PT Prima International Development v Kempinski Hotels SA and other appeals [2012] SGCA 35

Suit No:	Civil Appeals Nos 94, 95, 96 and 98 of 2011
Decision Date:	9 July 2012
Court:	Court of Appeal
Coram:	Chan Sek Keong CJ, Andrew Phang Boon Leong JA and Belinda Ang Saw Ean J
Counsel:	Michael Hwang SC and Ernest Wee (Michael Hwang Chambers) and Nicholas Narayanan (Nicholas & Tan Partnership LLP) for the appellant in Civil Appeals Nos 94, 95 and 96 of 2011 and the respondent in Civil Appeal No 98 of 2011; Adrian Wong, Jansen Chow and Andrea Baker (Rajah & Tann LLP) for the respondent in Civil Appeals Nos 94, 95 and 96 of 2011 and the appellant in Civil Appeal No 98 of 2011.

Subject Area / Catchwords

Arbitration – Award – Recourse against award – Setting aside

[LawNet Editorial Note: The decisions from which the appeals arose are reported at **[2011] 4 SLR 633**, **[2011] 4 SLR 669** and **[2011] 4 SLR 670**.]

9 July 2012 Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

Introduction

1 The four appeals before us all arise out of awards made by the arbitrator ("the Arbitrator") in Singapore International Arbitration Centre ("SIAC") Arbitration No 37 of 2002 ("the Arbitration") between Kempinski Hotels SA ("Kempinski") and PT Prima International Development ("Prima"). Three of the appeals – *viz*, Civil Appeal No 94 of 2011 ("CA 94"), Civil Appeal No 95 of 2011 ("CA 95") and Civil Appeal No 96 of 2011 ("CA 96") – are brought by Prima, while the fourth appeal, Civil Appeal No 98 of 2011 ("CA 98"), is brought by Kempinski. Kempinski had earlier applied to the High Court to set aside the Arbitrator's third interim award dated 20 May 2008 ("the Third Award"), fourth interim award dated 20 October 2008 ("the Fourth Award") and costs award dated 15 April 2009 ("the Costs Award"). In CA 94, CA 95 and CA 96, Prima is appealing against the decision of the High Court judge ("the Judge") setting aside, respectively, the Costs Award, the Third Award and the Fourth Award. As for CA 98, it is Kempinski's cross-appeal against the Judge's decision not to set aside the Third Award and the Fourth Award on some of the grounds which it had relied on in its application to set aside those awards.

2 The Judge's decisions setting aside the Third Award, the Fourth Award and the Costs Award are reported in, respectively, *Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 633 ("the Judgment"), *Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 669 and *Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 670.

Background

3 Prima, an Indonesian company, is the owner of the Plaza Hotel at Jalan Jenderal Sudirman, Jakarta ("the Hotel"). Kempinski is a Swiss company which manages and operates hotels around the world. On 15 April 1994,**[note: 1]** Kempinski and Prima entered into an Operating and Management Contract ("the Management Contract") under which Kempinski was given the right to operate and manage the Hotel for 20 years.**[note: 2]** Kempinski commenced managing the Hotel after its soft opening in June 1998.**[note: 3]**

4 The Management Contract was subject to Indonesian law. It contained the following arbitration agreement in Art 20:[note: 4]

> Any dispute or difference arising out of or in connection with or resulting from [the Management Contract], its application or interpretation, where an amicable settlement cannot be reached, shall be referred to and determined by arbitration under the Rules of the [SIAC]. The arbitration shall be governed by the laws of Indonesia. All proceedings shall be in the English language. The place of arbitration shall be Singapore. The arbitral award shall be final and judgement thereof may be entered in any Court having jurisdiction thereof.

It should be noted that the applicable version of the SIAC's Arbitration Rules for the purposes of the Arbitration was the SIAC Rules (2nd Ed, 22 October 1997) ("the SIAC Rules (1997 Ed)").

5 Subsequently, the business relationship between the parties soured. On 6 February 2002,[note: 5] Prima gave Kempinski written notice of termination of the Management Contract on the ground that Kempinski had failed to perform its obligations under the Management Contract. Prima then entered into another management contract with a different company to manage the Hotel in place of Kempinski in April 2002.

Commencement of the Arbitration

6 The purported termination of the Management Contract by Prima led Kempinski to commence the Arbitration on 20 May 2002.[note: 6] In its Points of Claim, Kempinski sought the following remedies:[note: 7]

> a) declarations to the effect that:–
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> i. [Prima] had wrongfully and unjustifiably purported to terminate the [Management] Contract;
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> ii. [Kempinski was] not in material breach of the [Management] Contract;
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> iii. [Kempinski] should be entitled to continue with the [Management] Contract;
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> b) an injunction restraining [Prima] from entering into or continuing with any contract for the operation and management of the Hotel with any third party in place of or in addition to [Kempinski], or otherwise interfering with the [Management] Contract;
>
> c) further or alternatively, an order/award for the specific performance of the [Management] Contract;
>
> d) further or alternatively, the full extent of the loss and damage caused to [Kempinski], including loss of profits for the remainder of the term of the [Management] Contract, if [Kempinski is] not to continue with the [Management] Contract;
>
> e) if for any reason, [Kempinski is] not to continue with the [Management] Contract, the sum of about US$86,700.00 being the balance of the full amount of the management fees due to [Kempinski] as against the discounted figure, which discount was given on the basis of a continuation of the [Management] Contract;
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> f) interest at such rate and for such period as the Arbitrator deems fit and just;
>
> g) costs; and
>
> h) such further and/or other relief which the Arbitrator deems fit.

7 In September 2002, Prima filed its Points of Defence and Counterclaim in which it pleaded that the termination of the Management Contract was valid under Indonesian law and counterclaimed for damages against Kempinski for breach of the Management Contract.

8 In the course of the Arbitration, Prima applied to the Arbitrator for leave to amend its pleadings to include the defence that the Management Contract had become illegal under Indonesian law because of three decisions issued by the Indonesian Ministry of Tourism in, respectively, November 1996, June 1997 and May 2000 which changed the regulatory conditions for the management of hotels in Indonesia ("the Three Decisions"). In substance, the Three Decisions made it illegal for a foreign entity to manage hotels in Indonesia unless it set up a company incorporated in Indonesia (a "PMA company") or entered into a joint venture with Indonesian partners.

9 As either means of managing the Hotel had negative tax implications for Kempinski, it had, after the second of the Three Decisions was issued, sought legal advice on how to carry on managing the Hotel without contravening the altered regulatory framework. Kempinski's legal counsel had advised that Kempinski would not contravene the altered regulatory framework if it managed the Hotel without having a commercial presence in Indonesia or without bringing any monetary assets into Indonesia.**[note: 8]** Kempinski's legal counsel had further advised that since the general manager of the Hotel was employed by Prima (although he was nominated by Kempinski, which was then the industry practice),**[note: 9]** that meant that Kempinski did not have a commercial presence within Indonesia, and, as such, would not be acting in contravention of the altered regulatory framework.**[note: 10]** Acting on such legal advice, Kempinski had continued to manage the Hotel without any objection from Prima.

10 Prima's purpose in applying for leave to amend its Points of Defence and Counterclaim to plead supervening illegality was not to rely on it to deny liability for breach of contract should Kempinski prove that Prima had indeed terminated the Management Contract wrongfully. Instead, Prima's purpose was to rely on supervening illegality to limit the period for which Kempinski could claim damages. Specifically, Prima sought to argue that the relevant period should end on the date when the Management Contract began to be performed illegally by Kempinski. As Prima conceded that a reasonable period of time within which to comply with the Three Decisions would be one year from the date on which the last of the Three Decisions was issued (*viz*, 3 May 2000), it took the position that the period for which Kempinski could claim damages (in the event that it succeeded against Prima on the issue of liability) should end on 3 May 2001. The Arbitrator gave leave to Prima in June 2003 to make the aforesaid amendment.**[note: 11]** On 18 August 2003, Prima filed its Points of Re-Amended Defence and Counterclaim specifically pleading supervening illegality and *force majeure* under Art 1245 of the Indonesian Civil Code.

11 Shortly thereafter, Prima applied for the issue of illegality to be tried as a preliminary issue for the reason that if Kempinski were not entitled to damages from 3 May 2001 onwards, it would be moot for the Arbitration to continue further on the issue of whether Prima was liable to Kempinski for breach of contract since the alleged wrongful termination of the Management Contract took place only after 3 May 2001 (specifically, on 6 February 2002). The Arbitrator granted Prima's application and issued Procedural Order No 1 dated 8 July 2003**[note: 12]** directing that the issue of illegality be tried after Kempinski had closed its case in the Arbitration.

