.

6 Section 21(9) of the AA and Article 16(3) of the Model Law read together with s 10(3) of the IAA. On the issue of the form of this remedy and in particular whether this is equivalent to an application for setting aside of the award, see the decision of the Court of Appeal in *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2014] 1 SLR 130 at [64]–[70].

7 Sections 21A(1) and 21A(2) of the AA and ss 10(4) and 10(5) of the IAA.

8 See footnote 6 above.

9 See footnote 7 above.

(one of the requirements for substantial validity) may be determined by the personal law of that party; however, the formal validity of the arbitration agreement may be determined by the law of the seat of arbitration. Second, it follows that it is not meaningful to discuss the 'law governing the arbitration agreement' in the abstract if the context or purpose is not given.

3.3 For the purpose of this section II, the 'law governing the arbitration agreement' and other similar references shall be taken as shorthand for the law applicable to issues relating to the interpretation (see Part VI below) and scope of the arbitration agreement (see Part VII, below). This proposition was acknowledged by the High Court in *Piallo GmbH v Yafriro International Pte Ltd* ('*Piallo*'),[10] where the court cited with approval the following passage from *Dicey, Morris and Collins on The Conflict of Laws*:[11] '[t]he question whether an arbitration agreement is wide enough to cover the dispute between the parties depends on the principles of interpretation of the law applicable to the arbitration agreement'.[12]

3.4 On the question of ascertaining the law applicable to the arbitration agreement, the state of Singapore law, as provided by *Halsbury's Laws of Singapore*,[13] is as follows:

> The law applicable to the arbitration agreement determines the validity of the arbitration agreement, from which the authority of the arbitrator flows. It is also applicable to questions as to whether a dispute lies within the scope of the agreement and the agreed qualifications or constitution of the tribunal.
>
> Where an issue which requires the determination under the law of the arbitration agreement (in the absence of an agreed proper law of the arbitration agreement) arises before the commencement of arbitral proceedings, such as during an application for stay of proceedings, *the approach should be to subject the arbitration clause to the same law*

10 [2014] 1 SLR 1028.
11 (15th Ed, Sweet and Maxwell, 2012) at para 16-075.
12 *Ibid* at [20] of the Judgment.
13 *Halsbury's Laws of Singapore*, Arbitration, Building and Construction, Volume 2 (LexisNexis Butterworths, 2003 Reissue) pp 9-14 and p 26, para 20.006.

> *that governs the substantive rights of the parties as the implied choice of law or the law which has the closest and most real connection.* Such questions could also be raised before the Singapore court at the stage when an award made in Singapore is sought to be set aside or when a foreign award which is sought to be enforced in Singapore is resisted on the ground of the invalidity of the arbitration agreement. In the case of an application to set aside an award made in Singapore on the ground of invalidity of the agreement, the court could, in the absence of any indication as to the agreed proper law of the arbitration agreement, determine these questions under 'the law of this State (Singapore)'. *It follows that in the absence of an agreed law that governs the arbitration agreement, the court would need to consider the issue of the validity of the agreement in accordance with Singapore law as lex fori.*
>
> Where the enforcement of a foreign award is resisted on the ground of the invalidity of the arbitration agreement, the court could in the absence of any indication as to the agreed proper law of the arbitration agreement, determine these questions under the law where the award was made.

3.5 According to Lim Wei Lee and Alvin Yeo SC, 'The law governing the arbitration agreement generally follows that of the substantive law of the main contract. Parties are generally well advised to specify the law governing the arbitration agreement; omitting to do so may open the door to arguments over the applicable law (eg the applicable law may well determine whether the arbitration agreement is void).'[14]

3.6 Consistent with the passages cited above, the High Court in *Piallo* seemed content to accept that (in the absence of an express choice of law by the parties to govern the arbitration agreement) the law governing the substantive obligations between the parties applied also to the agreement to arbitrate.[15]

14 In Michael Moser and John Choong, eds, *Asia Arbitration Handbook* (OUP, 2011) pp 675-684, at para 15.43.
15 [2014] 1 SLR 1028 at [20]. The court found that the scope of the arbitration agreement was a matter to be determined in accordance with Swiss law as the underlying agreement between the parties was expressly stated to be governed by Swiss law. However, on the separate question of proof of foreign law, the court proceeded on the basis that Swiss law was the same

3.7 It should also be pointed out that the Singapore judicial system is a common law system inherited from the English common law tradition. English decisions are not binding in Singapore. However, they are persuasive. With respect to the law governing the arbitration agreement, English courts have traditionally adopted the view that the law chosen to govern the main contract also governs the arbitration agreement.[16] In other cases, English courts have also held that the law of the seat (ie England) was to resolve the question.[17] However, the English approach to the issue has changed fundamentally most recently.

3.8 In its decision *Sulamerica CIA Nacional De Seguros SA & Ors v Enesa Engenharia SA & Ors,*[18] the English Court of Appeal established a threefold test to determine the proper law of the arbitration agreement:

1. Have the parties made an express choice of law to govern the arbitration agreement?
2. If not, have the parties made an implied choice?
3. If not, what law has the closest and most real connection with the arbitration agreement?

3.9 The *Sulamerica* decision establishes a rebuttable presumption that the substantive law of the underlying contract will indicate the parties' implied choice of law to

as Singapore law as the parties did not address the court on the relevant provisions of Swiss law: see [24] of the Judgment.

16 According to *Halsbury's Laws of England on Arbitration*, 1208, The Proper Law of the Arbitration Agreement, Volume 2 (5th Ed, LexisNexis UK, 2008): 'The proper law of the arbitration agreement governs its validity, interpretation and effect. *That proper law is determined in accordance with the general principles of the conflict of laws, namely the law chosen by the parties or, in the absence of such choice, the law of the country with which the agreement is most closely connected.* An agreement to submit future disputes to arbitration usually forms part of a substantive contract, for example a contract of sale, but is to be treated as a separate contract. *Normally the proper law of the arbitration agreement will be the same as the proper law of the substantive contract of which it forms part, but exceptionally this may not be the case'* (emphasis added).

17 *C v D* [2007] EWCA Civ 1282. See also *XL Insurance Ltd v Owens Corning* [2001] 1 All ER (Comm) 530.

18 [2012] EWCA Civ 638. See Charles B Rosenberg, '*Sulamerica v Enesa*: The Hidden Pro-Validation Approach Adopted by the English Courts with respect to the Proper Law of the Arbitration Agreement', 29 Arbitration International 115 (2013).

govern the arbitration agreement. Choosing a different seat of arbitration will not of itself be enough to rebut this presumption. In other words, at the second stage, the real issue is whether other factors (in addition to a contrary choice of the seat) are present to rebut the presumption in favour of the substantive law of the contract applying also to the arbitration agreement. Only if no choice of law can be so implied will the third limb of the test be applied and, at that stage, the seat is the determinative factor in the 'closest and most real connection' test.

3.10 The *Sulamerica* test was recently applied by the English High Court in *Arsanovia Ltd & Others v Cruz City 1 Mauritius Holdings*,[19] in which the Court upheld a challenge under s 67 of the Arbitration Act 1996 and overturned an arbitral award on the grounds that the tribunal did not have substantive jurisdiction. With respect to the law governing the arbitration agreement, the court had to resolve the issue of whether to follow the law of the underlying contract (India) or the law of the seat (England). The court found it relevant that the parties had expressly excluded interim relief in India and excluded Part I of the Indian Arbitration and Conciliation Act 1996, noting that 'the natural inference is that they understood and intended that otherwise that law would apply'. On this basis, the court decided that the parties had impliedly chosen the governing law of the arbitration agreement to be Indian law. Interestingly, the court also noted that had it been required to decide which system of law had the closest and most real connection with the arbitration agreement, it would have decided in favour of English law.

Part III: Formal Validity

3.11 Under both the AA and the IAA, an arbitration agreement may be entered into before or after a dispute has arisen. No distinction is made between an agreement to submit an existing dispute to arbitration, referred to as a submission, and a pre-dispute arbitration clause.[20]

19 [2012] EWHC 3702 (Comm) (20 December 2012).

20 Section 4(2) of the AA and Article 2A(2) of the IAA.

3.12 Prior to the Amendment,[21] the AA and IAA defined an 'arbitration agreement' to include only written forms of communication. The arbitration agreement had to be in writing and included agreements made by means of electronic communications — eg letters, telecopies and e-mail messages. Under the current regime, the requirement for the arbitration agreement to be in writing has been relaxed. Now, the AA and IAA both provide that 'An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct or by other means'.[22]

3.13 However, the expanded definition of the arbitration agreement only applies to Part II of the IAA unless the parties decide otherwise in writing.[23] It does not apply to Part III of the IAA. Part II of the IAA deals with arbitrations which are subject to Singapore curial law and awards made in Singapore. Part III deals with awards made outside Singapore and are therefore subject to a foreign curial law, but which are enforced in Singapore under the New York Convention.

3.14 Compared to s 2A(5) in Part II of the IAA, s 27, in Part III, provides under the title 'Interpretation of Part III', that an arbitration agreement in writing includes 'an agreement contained in an exchange of letters, telegrams, facsimile or in a communication by teleprinter'. Section 27 of the IAA is based on the text of Article II(2) of the New York Convention and remains unchanged in the latest version of the IAA even though UNCITRAL issued an interpretive instrument in 2006 recommending that Article II(2) of the New York Convention be applied 'recognising that the circumstances described therein are not exhaustive'.

3.15 No specific words are required to constitute an arbitration agreement. The only requirement is that the wording must

21 See above, Section I, A.
22 Section 4(4) of the AA and s 4(4) of the IAA.
23 Section 5(1) of the IAA and Minn Naing Oo and Rachel Foxton, 'Recent Developments in International Arbitration in Singapore', in Christian Klausegger, Peter Klein et al (eds), *Arbitration Yearbook on International Arbitration*, 2011, 197, at 203.

express a clear and unequivocal intention to arbitrate. Silence will not amount to an agreement to arbitrate.[24]

3.16 In addition, both under the AA and the IAA, an arbitration agreement is also deemed to exist in the following situations: (i) [w]here in any arbitral or legal proceedings, a party asserts the existence of an arbitration agreement in a pleading, statement of case or any other document in circumstances in which the assertion calls for a reply and the assertion is not denied; (ii) where there is a reference in a contract to any document containing an arbitration clause if the reference is such as to make that clause part of the contract; or (iii) where a bill of lading refers to a charterparty or some other document containing an arbitration clause if the reference is such as to make that clause part of the bill of lading.[25]

Part IV: Substantial Validity

3.17 In order for an arbitration agreement to be valid, the parties thereto must have legal capacity to enter into contracts, the dispute falling under the arbitration agreement must be arbitrable, the parties' submission of the dispute to arbitration must not be contrary to the public policy of Singapore and, in general, the arbitration agreement must be exempt of vitiating factors which would render it invalid.

4. Legal Capacity

4.1 The parties to an arbitration agreement must have legal capacity. The capacity to enter into an arbitration agreement is governed by the personal law of the parties. In Singapore, any person who has the capacity to enter into a commercial contract will have the capacity to enter into an arbitration agreement.[26]

24 Alvin Yeo SC and Lim Wei Lee, *Singapore Arbitration Guide*, IBA Arbitration Committee, p 4; Michael Hwang SC, Lawrence Boo and Yewon Han, *National Report for Singapore* (2011) in Jan Paulsson (ed), *International Handbook on Commercial Arbitration*, (Kluwer Law International 1984, last updated: May 2011 Supplement No 64) p 7.
25 Sections 4(6), 4(7) and 4(8) of the AA and ss 2A(6), 2A(7) and 2A(8) of the IAA.
26 Hwang, Boo and Han, op cit at footnote 24, p 6.

or an explanation of the steps taken in good faith to notify them (para 1 of Schedule 1).

5.70 The Schedule 1 regime provides that the President, if he determines that SIAC should 'accept the application', seek to appoint an Emergency Arbitrator within one business day of the Registrar's receipt of the application and payment of any required fee (para 2 of Schedule 1). Schedule 1 does not describe the considerations that will be taken into account by the President in deciding whether to accept the application, and nor has SIAC so far published a Practice Note on this issue. However, SIAC reports that it received 19 applications to appoint an emergency arbitrator during 2013, and that all of these were accepted. It also reports that as at 31 December 2013, a total of 30 emergency arbitrator applications had been accepted by SIAC.[129]

5.71 The Emergency Arbitrator has all of the powers of the tribunal under the SIAC Rules, and is empowered to order or award any interim relief that he deems necessary. He must provide a reasonable opportunity for all parties to be heard, and give written reasons for his decision, but may later modify or vacate his interim award or order 'for good cause shown' (paras 5 and 6 of Schedule 1).