The Arbitrator's first interim award

12 The Arbitrator heard arguments on the issue of illegality in two tranches. The first tranche was heard between 26 and 28 July 2004, followed by two rounds of written submissions by the parties. Prima's submission that the Management Contract had been rendered illegal by the Three Decisions was met by Kempinski's response that, first, there was no doctrine of supervening illegality in Indonesian law and, second, the Three Decisions were constitutionally invalid.

13 On 18 February 2005, the Arbitrator published his first interim award ("the First Award"), which dealt with the issue of illegality as follows:**[note: 13]**

> 1. … [T]he [Management] [C]ontract remains valid but has become impossible of performance as a result of the [Three] Decisions.

2. Any benefits passed by [Kempinski] to [Prima] under the [Management] [C]ontract may be recoverable, subject to existing pleadings accommodating such relief and subject to counterclaims by [Prima].

It should be noted that although the Arbitrator decided that the Management Contract had become "impossible of performance as a result of the [Three] Decisions",[note: 14] what he actually meant was that it had become impossible to perform, *save in a manner that conformed with the Three Decisions*. This can be seen from para 68 of the First Award, where he stated that "[i]t [was] clear that the [Three] Decisions *[did] not prevent the performance of the [Management] [C]ontract but only prescribe[d] a manner for [its] performance*"[note: 15] [emphasis added].

The Arbitrator's second interim award

14 The First Award did not settle the issue of how lawful performance of the Management Contract – *ie*, performance in a manner which complied with the Three Decisions – could be carried out. To settle this issue, the parties requested the Arbitrator to answer the four questions set out in the quotation at [15] below. The Arbitrator considered those questions in the second tranche of the oral hearing on the issue of illegality from 6 to 8 February 2006. Both parties adduced expert evidence on Indonesian law, and the experts called by the parties were also cross-examined. The parties also tendered further written submissions. In particular, Kempinski's expert witness, Prof Mariam Darus ("Prof Darus"), opined that there were three methods of performing the Management Contract that were permitted by the Three Decisions, namely:[note: 16]

(a) novation of the Management Contract to and subsequent performance through a PMA company;

(b) delegated performance of the Management Contract through an Indonesia corporation pursuant to Art 18(1) of the Management Contract; and

(c) modification of the Management Contract to include an Indonesian company within a tripartite arrangement.

15 The Arbitrator published his second interim award ("the Second Award") on 12 December 2006 in which he answered the four questions referred to him by the parties as follows:[note: 17]

Question One: Given the finding [in the First Award] that the [Management] Contract is valid but is not capable of performance except in the manner prescribed in the [Three] Decisions, are any claims to damages arising from the [Management] Contract still available to [Kempinski] under Indonesian law?

The answer that must be given is that there are alternative methods of performance which would be consistent with the [T]hree Decisions. Given that the [Management] Contract is valid, recourse to these alternative methods of performance is viable. Their existence rules out *force majeure*. Failure to give effect to them raises the possibility of a remedy by way of damages. Thus, claims for damages arising from the [Management] Contract are still available to [Kempinski] under Indonesian Law.

Question Two: If … claims to damages are still available to [Kempinski,] what are the bases for computation of such damages?

Subject to any defences which arise from the pleadings and other counterclaims, the normal basis for damages would be for the loss of profits. The life of the [Management] Contract has to be determined in the light of the circumstances. Other matters that may affect damages are matters for further evidence.

Question Three[:] If … claims for damages are not available to [Kempinski], are there any other remedies (including a declaration) available to [Kempinski]?

This question need not be answered in view of the finding that there is a remedy by way of damages still open.

Question Four[:] If no remedies are available, should the [c]laims be dismissed and an appropriate order made as to costs?

As there are remedies available, the claim need not be dismissed.

[emphasis in bold in original]

The Third Award

16 After the Second Award was published, Prima discovered that Kempinski had entered into a contract dated 28 April 2006 (as later admitted by Kempinski) to provide hotel management services in respect of another hotel in Indonesia ("the New Management Contract"). This contract was entered into after Kempinski incorporated a company in Indonesia. On 28 March 2007, Prima's solicitors wrote to the Arbitrator to seek "clarification"**[note: 18]** of the Second Award in the light of this newly-discovered information. Specifically, Prima requested the Arbitrator to consider whether the three modes of performing the Management Contract set out at [14] above were still possible in view of the New Management Contract,**[note: 19]** which, it contended, was in breach of the exclusivity clause in Art 21 of the Management Contract. A conference was held on 10 April 2007 to decide how the Arbitration should proceed. Following that conference ("the April 2007 Directions Conference"), Kempinski failed to comply with the Arbitrator's order for it to give full disclosure of the salient terms of the New Management Contract, and only disclosed that it would be managing the Grand Hotel Indonesia Kempinski under the New Management Contract. Dissatisfied with the extent of Kempinski's disclosure, the Arbitrator issued further discovery orders. This led to Kempinski's statement that the New Management Contract was entered into on 28 April 2006.**[note: 20]** The parties subsequently tendered written submissions and expert opinions to the Arbitrator.

17 On 20 May 2008, the Arbitrator published the Third Award, which held as follows:**[note: 21]**

> (i) [T]he New Management Contract made on [28th] April 2006 is inconsistent with the obligations [of Kempinski] under the [Management Contract] …
>
> (ii) As a result the methods of performance that remained open after the Three Decisions are no longer possible.
>
> (iii) The possibility of damages for the period between the date of the alleged termination of the [M]anagement [C]ontract and [28th] April, 2006 still remains. When submissions on this issue are completed, the [Arbitrator] will make an award as to damages and costs.

18 Consequent upon the Third Award, the Arbitrator directed the parties on 20 May 2008 to file submissions on whether, in the event that Kempinski succeeded against Prima on the issue of liability, any damages would be payable to Kempinski for the period between the date of the alleged wrongful termination of the Management Contract by Prima and the date on which the New Management Contract was entered into by Kempinski ("the Intervening Period"). Kempinski did not comply with the Arbitrator's direction within the stipulated timeframe. Instead, it filed Originating Summons No 903 of 2008 ("OS 903") on 4 July 2008 to set aside the Third Award.

The Fourth Award

19 On 27 June 2008, pending the hearing of OS 903, Prima tendered its submissions as directed by the Arbitrator and requested the Arbitrator to decide, as a matter of law, whether any damages were payable to Kempinski for the Intervening Period should Prima be found liable for breach of contract. Prima contended that the Three Decisions had to be complied with within a reasonable period of time. In this regard, Prima conceded that a reasonable period of time would be one year from the date on which the last of the Three Decisions was issued, but submitted that since that period had already expired by the time the Intervening Period commenced, the Management Contract had ended by operation of law even before the start of the Intervening Period. As such, Prima argued, Kempinski could not claim any damages for the Intervening Period. Prima further

contended that any award of damages in favour of Kempinski for the Intervening Period would be offensive to the public policy of Indonesia.

20 Notwithstanding the absence of any arguments from Kempinski on the aforesaid question (*viz*, whether any damages would be payable to Kempinski for the Intervening Period should Prima be found liable for breach of contract), the Arbitrator proceeded to consider that question. He took the view that awarding damages to Kempinski for the Intervening Period would involve overlooking the fact that during that period, Kempinski performed the Management Contract in a way which was contrary to the law of Indonesia as set out in the Three Decisions. For this reason, the Arbitrator held, any award of damages in favour of Kempinski for the Intervening Period would be against the public policy of Indonesia and would not be enforceable. In the result, the Arbitrator published the Fourth Award on 20 October 2008 holding that Kempinski could not claim any damages for the Intervening Period and, accordingly, its claims for relief in the Arbitration, including its claim for specific performance of the Management Contract, had wholly failed.

21 On 29 January 2009, Kempinski filed Originating Summons No 121of 2009 ("OS 121") to set aside the Fourth Award.

The Costs Award

22 After the issue of the Fourth Award, the Arbitrator requested the parties to make submissions on costs. On 15 April 2009, he issued the Costs Award, which was in favour of Prima. On 6 July 2009, Kempinski filed Originating Summons No 766 of 2009 ("OS 766") to set aside the Costs Award.

The Judge's decision on OS 903, OS 121 and OS 766

23 Before the Judge, Kempinski made the following arguments in support of its application to set aside the Third Award, the Fourth Award and the Costs Award in, respectively, OS 903, OS 121 and OS 766:

> (a) the Arbitrator lacked the jurisdiction to issue the Third Award and the Fourth Award because the matters determined in those awards had already been determined in the First Award and the Second Award (referred to hereafter as "the *functus officio* argument");
>
> (b) Prima was barred by issue estoppel from raising any issue relating to the New Management Contract in the Arbitration after the Second Award was made (referred to hereafter as "the issue estoppel argument");
>
> (c) in the Third Award and the Fourth Award, the Arbitrator had decided issues that had not been formally pleaded, thereby acting beyond the scope of his authority (referred to hereafter as "the pleadings argument"); and
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> (d) there was apparent bias on the part of the Arbitrator in conducting his own line of inquiry into the New Management Contract, and Kempinski's right to be heard had been violated by (*inter alia*) the Arbitrator's refusal to allow cross-examination of the respective parties' legal experts on the legal effect of the New Management Contract (referred to hereafter as "the natural justice argument").