5.72 The Emergency Arbitrator may not act as arbitrator in any future arbitration relating to the dispute unless the parties agree. Nor has he any power to act after the tribunal is constituted. The tribunal is not bound by the reasons he has given, and is entitled to modify or vacate his interim award or order for emergency relief (paras 4 and 7 of Schedule 1).

5.73 Importantly, any order or award of the Emergency Arbitrator automatically ceases to be binding if the tribunal is not constituted within 90 days of the making

129 SIAC Annual Report 2013, p 11. The report also records that during 2013, SIAC also received 36 requests for the application of the Expedited Procedure, and accepted 22 of these. As at 31 December 2013, SIAC had received a total of 115 applications (of which 83 were accepted) for the Expedited Procedure, since the introduction of these provisions in July 2010: SIAC Annual Report, p 11.

of the order or award, or when the tribunal makes a final award, or if the claim is withdrawn (para 7 of Schedule 1).

6. Challenging the Tribunal[130]

6.1 The Model Law and the SIAC Rules both contain detailed provisions setting out the grounds for challenging an arbitrator once appointed, and the procedure to be followed for making and adjudicating that challenge.

6.2 By Article 12(2) of the Model Law, an arbitrator may be challenged only if circumstances exist that give rise to 'justifiable doubts' about (a) his impartiality, or (b) his independence, or if the arbitrator 'does not possess qualifications agreed upon by the parties'. Rule 11.1 of the SIAC Rules (5th Edition) is to the same effect.

Lack of Impartiality

6.3 Under Singapore law, circumstances will exist that give rise to justifiable doubts about an arbitrator's impartiality, if they give rise to 'a reasonable suspicion or apprehension on the part of a fair-minded reasonable person with knowledge of the relevant facts that he (the Arbitrator) was biased or had already made up his mind'.[131]

130 For discussion, Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (3rd Ed, Sweet & Maxwell, 2010) pp 183-198; Webster, *Handbook of UNCITRAL Arbitration* (Sweet & Maxwell, 2010) pp 167-201 at 203-225; Blackaby and Partasides, *Redfern and Hunter on International Arbitration* (5th Ed, Oxford University Press, 2009) at [4.91]–[4.154]; Born, *International Commercial Arbitration* (Wolters Kluwer, 2009) Vol 1, pp 1461-1528, 1532-1586; Greenberg et al, *International Commercial Arbitration An Asia-Pacific Perspective* (CUP, 2011) at [6.01]–[6.190]. For further discussion, Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a 'Real Danger' Test* (Kluwer International, 2009).

131 *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [59]. See also, *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd* [1988] 1 SLR(R) 483 at [72] ('reasonable suspicion' of bias sufficient to warrant removal of arbitrator under former s 17(1) of the *Arbitration Act* (Cap 10, 1985 Rev Ed), since replaced by s 14 of that Act).

Lack of Independence

6.4 Justifiable doubts about independence are likely to exist if the arbitrator has an interest in the outcome of the proceedings, or has a personal or business relationship with one of the parties, or a witness, sufficient to cast a reasonable doubt over his capacity to remain entirely independent. A sufficient professional relationship between the tribunal and the parties, or representative of one of the parties, will also suffice in an appropriate case.[132]

SIAC's Code of Ethics

6.5 SIAC's 'Code of Ethics for an Arbitrator' expresses the following view:[133]

> Any close personal relationship or current direct or indirect business relationship between an arbitrator and a party, or any representative of a party, or with a person who is known to be a potentially important witness, will normally give rise to justifiable doubts as to a prospective arbitrator's impartiality or independence.

6.6 Although para 7.2 of the SIAC Code of Ethics states that 'This Code is not intended to provide grounds for the setting aside of any award', it seems likely that it will be relied upon by parties in making challenges to arbitrators where the SIAC Rules apply, in the same way that the IBA Guidelines on Conflicts of Interest in International Arbitration have hitherto been relied upon.[134]

132 See LCIA Ref No 81160, LCIA Ref No UN96/X15, LCIA Ref No 9147; and cf LCIA Ref No UN3476, abstracted in *Arbitration International* Vol 27, No 3 (2011). See also the IBA Guidelines on Conflicts of Interest in International Arbitration, IBA, 22 May 2004.

133 See also the analysis in Merkin and Hjalmarsson, *Singapore Arbitration Legislation Annotated* (Informa, 2009) pp 86-87, and the discussion in Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (3rd Ed, Sweet & Maxwell, 2010) at [3-049]–[3-055].

134 See Webster, *Handbook of UNCITRAL Arbitration* (Sweet & Maxwell, 2010) at [12-4], [12-13], [12-14] (discussing the use of the IBA Guidelines and the AAA/ABA Code of Ethics in challenges to arbitrators). See also, Born, *International Commercial Arbitration* (Wolters Kluwer, 2009) Vol 1, p 1535–1536; Chan Leng Sun, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011) at [6.90].

Restriction where Party Participates in Appointment

6.7 By Article 12(2) of the Model Law, a party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made. Rule 11.2 of the SIAC Rules (5th Edition) provides that this restriction applies only in respect of arbitrators 'nominated' by a party.

Time Frame for Challenge

6.8 Under the Model Law as incorporated in Singapore, any challenge to an arbitrator must be brought before the tribunal within 15 days of the moving party becoming aware of the constitution of the tribunal or of circumstances providing a ground for challenge, and if the challenge fails, the matter may be taken to the High Court within thirty days of notification that the challenge has been rejected (Article 13(2), 13(3) of the Model Law, s 8(1) of the IAA). Failure to observe these time limits is likely to cause the right to challenge to be lost by waiver.[135] There would appear to be no restriction on the bringing of a second challenge upon further information becoming available to the challenging party.[136]

Subsequent Attack on the Award

6.9 Differing views have been expressed on whether the Award may be subsequently attacked on grounds that could have provided a basis for challenging the tribunal under Article 12(1) of the Model Law.[137] The point would

135 Greenberg et al, *International Commercial Arbitration An Asia-Pacific Perspective* (CUP, 2011) at [6.120]–[6.122]; Born, *International Commercial Arbitration* (Wolters Kluwer, 2009) Vol 1, p 1558. The point was not determined and apparently left open in *PT Prima International Development v Kempinksi Hotels SA* [2012] 4 SLR 98 at [58]–[59].

136 Webster, *Handbook of UNCITRAL Arbitration* (Sweet & Maxwell, 2010) [13–48].

137 Blackaby and Partasides, *Redfern and Hunter on International Arbitration* (5th Ed, Oxford University Press, 2009) at [4.134] (Award should be immune 'on this basis' if fail to challenge); cf Greenberg et al, *International Commercial Arbitration An Asia-Pacific Perspective* (CUP, 2011) at [6.122] (Award not immune from attack if failure to challenge within time).

seem unlikely to arise in Singapore, because the grounds for challenging an arbitrator do not overlap with the grounds for applying to have an Award set aside, set out in s 24 of the IAA and Article 34 of the Model Law.

6.10 Even if facts are proved that engage one of the grounds set out in s 24 of the IAA, or Article 34(2)(a)(ii) or (iv), and some or all of the facts would have permitted an earlier challenge to the tribunal for lack of impartiality, independence, or qualifications, it would seem unlikely that by failing to challenge the tribunal, the party is to be taken to have waived also the right to apply to set the Award aside on the grounds enumerated in s 24 of the IAA and Article 34 of the Model Law.[138]

SIAC Regime for Challenges

6.11 A different and more elaborate regime is provided by the SIAC Rules. Under that regime, a notice of challenge must be provided to the tribunal and the other parties and filed with the Registrar, and the SIAC Court of Arbitration determines the challenge if the arbitrator does not withdraw voluntarily, and their decision is not subject to appeal (Rule 12 and 13 of the 5th Edition).

6.12 The SIAC has not yet published articles or examples as to the practice of the court in adjudicating challenges, in the manner that has been adopted by the LCIA Court, and the ICC Court.[139]

SIAC Regime Ineffective to Prevent Recourse to the Court

6.13 When the IAA applies, it appears that the SIAC Rules are not effective to prevent a party from applying to the High Court to challenge an arbitrator, in accordance with the provisions of Article 13(3) of the Model Law. That is

138 *Grey District Council v Banks* [2003] NZAR 487 at [60] (High Court of NZ, considering local legislation based upon the Model Law).

139 For the LCIA experience, see the 'Challenge Digests', *Arbitration International* Vol 27, No 3 (2011). The ICC experience is discussed in eg Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (3rd Ed, Sweet & Maxwell, 2010) at [3-060]; Greenberg et al, *International Commercial Arbitration An Asia-Pacific Perspective* (CUP, 2011) pp 280-282.

because Article 13(1) of the Model Law states that the parties are free to agree on a procedure for challenging an arbitrator 'subject to the provisions of paragraph (3) of this Article'. Article 13(1) thereby appears to make Article 13(3) a provision from which the parties cannot derogate, within the meaning of s 15A(1) of the IAA. If this is correct, Article 13(3) is a provision that applies irrespective of the parties' agreement.[140] Article 13(3) says in terms that:

> If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this Article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in Article 6 to decide the challenge, which decision shall be subject to no appeal...

6.14 For these reasons, whilst Rule 13.5 of the SIAC Rules (5th Edition) provides that the decision of the SIAC Court of Arbitration shall be final and not subject to appeal, where the IAA applies, this rule should not oust the entitlement of the challenging party to have the matter decided by the High Court of Singapore in the event that the SIAC Court of Arbitration dismisses the challenge, in accordance with Article 13(3) of the Model Law.

Suspending the Proceedings

6.15 The Model Law gives the tribunal discretion to continue with the proceedings pending the resolution of a challenge by the High Court,[141] and the SIAC Rules allow the Registrar to suspend the arbitration pending resolution of the challenge.[142]

6.16 Where the Model Law applies, the High Court has no jurisdiction to grant an interlocutory injunction restraining the challenged arbitrator pending the resolution of the

140 As to the mandatory character of Article 13(3), Binder, *International Commercial Arbitration and Conciliation* in UNCITRAL Model Law Jurisdictions (3rd Ed, Sweet & Maxwell, 2010) at [3-068], [3-077].

141 Model Law, Article 13(3). Cf SIAC Rule 12.2.

142 SIAC Rule 12.2.

challenge.[143] The position should be the same if the parties have chosen the SIAC Rules.

Replacement Arbitrator

6.17 If the challenge causes the arbitrator to be removed the Model Law provides that a substitute arbitrator will be appointed pursuant to the rules of appointment that applied to the arbitrator who was removed.[144] The SIAC Rules provide for the substitute arbitrator to be appointed pursuant to Rules 6 and 7 or Rules 8 and 9, of the SIAC Rules.[145]

7. Resignation of an Arbitrator

Governing principle

7.1 The principles governing the entitlement of an arbitrator to resign were explained by Quentin Loh J in *Anwar Siraj v Teo Hee Lai Building Construction Pte Ltd*.[146] His Honour there stated that an arbitrator's rights and obligations are derived from a conjunction of contract and status, and acceptance of appointment gives rise to a trilateral contract in which the arbitrator becomes a party to the previously bilateral arbitration agreement between the parties.[147] The right to resign is governed by the terms of that contract.[148]

Grounds for Resignation

7.2 It appears that under Singapore law, an arbitrator may resign following a repudiatory breach by the parties to the reference, or for other sufficient cause.[149] In that case it was held that the arbitrator, who had been appointed

143 *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush* [2004] 2 SLR(R) 14 (Woo Bih Li J).
144 Article 15 of the Model Law.
145 SIAC Rule 13.2.
146 [2014] 1 SLR 52.
147 Following *K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd* [1992] QB 863 at 884.
148 *Anwar Siraj v Teo Hee Lai Building Construction Pte Ltd* [2014] 1 SLR 52 at [26]–[27].
149 *Ibid*.

by order of the court, had good and sufficient cause to resign, by reason of the deterioration in his relationship with the plaintiff, which had become acrimonious.[150]

7.3 Whilst in each case the question turns upon the proper construction of the particular contract between the tribunal and the parties, it is submitted that in the ordinary course, sufficient cause for resignation will exist if it could be shown that supervening events had rendered it impractical for the tribunal to continue with the reference.[151]

Form of Notice

7.4 In *Anwar Siraji* Quentin Loh J held that in the absence of a particular rules required by the applicable institutional rules, national law or contract, a letter to the parties clearly stating that the arbitrator wishes to resign or resigns, will be sufficient.[152]

Model Law

7.5 The Model Law does not prescribe the circumstances in which an arbitrator may resign. By Article 14(1) of the Model Law, if an arbitrator is unable to perform his functions, or for other reason fails to act without undue delay, his mandate terminates if he withdraws from office, or if the parties agree on the termination.