24 Prima contested all the above arguments and further submitted that even if any of them were made out, Kempinski had not suffered any prejudice, and the Third Award, the Fourth Award and the Costs Award (collectively, "the Three Awards") should therefore not be set aside.

25 The Judge set aside the Third Award on the basis that the New Management Contract, which had a significant impact on the Arbitrator's decision, had not been pleaded. As for the other three arguments that were raised by Kempinski in challenging the Third Award, the Judge found that they either did not apply or consequential prejudice was not made out. The Judge likewise set aside the Fourth Award on the ground that it was based on an unpleaded matter. Since the Third Award and the Fourth Award were set aside, the Costs Award was also set aside as a corollary.

The present appeals

26 In CA 94, CA 95 and CA 96, Prima is in effect seeking to restore, respectively, the Costs Award, the Third Award and the Fourth Award. On its part, Kempinski is cross-appealing in CA 98 against the Judge's decision on the ground that the Third Award and the Fourth Award should have been set aside based on the other three arguments set out at [23] above (other than the pleadings argument) as well.

CA 95

27 As mentioned earlier, in the court below, Kempinski raised four arguments in support of its contention that the Three Awards should be set aside. The pleadings argument is the subject matter of CA 95, while the other three arguments come within the purview of CA 98. Should we decide to allow CA 95 in respect of the Third Award, it will be necessary for us to deal with the arguments raised by Kempinski in CA 98 to consider whether that award (as well as the Fourth Award) should remain set aside, albeit on a different ground from that relied on by the Judge. However, if CA 95 is dismissed, then CA 98 need not be addressed. For this reason, we shall deal with CA 95 first.

Article 34(2)(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration

28 The Judge's decision to set aside (*inter alia*) the Third Award on the ground that it was based on an unpleaded matter was made pursuant to Art 34(2)(a)(iii) of the UNICITRAL Model Law on International Commercial Arbitration ("the Model Law"), which (apart from ch VIII thereof) has the force of law in Singapore by virtue of s 3 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"). Under Art 34(2)(a)(iii) of the Model Law, an international arbitral award can be set aside if it is shown that:

> [T]he award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration …

29 At [54]–[56] of the Judgment, the Judge commented on Art 34(2)(a)(iii) of the Model Law and the role of pleadings in arbitral proceedings as follows:

> 54 … The purpose of the arbitration agreement here, as in other cases, was to bind [the] parties to submit the disputes arising under the [Management] Contract to determination by arbitration. It did not imply that [the] parties would be free at any time during the proceedings to raise material and unpleaded points without having first made an application to amend their pleadings.
>
> 55 … Under Art 34(2)(a)(iii) of the Model Law …, one of the grounds on which an arbitration award may be set aside is where the matters decided by the Tribunal were beyond the scope of the submission to arbitration. To determine whether matters in an award were within or outside the scope of the submission to arbitration, a reference to the pleadings would usually have to be made. It is therefore incorrect for [Prima] to argue that jurisdiction in a particular reference was not limited to the pleadings or that there was no rule of pleading that requires all material facts to be stated and specifically pleaded as would be required in court litigation. An arbitrator must be guided by the pleadings when considering what it is that has been placed before him for decision by the parties. Pleadings are an essential component of a procedurally fair hearing both before a court and before a tribunal. I was therefore surprised that [Prima] argued that it was not required to plead material facts because this dispute was being adjudicated by an arbitrator.
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> 56 *Singapore Arbitration Legislation Annotated* by Merkin and Hjalmarsson (Informa, 2009) … states at p 38:
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> > Where an arbitration is conducted on the basis of [the] Model Law, art. 23, the arbitrator is bound to decide the case in accordance with the parties' pleadings, and he is not entitled to go beyond the pleadings and decide on points on which the parties have not given evidence and have not made submissions.

> The above statement was adopted from *Ng Chin Siau v How Kim Chuan* [2007] 2 SLR(R) 789, a decision that I made in the context of the Arbitration Act (Cap 10, 2002 Rev Ed) … The fact that it was incorporated in a text on the Model Law and the [IAA] shows that the principles enunciated in that case are accepted as applying equally to international arbitration under the [IAA]. In that case, I emphasized that abiding by the rule as to the pleading of material facts was essential in arbitration proceedings where the right of appeal was severely limited.

Prima's case on the pleadings argument

30 Before us, Prima's case is that the Judge's decision on the pleadings argument is wrong for the following reasons:

(a) Pleadings are not essential in international arbitration.

(b) The essence of procedural fairness lies in Art 18 of the Model Law, which does not require the filing of pleadings.

(c) Subject to the requirements of Art 18 of the Model Law, an arbitrator is allowed to determine the arbitration procedure to be followed. The Model Law does not fetter an arbitrator's discretion to decide what the required procedure in an arbitration should be or what the required content (or content specificity) of the pleadings filed in an arbitration should be.

(d) The New Management Contract and its legal effect on Kempinski's claim for damages in general was an issue within the Arbitrator's mandate as it fell within "the scope of the submission to arbitration" for the purposes of Art 34(2)(a)(iii) of the Model Law. In this regard, Prima reiterates the argument (which was rejected by the Judge) that the jurisdiction of the Arbitrator was determined by the scope of the arbitration agreement in Art 20 of the Management Contract, and not by the respective parties' pleadings. The arbitration agreement in this case, Prima submits, is of the widest possible construction and would cover the relevant facts of the New Management Contract in relation to the continuing viability (or otherwise) of Kempinski's claim for damages.

We should add, in relation to sub-para (d) above, that Prima's submissions on the New Management Contract were directed mainly at the legal effect of that contract on Kempinski's claim for damages; its legal effect on Kempinski's alternative claim for specific performance was hardly addressed before this court. The same comment applies to Kempinski's submissions on the New Management Contract. We shall thus, in the rest of this judgment, discuss the legal effect of the New Management Contract predominantly in respect of Kempinski's claim for damages. It should, however, be noted that our comments and ruling on this issue apply equally to Kempinski's alternative claim for specific performance as well.

Our analysis of the pleadings argument

31 In our view, the crucial point in relation to the pleadings argument is whether the legal effect of the New Management Contract was part of, or directly related to, the dispute which the parties submitted for arbitration. In *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597, this court made the following observations on the jurisdiction (in the sense of the mandate or authority) of an arbitral tribunal:

> 37 The law on the jurisdiction of an arbitral tribunal is well established. Article 34(2)(a)(iii) of the Model Law merely reflects the basic principle that an arbitral tribunal has no jurisdiction to decide any issue not referred to it for determination by the parties. In relation to this matter, we note Lord Halsbury's observations in *London and North Western and Great Western Joint Railway Companies v J H Billington, Limited* [1899] AC 79, where he noted, at 81, as follows:
>
> > I do not think any lawyer could reasonably contend that, when parties are referring differences to arbitration, under whatever authority that reference is made, you could for the first time introduce *a new difference after the order of arbitration was made*. Therefore, upon that question I certainly do give a very strong opinion. …

[emphasis in original]

In *London and North Western and Great Western Joint Railway Companies v J H Billington, Limited* [1899] AC 79 at 81, Lord Halsbury LC was making a general observation that where an arbitral award had been made on issues that had been submitted for arbitration, one party could not be allowed to introduce a new dispute which was not within the scope of the submission to arbitration.

The role of pleadings in arbitration and litigation

32 An arbitration agreement is merely an agreement between parties to submit their disputes for arbitration. The disputes submitted for arbitration determine the scope of the arbitration. It is plain that the scope of an arbitration agreement in the broad sense is not the same as the scope of the submission to arbitration. The former must encompass the latter, but the converse does not necessarily apply, in that the particular matters submitted for arbitration may not be all the matters covered by the arbitration agreement. The parties to an arbitration agreement are not obliged to submit whatever disputes they may have for arbitration. Those disputes which they choose to submit for arbitration will demarcate the jurisdiction of the arbitral tribunal in the arbitral proceedings between them. An arbitral tribunal has no jurisdiction to resolve disputes which have not been referred to it in the submission to arbitration. Simply put, a party cannot raise a new dispute in an arbitration without the consent of the other party. These propositions flow inexorably from the consensual nature of arbitration.