7.6 By Article 15 of the Model Law, where the mandate of an arbitrator terminates under Article 14, or because of his withdrawal from office for any other reason, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

SIAC Rules

7.7 The SIAC Rules also do not prescribe the circumstances in which an arbitrator may resign. If he does resign, Rule 14.1 provides that a substitute shall be appointed

150 *Ibid* at [28].
151 *Ibid* at [27].
152 *Ibid* at [42].

Chapter 10

Arbitration Awards

Professor Robert Merkin

1. Introduction

1.1 This chapter is concerned with the primary duty of the arbitral tribunal, namely, to produce an enforceable award which resolves the issues in dispute between the parties. The chapter reviews the requirements for awards in domestic arbitrations under the Arbitration Act,[1] and the International Arbitration Act ('IAA').[2] IAA adopts in modified form the UNCITRAL Model Law and is less interventionist in its approach, so that AA contains a number of 'consumerist' provisions[3] relating to awards which are not replicated in IAA or the Model Law. In addition, the Rules of the Singapore International Arbitration Centre,[4] often adopted for arbitrations with their seat in Singapore, contain supplementary provisions on the types of awards and their formal requirements. The SIAC Rules were revised on 1 April 2013.

1.2 It is important to be able to identify an award, for three main reasons. First, there is a distinction between orders and directions issued by the tribunal and awards: the former are for the most part incapable of challenge in the court and have no direct effect on the outcome of the dispute, whereas the latter are subject to curial jurisdiction and are capable of international enforcement under the regime established by the New York Convention 1958. Secondly, an award has to meet the statutory or contractual requirements demanded of awards, as

1 Chapter 10 (2002 Rev Ed).
2 Chapter 143A (2002 Rev Ed) ('IAA'); both as amended.
3 Some of which are based on the Arbitration Act 1996 (England and Wales).
4 SIAC Rules 5th Ed (2013) ('SIAC Rules').

regards form, content and effect. Thirdly, an award is a final determination of the issues dealt with by the award, and it cannot be reopened by the arbitrators:[5] at best, the parties may apply to the arbitrators for clarification and the correction of errors.[6] Indeed, once the tribunal has issued its final award it becomes functus officio and has no further powers in respect of the arbitration. The Model Law, Article 32, confirms the common law principle by stating that the arbitration proceedings are terminated by the final award.[7]

1.3 There is no exhaustive definition of 'award' in the legislation, other than the general statement that an award is 'a decision of the arbitral tribunal on the substance of the dispute'.[8] The New York Convention is even less helpful in defining an award only by the statement that an award includes 'not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.'[9]

1.4 There are various classes of award recognised in Singapore:

a. Final awards;
b. Partial awards;
c. Consent awards;
d. Default awards;
e. Awards by emergency arbitrators.

1.5 The subject matter of this chapter is dealt with under the following headings:

a. Awards, orders and directions;
b. Types of awards;
c. The requirements of an award;
d. Correction of award by arbitrators;
e. Remedies for deficiencies in an award.

5 SIAC Rule 28.9 obliges the parties to treat the award as binding.
6 See para 6.1 et seq.
7 Note r 28.1 of the SIAC Rules, which allows the tribunal to reopen the proceedings before the award has been made even though the arguments have concluded, but not thereafter.
8 AA s 2(1); IAA s 2(1).
9 Article I.2.

2 Awards, Orders and Directions

a. The Nature of Awards and Directions

2.1 Both AA, s 2(1) and IAA, s 2(1) draw the distinction between an award, namely 'a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award', and 'any order or directions' made by the arbitrators.[10] The SIAC Rules define the term 'award' by reference to the types of award which may be made, and does so on a non-exhaustive basis by stating that the term 'includes a partial or final award and an award of an Emergency Arbitrator'.[11] Directions and orders are concerned with the conduct of the litigation and the provision of security for the award or the subject matter of the award.

2.2 Arbitration awards made under the AA or the IAA are enforceable in Singapore with the leave of the High Court in the same manner as a judgment to the same effect and, where leave is so given, judgment may be entered in terms of the award.[12] An award made in another state which is a party to the New York Convention may also be enforced in Singapore in the same way as an award made in Singapore.[13] Orders and directions made in arbitrations with their seat in Singapore are similarly enforceable as if they were orders of the court, and judgment may be entered in terms of the order or direction,[14] but such enforcement is designed to support the arbitral process rather than give effect to its outcome[15] and the consequence of enforcement is contempt of court rather than a substantive decision against the defaulter.[16] An

10 Arbitral immunity extends to both: AA, s 20; IAA, s 25. See also SIAC Rule 34.
11 Rule 1.5.
12 AA, s 46; IAA, s 19.
13 IAA, s 29, bringing in the enforcement mechanisms in IAA, s 19.
14 AA, s 28(4); IAA, s 12(7).
15 It is the equivalent of enforcement of arbitral peremptory orders under s 41 of the Arbitration Act 1996 (England and Wales).
16 The tribunal may enforce its own orders and directions in other ways: AA, s 29(2) allows the tribunal to terminate the proceedings or proceed to an award on the evidence before it in the event of default, and r 21.3 of the SIAC Rules similarly provide that 'If any party to the proceedings fails to appear at a hearing without showing sufficient cause for such failure, the

order or direction made in a foreign arbitration cannot be enforced in Singapore under the New York Convention.

b. The Subject Matter of Orders and Directions

2.3 The list of directions and orders open to arbitrators in Singapore, as set out in AA, s 28 and IAA, s 12, consists of: security for costs; discovery of documents and interrogatories; giving of evidence by affidavit; examination of a party or witness on oath or affirmation; the preservation and interim custody of any evidence for the purposes of the proceedings; samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute; and the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute. This list is supplemented by the general provisions of the Model Law, Article 17, which empowers the tribunal 'to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.'[17]

2.4 Where the SIAC Rules have been adopted, r 24 authorises the arbitrators to make a variety of orders, including:

a. order the parties to make any property or item available for inspection;
b. order the preservation, storage, sale or disposal of any property or item which is or forms part of the subject-matter of the dispute;
c. order any party to produce to the tribunal and to the other parties for inspection, and to supply copies of, any document in their possession or control which the tribunal considers relevant to the case and material to its outcome;

tribunal may proceed with the arbitration and may make the award based on the submissions and evidence before it.'

17 Singapore has yet to implement the changes to the Model Law as regards interim measures and preliminary orders, set out in the revised version of Article 17 and new Articles 17A–17J, adopted by UNCITRAL in 2006.

d. direct any party to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party;
e. order any party to provide security for legal or other costs in any manner the tribunal thinks fit;
f. order any party to provide security for all or part of any amount in dispute in the arbitration.