33 The role of pleadings in arbitral proceedings is to provide a convenient way for the parties to define the jurisdiction of the arbitrator by setting out the precise nature and scope of the disputes in respect of which they seek the arbitrator's adjudication. It is for this purpose that Art 23 of the Model Law provides for the compulsory filing of pleadings as follows:

STATEMENTS OF CLAIM AND DEFENCE

> (1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.
>
> (2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

34 Additionally, Rule 18 of the SIAC Rules (1997 Ed) also provides for pleadings to be filed by the parties. Accordingly, in order to determine whether an arbitral tribunal has the jurisdiction to adjudicate on and make an award in respect of a particular dispute, it is necessary to refer to the pleaded case of each party to the arbitration and the issues of law or fact that are raised in the pleadings to see whether they encompass that dispute.

35 Pleadings play a similar role in litigation. A useful summary of the function of pleadings in litigation is provided by Sir Jack Jacob and Iain S Goldrein, *Pleadings: Principles and Practice* (Sweet & Maxwell, 1990) at pp 2–4 as follows:

> **Pleadings — their dual object in summary**
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> Pleadings serve a two-fold purpose:
>
> > (a) … To inform each party what is the case of the opposite party which he will have to meet before and at the trial; and
> >
> > (b) … Concurrently to apprise the court [of] what are the issues. The identity of the issues is crucial, not only for the purposes of trial, but also for the purposes of all the pre-trial interlocutory proceedings.

The object of pleadings — in detail

> (a) … To define with clarity and precision the issues or questions which are in dispute between the parties and fall to be determined by the court. …
>
> (b) … To require each party to give fair and proper notice to his opponent of the case he has to meet to enable him to frame and prepare his own case for trial. …
>
> (c) … To inform the court what are the precise matters in issue between the parties which alone the court may determine, since they set the limits of the action which may not be extended without due amendment properly made. …
>
> (d) … To provide a brief summary of the case of each party, which is readily available for reference, and from which the nature of the claim and [the] defence may be easily apprehended, and to constitute a permanent record of the issues and questions raised in the action and decided therein so as to prevent future litigation upon matters already adjudicated upon between the litigants or those privy to them.

36 Although there is an important difference between arbitration and litigation in the sense that arbitration is consensual in nature whereas litigation is not, the basic principles applicable to determine the jurisdiction of the arbitrator or the court to decide a dispute raised by the parties are generally the same. In arbitration, the parties can determine the scope of the arbitration; so can the parties in litigation *vis-à-vis* the issues to be tried. As Dyson LJ observed in *Al-Medenni v Mars UK Limited* [2005] EWCA Civ 1041 at [21]:

> … It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. *The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. Bu[t] if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness.* [emphasis added]

37 Thus, if A sues B for damages for breach of contract and B joins issue with A, the court cannot dismiss the claim on the ground that there is no contract unless that ground is raised by way of an amended defence (allowed by the court) at any time before the conclusion of the trial (see *Loy Chin Associates Pte Ltd v Autohouse Trading Pte Ltd* [1991] 1 SLR(R) 740 at [19]–[21]). Even where a new issue is raised by the court on its own motion as a result of the evidence adduced during the trial, the defence should, for the sake of good order, be amended so that the plaintiff may file an amended reply and, if necessary, call rebuttal evidence on the new issue. This is an established process to ensure fairness to the party affected by the new issue. From the court's perspective, any issue of fact and/or law that is relevant to the dispute before it will normally be allowed to be raised by way of an amendment to the pleadings so that all the issues relevant to the dispute can be disposed of at the same time in the same trial (subject only to the principle that a proposed amendment to a party's pleadings, if allowed, must not result in prejudice to the other party which cannot be compensated by way of costs).

38 The established principles in this area of the law are clear. As Lord Normand succinctly stated in *Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218 at 238–239:

> The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. …
>
> …

> … To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

Similarly, in *Loveridge, Loveridge v Healey* [2004] EWCA Civ 173, Lord Phillips of Worth Matravers MR commented at [23]:

> It is on the basis of the pleadings that the parties decide what evidence they will need to place before the court and what preparations are necessary before the trial. Where one party advances a case that is inconsistent with his pleadings, it often happens that the other party takes no point on this. Where the departure from the pleadings causes no prejudice, or where for some other reason it is obvious that the court, if asked, will give permission to amend the pleading, the other party may be sensible to take no pleading point. Where, however, departure from a pleading will cause prejudice, it is in the interests of justice that the other party should be entitled to insist that this is not permitted unless the pleading is appropriately amended. That then introduces, in its proper context, the issue of whether or not the party in question should be permitted to advance a case which has not hitherto been pleaded.

The scope of the submission to arbitration in the present case

39 In the present case, the scope of the parties' submission to arbitration is delineated by the Notice of Arbitration filed by Kempinski on 20 May 2002 in accordance with Art 20 of the Management Contract. After setting out the disputes arising from the Management Contract, Kempinski alleged that the purported termination of the Management Contract by Prima on 6 February 2002 was legally unjustified, wrongful and/or in repudiation of that contract. In consequence, Kempinski sought the reliefs set out at [6] above.

The Judge's reasoning apropos the pleadings argument

40 The Judge set aside the Third Award on the ground that the New Management Contract had not been pleaded and, thus, its legal effect was not an issue which had been submitted for arbitration. Accordingly, the Arbitrator had no jurisdiction to decide that issue and had acted in excess of his jurisdiction in making the Third Award, which, on account of the New Management Contract, indirectly amended the Second Award. The Judge held that the Arbitrator would have had the jurisdiction to decide what legal effect the New Management Contract had only if Prima had applied for leave to amend its pleadings to plead that new point and thereby allowed Kempinski to amend its pleadings as well to reply to that point.

41 The Judge explained her decision at [60]–[64] of the Judgment as follows:

> 60 In essence, [Prima] had claimed in the italicised portion of its Points of Re-amended Defence and Counterclaim, that the [Management] Contract had become unenforceable and/or incapable of performance after 3 May 2000 because of the supervening illegality. This pleading was filed in August 2003 at which point the [N]ew [M]anagement [Contract] had not been entered [into]. It was not in the contemplation of [Prima] at that time, therefore, that the impossibility of performing the [Management] Contract could possibly be due to conflicting contractual obligations voluntarily undertaken by [Kempinski] with a third party. [Prima] was saying only that the [Management] Contract could not be performed because it had been rendered illegal by the Three Decisions or because of the *force majeure* consequence of the Three Decisions. At that time, [Prima] considered the supervening illegality issue to be a total answer to [Kempinski's] claim. It was not necessary therefore to consider other points which might make it impossible for [Kempinski] to perform the [Management] Contract. The necessity of doing this only arose when the Arbitrator found, based on Prof Darus' evidence, that there were still three possible ways of performing the [Management] Contract despite the Three Decisions. Paragraph 43C of the Points of Re-Amended Defence and Counterclaim thus does not, was not intended to, and cannot, cover the issue of the effect of the [N]ew [M]anagement [Contract] on the possibility of performing the [Management] Contract. A related point, *ie*, the extent to which [Kempinski's] possible future claim to damages was restricted or adversely affected by the [N]ew [M]anagement [Contract], was also not covered by this pleading.

61 The correct course for [Prima] to have taken when it found out about the [N]ew [M]anagement [Contract] in 2006 or 2007 was to have applied to amend its pleading to include the allegation that the existence of the [N]ew [M]anagement [Contract] was a fact which made it impossible for [Kempinski] to perform the [Management] Contract and therefore to claim damages as from the date the [N]ew [M]anagement [Contract] came into existence. Such an amended pleading would have allowed [Kempinski] to amend its own pleading in order to set out the possible grounds on which it could contend that the [N]ew [M]anagement [Contract] would not have such an effect. The Arbitrator would then have been able to take evidence on the [N]ew [M]anagement [Contract] and the impact it had on the [Management] Contract and would have been able to establish the facts necessary to come to a decision as to whether or not the existence of the [N]ew [M]anagement [Contract] made it impossible for [Kempinski] to perform the [Management] Contract and/or claim damages.

62 Instead of doing that, [Prima] raised the [N]ew [M]anagement [Contract] in its letter of 28 March 2007 in which it asked for "clarifications" on the Second Award. In para 9.1 of this letter …, [Prima] asked for clarification on whether [Kempinski's] application for a PMA licence to carry on the [N]ew [M]anagement [Contract] was in breach of its active duty of good faith. In para 9.4 of the same letter, [Prima] went on to ask for clarification whether [Kempinski] was entitled after its own repudiation of the [Management] Contract (*ie*, by entering into the [N]ew [M]anagement [Contract]) to prospectively perform the [Management] Contract by rectifying its prior and existing breaches of the Three Decisions.