3. Distinction between Awards, Orders and Directions

3.1 The distinction between an award on the one hand and, a procedural order or direction on the other, is in most cases straightforward and obvious. The basic principle is that an award disposes finally of an issue between the parties, whereas an order or direction is concerned with the operation of the arbitration rather than its outcome.[18] However, there may be borderline disputes. The distinction between awards and orders or directions has been considered in a number of cases. The authorities emphasise that what matters is the substance and not the form or description given by the tribunal.[19]

3.2 In *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd*[20] an arbitral award on interest was set aside by the court, and an application was then made to the tribunal for the matter to be revisited. The tribunal declined jurisdiction, ruling that it had become functus officio following the making of its award, so that it no longer possessed jurisdiction to act in the arbitration. Belinda

18 That proposition is supported from cases in a variety of jurisdictions: *Re Arbitration Between Mohamed Ibrahim and Koshi Mohamed* [1963] MLJ 32; *Cargill v Kadinopoulos* [1992] 1 Lloyd's Rep 1; *The Trade Fortitude* [1992] 1 Lloyd's Rep 169; *Charles M Willie Co (Shipping) Ltd v Ocean Laser Shipping Ltd, The Smaro* [1999] 1 Lloyd's Rep 225; *Michael Wilson & Partners Ltd v Emmott* [2008] EWHC 2684 (Comm); *Resort Condominiums International Inc v Bolwell* (1993) 118 ALR 655; *Command v Fletcher* [1999] VSC 235; *Mond v Berger* [2004] VSC 45; *General Distributors Ltd v Melanesian Mission Trust Board* [2008] NZHC 1817.

19 See *Ranko Group v Antarctic Maritime SA, The Robin* [1998] ADRLN 35, where 'rulings' were held to constitute a partial award on jurisdiction. See also *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597.

20 [2014] 1 SLR 1221.

Ang J dismissed an appeal against that ruling, holding that it did not constitute an award in its own right so that there was no statutory basis for any appeal to the court.

3.3 A further issue relates to interim relief. Rule 26.1 of the SIAC Rules provides as follows:

> The tribunal may, at the request of a party, issue an order or an award granting an injunction or any other interim relief it deems appropriate. The tribunal may order the party requesting interim relief to provide appropriate security in connection with the relief sought.

3.4 It will be seen from this provision that the tribunal may grant an interim injunction or other relief in the form of an award or order. It may not matter which for enforcement purposes, because, as set out above, either may be enforced by the Singapore court. However, it will matter if the issue is whether there may be an appeal against the ruling: that is possible in the case of an award, but not an order.

3.5 The point was considered in *PT Pukuafu Indah v Newmont Indonesia Ltd*.[21] The application in this case was made under IAA s 24 and Article 34 of the Model Law to set aside an interim anti-suit injunction made by the tribunal preventing the applicants from pursuing legal proceedings in Indonesia, under the purported exercise of its power under r 26.1 of the SIAC Rules to grant interim relief, an order that the High Court subsequently gave leave to enforce. The order stated that the injunction was granted 'until further order by this tribunal' and also provided that the 'costs of the application for interim relief be reserved to the Final Award'. The purpose of the arbitration was to obtain a permanent anti-suit injunction. The court was satisfied that this was an order made under s 12 of the IAA and not an award: it was irrelevant that there was no reference to s 12;[22] and it was plain that the purpose of

21 [2012] 4 SLR 1157.

22 The court commented, with some feeling, that: 'The absence of a reference in the Order to s 12(1) merely provided a pretext for the plaintiffs to make the present application. This could have been precluded by making a reference in the Order to s 12(1) of the IAA and an arbitral tribunal would do a great service to the parties before them if they simply state this fact in making such an order.'

the order was simply to preserve the status quo until the matter could be determined on its merits.[23] It follows from this reasoning that an order intended to be temporary and is potentially to be superseded, is not an award.

4. Types of Awards

a. Final Awards

4.1 A final award is 'final and binding on the parties and on any person 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.'[24] The proceedings are automatically terminated once a final award has been given.[25]

4.2 It is not always obvious when an award is final and the arbitrators have become functus officio and thus incapable of rendering any further award. For example, it is common practice for the arbitrators to give an award on the substantive issues and not to refer to costs, with the intention of making a further award just on costs at a later date. In such a case the proceedings have not terminated and the arbitrators remain in office. By contrast, if it can be shown that the tribunal simply failed to deal with costs, then an application can be made to the tribunal for the making of an additional award.[26] The failure by the tribunal to grant a specific remedy despite being requested to do so does not necesarily mean that an application may be made for an additional award, as

23 The court classified any interlocutory order as one that did not decide the substance of the dispute, and any interim order as one which sought to preserve the rights of the parties pending the outcome of the arbitration: the latter category was a part of the former wider category.

24 AA, s 44(1); IAA, s 19A(1); *Alexander G Tsvarilis & Sons Maritime Co v Keppel Corporation Ltd* [1995] 1 SLR(R) 701.

25 Model Law, Article 32(1); *Anwar Siraj v Teo Hee Lai Building Construction Pte Ltd* [2007] 2 SLR(R) 500.

26 See para 6.5, infra. For the distinction, see *Sea Trade Maritime Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Athena* [2007] 1 Lloyd's Rep 280.

it may be that the award should be read as rejecting the request for that remedy so that the award is complete.[27]

4.3 It may be noted that construction disputes adopt an adjudication process under which adjudication awards may be given on specific disputes as and when they arise between the parties, but such awards are only provisional and are subject to subsequent arbitration after the completion of the works if either party so wishes.[28]

b. Partial Awards

4.4 There is now[29] statutory authority empowering the tribunal to make awards on different issues. At one time such awards were referred to as 'interim' awards, but that phraseology is misleading because it implies that the award can be revisited. The modern terminology is that of the 'partial award', making it clear that each award is a final award in its own right, resolving the particular issue dealt with in the award and leaving other issues to be determined by future awards.[30] It is important to distinguish partial awards from provisional awards, which are permitted by English law[31] but not by the law of Singapore.[32] A provisional award is typically one made where the tribunal has determined liability but has yet to assess damages but awards a sum on account pending a final determination. It is presumably open to the parties to an arbitration in Singapore to confer upon the tribunal the power to make provisional awards.

4.41 The statutory authorisation in Singapore for the arbitrators to make partial awards is contained, in identical terms, by AA, s 33 and IAA, s 19A:

27 *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125.
28 See, eg, *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305.
29 For the earlier position, see *Tang Boon Jek Jeffrey v Tan Poh Leng Stanley* [2001] 2 SLR(R) 273.
30 *Government of the Republic of the Philippines v Philippine International Air Terminals Co Ltd* [2007] 1 SLR(R) 278.
31 Arbitration Act 1996, s 39.
32 The common law does not recognise such awards: *The Kostas Melas* [1981] 1 Lloyd's Rep 18.

(1) Unless otherwise agreed by the parties, the arbitral tribunal may make more than one award at different points in time during the proceedings on different aspects of the matters to be determined.

(2) The arbitral tribunal may, in particular, make an award relating to —
(a) an issue affecting the whole claim; or
(b) a part only of the claim, counter-claim or cross-claim, which is submitted to the tribunal for decision.

(3) If the arbitral tribunal makes an award under this section, it shall specify in its award, the issue, or claim or part of a claim, which is the subject-matter of the award.

4.42 The SIAC Rules, r 28.3, confirm that the tribunal may make separate awards on different issues at different times.

4.43 Issues of pure jurisdiction – including the validity of the arbitration clause, whether the dispute falls within the arbitration clause and the validity of the appointment of the tribunal – are often dealt with as partial awards. In that way the jurisdictional issues can be resolved and, if necessary, appealed against. The legislation provides that the tribunal is empowered to rule on its own jurisdiction in this way, subject to an appeal to the court within 30 days of any such ruling by a party to the arbitration.[33] Rule 25 of the SIAC Rules allows the tribunal to rule on a plea of want of jurisdiction either as a preliminary question or in an award on the merits.

4.44 In some cases it may be impossible to split jurisdictional and substantive issues (as where the dispute is to where there is any agreement at all between the parties) so that the tribunal remains free to rule on jurisdiction as a part of the award on the merits.[34]

4.45 Partial awards are also useful where there are preliminary issues, eg, on the construction of a contract, whose resolution can lead to settlement of the dispute itself.

33 AA, s 21; IAA, s 10 and Model Law, Article 16.
34 AA, s 21(8).

In those circumstances a tribunal may issue a summary partial award on the issues in question, leaving over for further proceedings any matters in respect of which summary judgment is refused or which otherwise require resolution.[35] It is also common practice for tribunals to make separate awards on costs and interest after the substantive award itself. Under SIAC Rules, r 24, the tribunal may issue a partial award for unpaid costs of the arbitration.

4.46 A partial award is a final and dispositive award in its own right. It cannot therefore be altered by the tribunal other than in accordance with the statutory provisions for the correction of final awards.[36] On the same basis it is not open to the parties to reopen the issues resolved by a partial award by adopting new arguments on those issues. It will thus be important to determine exactly what a partial award has decided. In *Econ Piling Pte Ltd v Shanghai Tunnel Engineering Co Ltd*[37] the basic issues were whether a sub-contractor was entitled to an extension of time and how damages were to be calculated. The sub-contractor sought an interim summary award, but the application was dismissed by what was described as an interim award dated 3 April 2006 in which the arbitrator noted that he had not made any ruling on the question whether a damages clause operated to lay down liquidated damages. Thereafter the sub-contractor sought to argue in the arbitration proceedings that the clause did not have that effect, and succeeded in that argument in a Partial Award. Judith Prakash J noted that:[38]

35 *Holland Leedon Pte Ltd (in liquidation) v Metalform Asia Pte Ltd* [2012] 3 SLR 377.

36 IAA, s 19B(2), and necessarily implicit from AA, s 44 given that a partial award is a final award as regards the issues resolved by the partial award. This was described by Belinda Ang J in *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2014] 4 SLR 1221, at para 32, as 'partial functus officio'.

37 [2011] 1 SLR 246. See also *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98, where the issue was whether the arbitrators had been entitled to issue third and fourth awards in the face of the allegation that the first towards had resolved all of the issues between the parties. The court upheld the third and fourth awards on the basis that they related to matters not dealt with previously.

38 Ibid at para 55.

> There was no decision on any substantive matter relating to the disputes being arbitrated. In strict terms therefore, there was no *award* in favour of [the sub-contractor] within the meaning of 'award' in s 2(1) of the [AA]. Accordingly, at the time of the arbitration hearings leading to the issuance of the Partial Award, the parties were proceeding from the position that they were in prior to the application for summary award (not prior to the Interim Award). At that time, the Arbitrator had made no findings in relation to [the clause] which were 'final and binding on the parties' under s 44 of the [AA].

c. Consent Awards

4.47 AA and IAA contain more or less identical provisions for consent awards. Such an award may be made where the parties have settled their dispute in the course of the arbitration and wish to embody their settlement in an award which can then – if necessary – be enforced in the same way as any other award.[39] AA, s 37(1) and Article 30(1) of the Model Law,[40] provide that if the parties settle, the tribunal is to terminate the proceedings, and, if requested by the parties, may[41] record the settlement in the form of an award. A domestic consent award must under AA s 37(2) state that it is an award and also comply with the requirements for the making of an award under AA, s 38, namely that it must be in writing, be signed, dated the place of making identified, although the obligation to provide reasons is dispensed with by s 38 itself in the case of a consent award. As far as international arbitration awards are concerned, Article 30(2) of the Model Law similarly states that the award must be in the form prescribed by the Model Law, Article 31(1), in that it must be signed, dated the place of making identified, but that the usual requirement for reasons has no application to consent awards is removed by Article 31(2).

4.48 As far as SIAC arbitrations are concerned, r 28.8 provides that, in the event of a settlement, if any party so requests, the tribunal may render a consent award recording the settlement. If the parties do not require a consent

39 AA, s 37(3); IAA, s 18(b).

40 Given effect by IAA, s 18.

41 There is no obligation on the tribunal to do so, but it is inconceivable that the tribunal would refuse.

award, the parties are to confirm to the Registrar that a settlement has been reached. In either case the tribunal is discharged and the arbitration treated as concluded upon payment of any outstanding costs of arbitration.

d. Default Awards

4.49 This type of award is available by statute in domestic arbitrations only, under AA, s 29(3), which applies if the tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim, and the delay: (a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim; or (b) has caused, or is likely to cause, serious prejudice to the respondent. In such circumstances the tribunal may make an award dismissing the claim. This is the arbitral equivalent of a judicial striking out, a power which is not available to arbitrators at common law, and the effect of such an award is to raise an estoppel preventing the claimant from issuing fresh proceedings on the same cause of action or issues.[42] In the specific situation where the claimant has failed to communicate the statement of claim, both domestic and international arbitral proceedings can be terminated by the arbitrators,[43] but there is no award and presumably nothing to prevent a fresh claim within the limitation period.

e. Awards by Emergency Arbitrators

4.50 Rule 26 of, and Schedule 1 to, the SIAC Rules, set out a useful procedure for obtaining emergency relief before the tribunal has been constituted.[44] This may be granted in the form of an award, but if that is the case then it operates only on a temporary basis and may be varied or revoked, and it may also lapse.