63 In my judgment, [Prima] was not truly asking for clarification on the Second Award by making these queries. Instead, it was raising new issues for the [Arbitrator's] determination. Indeed, in a later written submission to the court, [Prima] conceded that the wrong nomenclature had been used in the 28 March 2007 letter and that these matters were not matters of clarification. Under the [IAA], there is only a limited residual power for a tribunal to correct or interpret an arbitral award after it has been issued. Under Art 33 of the Model Law, a party to an arbitration may ask the tribunal to correct in an award "any errors in computation, any clerical or typographical errors or any errors of similar nature". It is further provided that if the parties agree, then one party may ask the tribunal to interpret a specific point or part of the award. The two queries raised by [Prima] in the 28 March 2007 letter (see [62] above) did not fall into either of these categories. The Arbitrator could either have ignored the request or pointed out the error. Instead, unfortunately, he took up the points and this eventually resulted in the Third Award. The issues raised required proper investigation and a determination of the factual matrix. That this was not done was one consequence of the issues being raised as "clarifications" and not in the form of an amended pleading which would have served to identify properly to [Kempinski] the case that it had to meet and reply to, and which would have enabled it to put in the necessary response and evidence.

64 In the result, the Third Award must be set aside on the ground that failure to plead the [N]ew [M]anagement [Contract] resulted in the [Arbitrator] making a decision that was beyond the scope of the matters submitted to [him]. …

Was the legal effect of the New Management Contract within the scope of the parties' submission to arbitration?

42 As mentioned at [31] above, the crucial point in relation to the pleadings argument is whether the legal effect of the New Management Contract was within the scope of the parties' submission to arbitration. This issue may be determined by considering what disputes between the parties were submitted to the Arbitrator for adjudication. Kempinski's claim against Prima was for damages for breach of contract for "the remainder of the term of the [Management] Contract"**[note: 22]** starting from 6 February 2002 (the date on which Prima terminated the Management Contract) and, in the alternative, specific performance. On its part, Prima counterclaimed for damages for breach of contract by Kempinski, and subsequently amended its Points of Defence and Counterclaim to plead illegality and *force majeure* arising from the Three Decisions with effect from

3 May 2000. We pause here to mention that "illegality" and "supervening illegality" are both English law concepts and are not so characterised in Indonesian law. The Arbitrator referred to the use of these terms as "an unfortunate facet"**[note: 23]** of the Arbitration that "befuddled the issues to a considerable extent".**[note: 24]** In the Arbitrator's view, "the situation of the [Three Decisions] required consideration of the principles of *force majeure* rather than that of illegality and should have been considered in these terms from the outset".**[note: 25]** However, he also noted that "[t]his difference in nomenclature ha[d] not significantly affected the outcome as sufficient clarity of the approach of Indonesian law had emerged as the [A]rbitration proceeded."**[note: 26]**

43 As mentioned earlier, the Arbitrator made the First Award on 18 February 2005 and held that the Management Contract had not been rendered illegal by the Three Decisions, although it had become impossible to perform, save in a manner that was in conformity with the Three Decisions. In the Second Award made on 12 December 2006, the Arbitrator held that based on the expert opinion of Prof Darus (Kempinski's expert witness), the Management Contract could still be lawfully performed in three ways which conformed with the Three Decisions. After the Second Award was made, Prima discovered that Kempinski had entered into the New Management Contract on 28 April 2006, which conduct (it was not disputed) was in breach of Kempinski's management obligations under the Management Contract.

44 Consequent upon this discovery, Prima sought "clarification"**[note: 27]** from the Arbitrator as to whether, in view of the New Management Contract, the Management Contract could still be performed by Kempinski in any of the three permitted ways set out in Prof Darus' opinion. The Arbitrator directed the parties to submit written arguments on this issue. In its written submissions, Kempinski contended that the New Management Contract was irrelevant to the issue of Prima's liability for breach of the Management Contract and only had a potential bearing on the issue of specific performance and damages.

45 In the Third Award made on 20 May 2008, the Arbitrator held that Kempinski's obligations under the New Management Contract were inconsistent with its obligations under the Management Contract, and that as a result: (a) Kempinski could no longer perform its obligations under the Management Contract in any of the three ways that remained possible after the Three Decisions were announced, and therefore could not claim any damages for the period after 28 April 2006 (the date on which the New Management Contract was entered into); but (b) the possibility of damages for the Intervening Period still remained. The Arbitrator explained his reasoning as follows in the Third Award:**[note: 28]**

> 12. … When [Prof Darus] identified three alternative methods of performance, she identified future conduct which would have enabled the performance of the obligations under the [Management] [C]ontract. *It was the possibility of the three alternative methods of performance that enabled the avoidance of a force majeure situation and kept the [Management] [C]ontract alive. Closing them would obviously impact on the continuing validity of the [Management] [C]ontract. The Awards* [*ie*, the First Award and the Second Award] *were premised on this continuity validity.*
>
> …
>
> 14. … [T]he three methods are techniques of future performance the possibility of which keeps the [Management] [C]ontract alive for a reasonable period of time. This view was foreshadowed in the First Award … *The continuing validity of the [Management] [C]ontract ... is premised on the future possibility of the performance of [that] contract and any event which makes that performance not possible impacts [on] the continuing validity of [that] contract.*
>
> …
>
> [emphasis added]

46 The underlying legal basis of the Third Award was that of *force majeure*, in that Kempinski, by entering into the New Management Contract on 28 April 2006, had breached Art 21 of the Management Contract and had thus made it impossible for itself to thereafter perform the Management Contract by any of the three methods of performance that remained possible after the Three Decisions were announced. In other words, *force majeure* had operated to terminate the Management Contract as of

28 April 2006. As such, even if Kempinski had succeeded against Prima on the issue of liability and even if specific performance of the Management Contract during the Intervening Period had been theoretically possible, after 28 April 2006, Kempinski's claim for damages as well as its alternative claim for specific performance were no longer viable.

47 Having regard to the pleaded issues that were submitted for arbitration, which included Kempinski's claim for damages from 6 February 2002 onwards for "the remainder of the term of the [Management] Contract"**[note: 29]** and its alternative claim for specific performance, the issue of what legal effect the New Management Contract had on the continuing viability of these two claims after 28 April 2006 was, in our view, within the scope of the parties' submission to arbitration. Even if Prima had wrongfully terminated the Management Contract, Kempinski's conduct in entering into the New Management Contract would have prevented damages from accruing with effect from 28 April 2006 as thereafter, Kempinski, being itself in breach of the Management Contract, could not suffer any loss, nor could it purport to be able to perform the Management Contract in any of the three ways that remained possible after the Three Decisions were announced. In our view, any new fact or change in the law arising after a submission to arbitration which is ancillary to the dispute submitted for arbitration and which is known to all the parties to the arbitration is part of that dispute and need not be specifically pleaded. It may be raised in the arbitration, as Prima did when it raised the New Management Contract as part of its *force majeure* defence to Kempinski's claim. We should also point out that Kempinski was given sufficient notice of and opportunity to meet Prima's *force majeure* defence.

48 In our view, the Judge, with respect, took too narrow an approach in determining the extent or scope of the Arbitrator's jurisdiction under the parties' submission to jurisdiction. She erred in finding that since the New Management Contract had not been pleaded, its legal effect on Kempinski's claim in the Arbitration was not within the scope of the parties' submission to arbitration. We take the different view that since Kempinski was seeking either damages from 6 February 2002 onwards "for the remainder of the term of the [Management] Contract"**[note: 30]** (*ie*, until 15 April 2014) or, alternatively, specific performance of the Management Contract, any new fact or change in the law arising in the course of the Arbitration which would affect Kempinski's right to these remedies must fall within the scope of the parties' submission to arbitration. In the circumstances, it was well within the Arbitrator's jurisdiction to decide whether, in the event that Kempinski succeeded against Prima on the issue of liability, the New Management Contract had the legal effect contended for by Prima. The matter can be considered from another perspective. Suppose we were to agree with the Judge and dismiss Prima's appeal in CA 95 on the ground that Prima should have (as the Judge held) amended its pleadings to specifically plead the New Management Contract and its legal effect, the final outcome of Kempinski's claim in respect of the period after 28 April 2006 (after this matter is remitted for arbitration) would still be the same. Prima would still be entitled, after making the necessary amendments to its pleadings, to adduce evidence of the New Management Contract to show that Kempinski would not be entitled to any damages or to insist on specific performance of the Management Contract after 28 April 2006.

49 Our conclusion on the pleadings argument provides a different perspective as to whether it was necessary for Prima to further amend its Points of Re-Amended Defence and Counterclaim to plead the defence arising out of the New Management Contract. The Judge held that Prima's failure to do so resulted in the legal effect of the New Management Contract being outside the scope of the parties' submission to arbitration, and was therefore fatal to the Third Award. However, leaving aside this conclusion (which, with respect, we have held to be an error of law), the crucial question is whether Kempinski was prejudiced by Prima's omission to amend its pleadings to plead the New Management Contract and its legal effect. The Judge held that Kempinski was prejudiced in that if that issue had been formally pleaded, Kempinski would have been able to reply to Prima's pleadings on that issue. The Arbitrator would then have been able to (see [61] of the Judgment):

> … take evidence on the [N]ew [M]anagement [Contract] and … establish the facts necessary to come to a decision as to whether or not the existence of the [N]ew [M]anagement [Contract] made it impossible for [Kempinski] to perform the [Management] Contract and/or claim damages.

50 With respect, we disagree with the Judge's views on this issue. The evidence on record shows that it was Kempinski which failed to disclose the existence of the New Management Contract when the Arbitrator was considering the four questions (see [15] above) which were the subject matter of the Second Award, thus depriving the Arbitrator of the opportunity to factor in the relevance and materiality of the New Management Contract before making the Second Award. In this regard, we note that although Kempinski had not entered into the New Management Contract yet at the time of the oral hearing relating to the Second Award (that oral hearing took place from 6 to 8 February 2006 (see [14] above)), it subsequently entered into that

contract *before* the Arbitrator issued the Second Award. After Prima discovered that Kempinski had entered into the New Management Contract, it raised the issue with the Arbitrator in a letter dated 28 March 2007 from its solicitors, and this resulted in an exchange of communications between the parties and the Arbitrator on: (a) 24 May 2007 (letter from Kempinski's solicitors to the Arbitrator);**[note: 31]** (b) 2 July 2007 (letter from Prima's then solicitors to the Arbitrator);**[note: 32]** and (c) 4 September 2007 (letter from Kempinski's solicitors to the Arbitrator).**[note: 33]** The Arbitrator also informed the parties of the issues which he wanted them to address – in particular, the legal effect of the New Management Contract – on the following occasions: (a) at the April 2007 Directions Conference (see [16] above); and (b) in his e-mails to the parties dated, respectively, 11 July 2007,**[note: 34]** 14 September 2007,**[note: 35]** 14 December 2007**[note: 36]** and 20 February 2008.**[note: 37]** Finally, written submissions and expert opinions on the legal effect of the New Management Contract were tendered by both parties. *Vis-à-vis* the written submissions, Prima and Kempinski filed their first round of written submissions on 26 October 2007; thereafter, Kempinski and Prima tendered their second round of submissions on 1 February 2008 and 5 February 2008 respectively. As for the expert opinions, Kempinski's expert, Prof Darus, submitted eight sets of expert opinion (one on 25 April 2008 and seven on 7 May 2008), while Prima's expert, Mr Fred Tumbuan ("Mr Tumbuan"), submitted his expert opinion on 29 April 2008.

51 Given the extensive correspondence, written submissions and expert opinions that were exchanged *vis-à-vis* the legal effect of the New Management Contract, we are of the view that Kempinski had ample notice of Prima's case on this particular point. That Prima did not amend its pleadings to specifically plead the New Management Contract and its legal effect was, in our view, immaterial. Kempinski did not suffer any prejudice in any way since it was given ample opportunity to address this issue of law. Although the Judge held that Kempinski was deprived of the opportunity to plead that the New Management Contract was not inconsistent with the Management Contract, this holding is, in our view, contrary to the conduct of Kempinski at the Arbitration. The terms of the New Management Contract were within Kempinski's exclusive knowledge. All it had to do to answer Prima's case on the New Management Contract was to disclose that contract to the Arbitrator, either with or without redacting the commercially-sensitive clauses.

Our ruling on CA 95

52 For the above reasons, we hold that the New Management Contract and its legal effect fell within the scope of the parties' submission to arbitration, and the Arbitrator thus had the jurisdiction to decide that issue. Accordingly, we find that the Judge erred in setting aside the Third Award. Prima's appeal in CA 95 is therefore allowed.

53 We shall now consider the merits of the other appeals, beginning with CA 98.

CA 98

The functus officio argument and the issue estoppel argument

54 As mentioned earlier, in CA 98, Kempinski contends that the Judge should have set aside the Third Award and the Fourth Award based on the other arguments set out at [23] above (apart from the pleadings argument) as well. *Vis-à-vis* the *functus officio* argument, Kempinski's case in the court below was that the Arbitrator was *functus officio* when he made the Third Award and the Fourth Award as the matters determined therein had already been determined in the First Award and the Second Award. In respect of the issue estoppel argument, Kempinski's case before the Judge was that after the Second Award was made, Prima was estopped from relying on the New Management Contract to challenge Kempinski's ability to perform the Management Contract. The Judge rejected both the *functus officio* argument and the issue estoppel argument on the ground that the First Award and the Second Award dealt with matters that were distinct from those determined in the Third Award and the Fourth Award (see [30]–[46] and [48]–[51] of the Judgment).

55 We agree with the Judge's decision in OS 903 that the issues decided by the Arbitrator in the First Award, the Second Award, the Third Award and the Fourth Award were distinct from one another. The First Award held that, as a matter of law, the Three Decisions did not render the Management Contract illegal, but merely made its performance impossible except in a manner that was in conformity with the Three Decisions. The Second Award held that, as a matter of law, since there were alternative methods of performing the Management Contract in a manner that conformed with the Three Decisions, damages would still be available to Kempinski if it had performed the Management Contract in such a manner. The Third Award held that Kempinski could not claim damages for the period from 28 April 2006 onwards as a result of its entering into the New

Management Contract, which conduct made it impossible for Kempinski, after 28 April 2006, to lawfully perform its obligations under the Management Contract in any of the three ways that remained open after the Three Decisions were announced. The Fourth Award held that Kempinski also could not claim damages for the Intervening Period, and, thus, its claim in the Arbitration had wholly failed. For these reasons, we reject both the *functus officio* argument and the issue estoppel argument.

The natural justice argument

Apparent bias

56 In the court below, Kempinski also sought to set aside the Third Award by raising the natural justice argument (see [23(d)] above). Among other things, it alleged that there had been apparent bias on the Arbitrator's part as:

> (a) he had entered the fray by asking Kempinski for information on the New Management Contract and by requesting for submissions from the parties on whether an adverse inference should be drawn from Kempinski's failure to give proper discovery of that contract; and
>
> (b) he had conducted the Arbitration with a closed mind in that he had reached conclusions on certain matters of Indonesian law without expert evidence having been adduced on those matters.

57 The Judge reviewed the evidence and held that Kempinski's allegation that the Arbitrator had entered the fray by asking for information on the New Management Contract was not made out as the existence of that contract had been raised by Prima and the Arbitrator had merely asked Kempinski for more information. As for Kempinski's complaint that the Arbitrator had entered the fray by requesting the parties to submit on whether an adverse inference should be drawn against it (Kempinski) for failing to give proper discovery of the New Management Contract, the Judge dismissed the complaint on the ground that it was Kempinski's repeated failure to disclose the material terms of that contract which had given rise to the issue of whether an adverse inference should be drawn. The Judge noted that Kempinski had been given several opportunities to explain its failure to disclose the New Management Contract, but had chosen not to do so.

58 With respect to Kempinski's complaint that the Arbitrator had a closed mind in that he had reached conclusions on certain matters of Indonesian law without expert evidence having been adduced on those matters, this complaint centred on two e-mails from the Arbitrator to the parties dated 14 September 2007 and 14 December 2007 respectively. The Judge was of the view (at [83] of the Judgment) that in writing the e-mail of 14 December 2007:

> … [T]he Arbitrator fell into error … This holding is not made because I think that the Arbitrator displayed a closed mind. It is made because the Arbitrator was making decisions which were beyond the scope of the existing pleadings and without the benefit of additional evidence which may have been adduced had both parties submitted proper pleadings on the issue of the [N]ew [M]anagement [Contract]. …

However, the Judge went on to hold at [84] of the Judgment as follows:

> … The SIAC Rules provide that any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence (r 10.1). [Kempinski] did not seek to challenge the Arbitrator's impartiality immediately after the issue of the 14 December [2007 e-mail]. This may be some indication that at the time [Kempinski] did not consider that that [e-mail], whether taken alone or in conjunction with the 14 September [2007 e-mail], showed a closed mind on the part of the [Arbitrator]. The SIAC Rules also provide that a challenge must be issued within 14 days after the relevant circumstances become known to the challenger. It seems to me, although I do not express a concluded view since this point was not argued before me, that [Kempinski's] failure to challenge the Arbitrator's impartiality in late 2007 or early 2008 should preclude the argument that is now being made on the basis of the [Arbitrator's e-mails dated 14 September 2007 and 14 December 2007].

59 For the reasons given by the Judge as set out at [57]–[58] above, we agree with her finding that the Arbitrator did not enter the fray, nor did he have a closed mind with regard to the matters of Indonesian law raised in his e-mails of 14 September 2007

and 14 December 2007. Given that the Arbitrator is a Professor of Law of the National University of Singapore, it is not surprising that he thought of all the possible legal ramifications that could arise from the facts before him and then sought the views of counsel for the parties on those matters. In our view, the Arbitrator's inquiries would not have given 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 when he raised the matters of Indonesian law set out in his e-mails of 14 September 2007 and 14 December 2007.