42 *James Lazenby & Co v McNicholas Construction Co Ltd* [1995] 2 Lloyd's Rep 30.

43 AA, s 29(2)(a); Model Law, Article 25(a). See also SIAC Rules, r 17.8 to the same effect.

44 Contrast the position in England, where application has to be made to the court for such relief: Arbitration Act 1996, s 44.

4.51 An application may be made concurrent with or following the filing of a notice of arbitration, and the President of SIAC may then appoint an emergency arbitrator, who has two days to arrange for the parties to give submissions on the application. Whatever the outcome of the application, the emergency arbitrator may not act as arbitrator in the substantive dispute itself, unless the parties agree otherwise. Any interim award or order of emergency relief may be conditioned on provision by the party seeking such relief of appropriate security.

4.52 The emergency arbitrator may act by way of award or order, but in either case the emergency arbitrator may modify or vacate the interim award or order for good cause shown. Once the tribunal is constituted it may reconsider, modify or vacate the interim award or order, and it is not by the reasons given by the emergency arbitrator. Any order or award will in any event lapse if the tribunal is not constituted within 90 days, and if it is maintained during the arbitration then it is to be replaced by the final award. It nevertheless follows from the reasoning in *PT Pukuafu Indah v Newmont Indonesia Ltd*,[45] discussed above,[46] that an emergency order is not an award no matter how it is expressed, and that while it can be enforced with the permission of the court, it cannot be overturned as an award. Indeed, the protection to the respondent is, as noted in *PT Puuafu*, the power of the court to refuse enforcement.

5. The Requirements of an Award

a. Formalities

5.1 The form and content of an award is a matter for the parties. In the absence of agreement, the default requirements of an award are as follows:

a. The award is to be in writing[47] and signed, in the case of a single arbitrator, by the arbitrator himself;

45 [2012] 4 SLR 1157.

46 See (*supra*) para 3.5.

47 Oral awards are valid at common law: *Thompson v Miller* (1867) 15 WR 353.

or in the case of two or more arbitrators, by all the arbitrators or the majority of the arbitrators provided that the reason for any omitted signature of any arbitrator is stated.[48] Under SIAC Rules, r 28.5, if any arbitrator fails to cooperate in the making of the award, having been given a reasonable opportunity to do so, the remaining arbitrators are to proceed in his absence.

b. The place of the award is to be stated, and for this purpose the place of the award is deemed to be the place of the seat.[49]

c. The award is to be dated.[50]

d. The award is to be reasoned, unless the parties have agreed that reasons are not to be stated or the award is a consent award.[51]

5.2 Where SIAC Rules have been adopted, a quality control procedure is imposed. Under r 28.2 any award must be submitted in draft form to the Registrar of SIAC within 45 days of the closure of the procedings, although that period may be extended by the Registrar but not by the tribunal. The purpose of the procedure is to allow the Registrar to 'suggest modifications as to the form of the award and, without affecting the tribunal's liberty of decision, may also draw its attention to points of substance.' An award is not to be made by the tribunal until the award has been approved by the Registrar as to its form.

5.3 A copy of the award is to be delivered to each party.[52] However, the tribunal is entitled to withhold the award as security for payment of its fees and expenses.[53] In the case of an arbitration governed by SIAC Rules, r 28.6

48 AA, s 38(1); Model Law, Article 31(1).
49 AA, s 38(3)–(4); Model Law, Article 31(3).
50 AA, s 38(3); Model Law, Article 31(3).
51 AA, s 38(2); Model Law, Article 31(2).
52 AA, s 38(5); Model Law, Article 31(4).
53 AA, s 41, which contains a procedure for application to the court for release of the award where the amount of fees and expenses is contested. In the case of an international arbitration, the Registrar of SIAC has the power to tax the fees and expenses of the tribunal, in which case the taxation forms a part of the award: IAA, s 21. Where SIAC Rules apply, the fees of the tribunal are fixed by the Registrar in accordance with the Schedule of Fees and the stage of the proceedings at which the arbitration ended: r 33.

provides that the award is be delivered to the Registrar, who will transmit certified copies to the parties upon the full settlement of the costs of arbitration.

b. Unanimity

5.4 There is no rule of law which requires arbitrators to reach their awards unanimously. The common law has never objected to majority awards, and that principle is confirmed by the SIAC Rules, r 28.5, which allows the tribunal to proceed by a majority. Failing a majority decision, the presiding arbitrator alone is to make the award for the tribunal.

c. Timing of an Award

5.5 The parties may agree that an award must be made within a given period. If the time limit is not met, the tribunal no longer has jurisdiction to make the award and the proceedings will terminate unresolved.[54] AA, s 36[55] allows the court in its discretion to extend time for the making of an award on the application of the tribunal itself (with notice to the parties) or by any party (with notice to the tribunal and other parties) if substantial injustice would result by a failure to extend time.This is a procedure of last resort, and cannot be used if there is any other mechanism for extending time, although such a mechanism if it exists does not exclude the ultimate right to apply to the court under AA, s 36,[56] unless the parties have agreed otherwise. In determining whether a refusel of time would lead to 'substantial injustice', it is necessary to take into account all surrounding circumstances, including the duration of the delay, the reason for the delay, the relative fault of the parties and the sum at stake.[57] Where the court refuses to

54 *Ting Kang Chung John v Teo Hee Lai Building Constructions Pte Ltd* [2010] 2 SLR 625.
55 Based on the English AA 1996, s 50.
56 *John Mowlem Construction plc v Secretary of State for Defence* (2001) 82 Con LR 140.
57 See *Ting Kang Chung John v Teo Hee Lai Building Constructions Pte Ltd* [2010] 2 SLR 625, where the court refused to extend time for an award made some 16 months late. Cf *Minermet SpA Milan v Luckyfield Shipping Corpn SA* [2004] Lloyd's Rep 348'; and *Pirtek (UK) Ltd v Deanswood Ltd* [2005] EWHC 2301 (Comm).