60 Indeed, we note that under Rule 25(e) of the SIAC Rules (1997 Ed), an arbitrator has the power to conduct on his own motion such inquiries as may appear to him to be necessary or expedient. Further, under Art 19 of the Model Law, an arbitrator may conduct an arbitration in such manner as he considers appropriate, including in relation to determining the admissibility, relevance, materiality and weight of any evidence.

The right to be heard – Cross-examination of expert witnesses

61 Before the Judge, Kempinski also alleged, as part of the natural justice argument, that it had been denied the right to be heard before the Third Award was made, in that it had been deprived of the opportunity to cross-examine Prima's expert witness, Mr Tumbuan, on the legal effect of the New Management Contract. The Judge accepted Kempinski's argument, but held that it had suffered no prejudice. At [96]–[97] of the Judgment, the Judge explained why, on balance, there had been no prejudice to Kempinski:

> 96 It is my view … that the [Arbitrator] should have, at the least, asked the parties whether they wished to cross-examine each other's expert on the new opinions submitted before [he] proceeded to issue the Third Award. The 2005 Procedural Order [*viz*, the procedural order by the Arbitrator dated 20 September 2005 directing, in essence, that the four questions set out in the quotation at [15] above were to be dealt with by cross-examination of the parties' expert witnesses],**[note: 38]** the [Arbitrator's] insistence on cross-examination in the 28 September 2005 letter, and the vigorous cross-examination of the experts that had previously taken place would have combined to create an expectation that new expert evidence would not be accepted or rejected without giving the experts the opportunity to defend their views on cross-examination. [Prima] put in an argument that, by this stage, the [A]rbitration was akin to a documents-only arbitration. I cannot accept that argument. There was a great deal of correspondence (in fact, far too much), but that did not change the essential nature of the Arbitration especially as [Kempinski] kept emphasising its desire to proceed to a hearing on the facts and to cross-examine the factual witnesses.
>
> 97 One of the requirements for an award to be set aside on the ground of breach of natural justice is that such breach must cause prejudice to the rights of the party challenging the award. In this case, in one sense, the breach caused prejudice to [Kempinski's] rights because the Arbitrator in the Third Award rejected Prof Darus' opinions in relation to this issue: he considered that they conflicted with evidence that she had previously given and that he had accepted. Prof Darus was not given the opportunity to even attempt to reconcile the apparent conflict between her previous and her current evidence. Nor was [Kempinski] able to attempt, by cross-examination, to wring any concessions from Mr Tumbuan on his conflicting opinion. *On the other hand, since the breach occurred in the context of an award that was outside the submission to arbitration, even if cross-examination had been allowed the award would still have been invalid.* The parties in fact saved costs by not conducting cross-examination. On balance, therefore, I hold that in the circumstances the failure to invite parties to cross-examine each other's experts could not have prejudiced their rights.
>
> [emphasis added]

62 Kempinski's argument before us is that the Judge's finding was that because the New Management Contract was not within the scope of the parties' submission to arbitration, the Arbitrator's failure to allow it (Kempinski) to cross-examine Prima's expert witness on the legal effect of that contract did not cause it any prejudice. Hence, Kempinski submits, if this court were to disagree with the Judge and find that the legal effect of the New Management Contract was within the scope of the parties'

submission to arbitration, then it must follow that the lack of cross-examination of Prima's expert witness on this issue had resulted in a violation of Kempinski's right to be heard and, consequently, Kempinski had suffered prejudice.

63 In our view, Kempinski's interpretation of the Judge's reasoning as to why the lack of cross-examination of Prima's expert witness on the legal effect of the New Management Contract had not caused it (Kempinski) any prejudice (and had in fact saved it some expense) is correct. However, Kempinski's conclusion that if this court were to hold that the legal effect of the New Management Contract was within the scope of the parties' submission to arbitration (which is what we have held at [52] above), then it must have suffered prejudice by having been deprived of the right to cross-examine Prima's expert witness on this point does not necessarily follow. This is because, first, both parties' expert witnesses had submitted their written opinion evidence on the legal effect of the New Management Contract pursuant to the Arbitrator's request in his e-mail to the parties dated 17 March 2008 ("the Arbitrator's 17 March 2008 e-mail") (see [64] below). Second, there is nothing on record which showed that Kempinski had requested and the Arbitrator had refused to allow Kempinski to cross-examine Prima's expert witness on the legal effect of the New Management Contract in relation to, specifically, the question set out in the Arbitrator's 17 March 2008 e-mail. In the circumstances, Rule 22.1 of the SIAC Rules (1997 Ed), in so far as it mandates that "[u]nless the parties have agreed on documents-only arbitration, the Tribunal shall, *if either party so requests*, hold a hearing for the presentation of evidence by witnesses, including expert witnesses, or for oral submissions" [emphasis added], does not assist Kempinski. Third, even if Kempinski had indeed requested to cross-examine Prima's expert witness on the issue raised in the Arbitrator's 17 March 2008 e-mail but had been turned down, it is now too late for Kempinski to complain about the Arbitrator's failure to allow such cross-examination since Kempinski had not raised any objection when its request was turned down, but had instead tendered two written opinions on the aforesaid issue. In this regard, Rule 34.1 of the SIAC Rules (1997 Ed) provides that a party is deemed to have waived its right to object to any non-compliance with these Rules if it knows that any provision of or requirement under these Rules has not been complied with, and yet proceeds with the arbitration without promptly stating its objection. In our view, Kempinski's argument that it had been denied the right to be heard, in terms of having been denied the opportunity to cross-examine Prima's expert witness on the legal effect of the New Management Contract (especially in relation to the issue raised in the Arbitrator's 17 March 2008 e-mail), is nothing more than a veiled attempt to introduce by the backdoor an objection which it has been deemed to have waived.

64 The crucial question *vis-à-vis* Kempinski's complaint that it had been denied the right to be heard before the Third Award was made is whether each party was given the opportunity to submit its expert witness's written opinion evidence on the legal effect of the New Management Contract, especially in relation to the question set out in the Arbitrator's 17 March 2008 e-mail, before the Third Award was made. The question that was put to the parties in the Arbitrator's 17 March 2008 e-mail was as follows:**[note: 39]**

> 1. Having regard to the fact that [Kempinski] has entered into [the] [N]ew [M]anagement [C]ontract in the vicinity of the [Hotel] that was the subject matter of the [Management] Contract between [Kempinski] and [Prima], is the conduct of the parties to [the] dispute after 6 February 2002 relevant to the issues that have been raised in this arbitration.
>
> (2) The opinions must have regard to the [Second Award] and the methods of performance open to [Kempinski] mentioned therein as well as those discussed in the existing opinions of the experts.
>
> The opinions should be submitted by 4th April, 2008.

65 Kempinski submitted the opinion of its legal expert, Prof Darus, on 25 April 2008, and Prima submitted the opinion of its legal expert, Mr Tumbuan, on 29 April 2008. Thereafter, Kempinski submitted Prof Darus' supplementary opinion on 5 May 2008. The Arbitrator rejected Prof Darus' opinion of 25 April 2008 that Kempinski's entry into the New Management Contract was "legally irrelevant under Indonesian law and ha[d] no effect on the quantum of damages to be awarded to [Kempinski] for [Prima's] wrongful termination of the [Management] Contract".**[note: 40]** He also rejected Prof Darus' supplementary opinion of 5 May 2008 as it "[did] not fall within the right of reply reserved to [Kempinski] as a result of the late submission of Mr Tambuan's opinion."**[note: 41]** As an aside, the Arbitrator noted that the materials appended to Prof Darus' supplementary opinion did not justify "a change of opinion that ha[d] been given several times over by [Prof Darus] and on which the [Arbitrator] ha[d] relied … for [his] earlier Award [*ie*, the Second Award]."**[note: 42]**

66 In contrast to Prof Darus, Mr Tumbuan was of the opinion that even if the Management Contract were indeed valid (*ie*, even if it were indeed not illegal *per se* as the Arbitrator had held in the First Award), it nonetheless ended when Kempinski entered into the New Management Contract on 28 April 2006 because Kempinski's conduct in doing so was in breach of Art 21 of the Management Contract, read with Art 22.5 thereof (we note here that Mr Tumbuan actually referred to Art 22.6 of the Management Contract in his opinion, but that was probably an inadvertent error on his part as it is Art 22.5 which contains the *force majeure* clause). The Arbitrator accepted Mr Tumbuan's opinion and concluded that the New Management Contract was "inconsistent with the obligations [of Kempinski] under the [Management] [C]ontract",**[note: 43]** thereby making it impossible for Kempinski, after 28 April 2006, to perform the Management Contract by any of the three methods that remained open after the Three Decisions were announced.

67 Given that the parties clearly had the opportunity to present to the Arbitrator their respective expert witnesses' written opinions on the legal effect of the New Management Contract, and given that the Arbitrator gave careful consideration to all the written opinions, there is absolutely no merit in Kempinski's complaint that it had been denied the right to be heard before the Third Award was made. In any event, having regard to the terms of the exclusivity clause in Art 21 of the Management Contract, it is our view that any cross-examination of Mr Tumbuan on the legal effect of the New Management Contract could not possibly have reconciled Kempinski's obligations under the two contracts. Clearly, as opined by Mr Tumbuan, in entering into the New Management Contract, Kempinski had made it impossible for itself, after 28 April 2006, to perform its obligations under the Management Contract in any of the three ways that remained possible after the Three Decisions were announced. Article 21 of the Management Contract provided as follows:**[note: 44]**

> During the Term of the [Management] Contract [Kempinski] shall not be permitted to own and/or operate another Kempinski Hotel within Indonesia without [the] prior written consent of [Prima], such consent not to be unreasonably withheld. [Kempinski] shall use its best endeavours to enable [Prima] to participate in any other Kempinski project in Indonesia.

By entering into the New Management Contract without the knowledge of Prima, Kempinski did precisely what it was not allowed to do under Art 21 of the Management Contract. Hence, after entering into the New Management Contract, Kempinski was not in any position to perform its obligations to Prima under the Management Contract by any of the three methods that were theoretically available to it after the Three Decisions came into effect.

68 We should add that although the Judge held that the Arbitrator's procedural order dated 20 September 2005, which directed (in essence) that the four questions set out in the quotation at [15] above were to be dealt with by cross-examination of the parties' expert witnesses,**[note: 45]** had created an expectation on Kempinski's part that cross-examination of the expert witnesses would be permitted for the entire duration of the Arbitration (see [96] of the Judgment (quoted at [61] above)), this finding is not strictly correct because that procedural order had been given specifically with respect to the four above-mentioned questions. That was why the Arbitrator did not seek the views of the parties on whether cross-examination of the expert witnesses on the legal effect of the New Management Contract should be allowed. Furthermore, any expectation of cross-examination of the expert witnesses on the legal effect of the New Management Contract was negated by the Arbitrator's correspondence with the parties. This can be seen from his e-mail to the parties dated 14 September 2007, in which he wrote (after referring to Kempinski's failure to comply with the directions given at the April 2007 Directions Conference (see [16] above)):**[note: 46]**

> In the light of the above, the [Arbitrator] invites the parties to address the [Arbitrator] as to the disposition of the dispute. ***It is not necessary to hear expert evidence as the law has now been sufficiently canvassed.*** *Parties could address the [Arbitrator] through* ***written submissions****.* … [emphasis added in italics and bold italics]

In a similar vein, in his e-mail dated 14 December 2007, the Arbitrator informed the parties that:**[note: 47]**

> …

> 7. The issue now is to determine the effect of the [N]ew [M]anagement [C]ontract … on the conclusion that there is the possibility of the performance of the [Management] [C]ontract in the three methods that were indicated in the [Second Award]. These three methods were identified after expert evidence. The experts also indicated views on how the three methods would work. *This dispenses with the need for further expert testimony on the particular issue.* The impact of the [N]ew [M]anagement [C]ontract on these three possible methods of performance will … be assessed in the light of the existing expert evidence.
>
> …
>
> 10. … [A] holding that the [N]ew [Management] [C]ontract closes the possibility of performance [of the Management Contract] in any of the three ways left seems inevitable. It has not been disclosed when the negotiations for the [N]ew [Management Contract] began. But it is evident that on or before 28th April 2006, the three possibilities of performance [of the Management Contract] ceased. The result is arrived at on the basis of existing expert evidence. [Kempinski] disputes this conclusion. To do so effectively, it must be demonstrated that the three ways of performance *are still possible, despite the [N]ew [Management] [C]ontract. If the parties agree to provide further expert evidence on this question, this would be heard*.
>
> …
>
> [emphasis added]

We thus find no merit in Kempinski's complaint that it had been denied the right to be heard (in terms of having been denied the right to cross-examine Prima's expert witness on the legal effect of the New Management Contract) before the Third Award was made.

Our ruling on CA 98

69 For the above reasons, we reject Kempinski's arguments in CA 98 and thus dismiss this appeal. We now turn to CA 96.

CA 96

70 Before we consider the correctness of the Fourth Award, which is the subject matter of CA 96, we note that it was issued on 20 October 2008 and that Kempinski's application in OS 121 to set it aside was filed on 29 January 2009, which was more than three months after the award was issued. However, no issue of time bar arises as the Fourth Award was only received by Kempinski on 30 October 2008, and, thus, the filing of OS 121 on 29 January 2009 was within "three months … from the date on which [Kempinski] … received the award" as stipulated in Art 34(3) of the Model Law.

71 In the court below, Prima argued that even if the Third Award were set aside, the Fourth Award could stand on its own. The Judge rejected this argument and instead accepted Kempinski's contention that if the Third Award were set aside, then the Fourth Award must also be set aside. She reasoned that (at [113] of the Judgment):

> … [T]he [Arbitrator's] finding [in the Fourth Award] that an award of damages would be contrary to public policy was based on his earlier finding that the [Management] Contract was in violation of the Three Decisions and the opinion that no effort appeared to have been made to effect the changes that would have made performance lawful (at para 62 of the Fourth Award). This opinion was not based on any pleaded case nor had evidence been admitted in relation to this issue. The Fourth Award must therefore be set aside as well.

We note that in making the above point, the Judge did not specify which country's public policy she was referring to. It is, however, clear from the Fourth Award that the Arbitrator was referring to the public policy of Indonesia (and not that of Singapore).**[note: 48]**

72 In the present case, Kempinski did not deny that after the Three Decisions came into effect, it could not lawfully perform its obligations under the Management Contract except by one of the three methods set out at [14] above. This was the opinion of Prof Darus, its own expert. Kempinski chose not to and did not address the Arbitrator on the question of whether, in the event that it succeeded against Prima on the issue of liability, any damages were payable to it for the Intervening Period. On Prima's part, it said that that question did not arise at all, reiterating its original view that the Management Contract had already ended by operation of law by, at the latest, 3 May 2001, one year after the date on which the last of the Three Decisions was issued. Prima also argued that in any event, awarding damages to Kempinski for the Intervening Period would be offensive to the public policy of Indonesia. In our view, public policy is a question of law which an arbitrator must take cognisance of if he becomes aware of it in the course of hearing the evidence presented during arbitral proceedings. As noted in Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at vol 1, p 835:

> Notwithstanding the importance of party autonomy in international arbitration, and the tribunal's mandate to resolve those disputes which are submitted to it (but not others), … [t]he arbitral tribunal's judicial mandate is to resolve the disputes that are submitted to it in accordance with applicable law – including applicable mandatory law – and to render an award on such matters that is binding and enforceable.
>
> *Where the parties' contract raises issues of illegality, violations of public policy or mandatory law, or performance of administrative functions, then the tribunal's mandate must necessarily include consideration of those issues insofar as they would affect its decision or the enforceability of its award. …*
>
> [emphasis added]

As such, the Judge erred in setting aside the Fourth Award on the basis that the public policy point "was not based on any pleaded case" (see the Judgment at [113]).

73 We further note that even though after 3 May 2000 (the date on which the last of the Three Decisions was issued), Kempinski purported to continue to manage the Hotel until Prima terminated the Management Contract on 6 February 2002 and removed Kempinski's nominated general manager from the premises, and even though Prima explicitly endorsed Kempinski's performance of the Management Contract during that period by remunerating Kempinski for it, the fact remains that Kempinski's performance of the Management Contract during that period was nevertheless an unlawful mode of performance. Arguably, Kempinski's unlawful performance would have continued after 6 February 2002 as no visible efforts were made by Kempinski to make the changes that were necessary to render its performance of the Management Contract lawful (*ie*, in conformity with the requirements of the Three Decisions). In the circumstances, any award of damages in Kempinski's favour for the Intervening Period would be tantamount to sanctioning a violation of a prohibition imposed by law (specifically, by the Three Decisions). As noted in Chan Leng Sun, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011) at para 6.152 in a section discussing the setting aside of arbitral awards on the ground of "arbitrability/public policy" (quoting from Michael J Mustill & Stewart C Boyd, *Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) at p 149):

> *The types of remedies which an arbitrator can award are limited by considerations of public policy* and by the fact that he is appointed by the parties and not by the state. For example, he cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena; *nor can he make an award which is binding on third parties or affects the public at large*, such as a judgment *in rem* against a ship, an assessment of the rateable value of land, a divorce decree, a winding-up order … [emphasis added]

74 Therefore, in our view, the Arbitrator was correct in holding in the Fourth Award that he had no power to award any damages to Kempinski for the Intervening Period as doing so would have been contrary to the public policy of Indonesia.

75 For the above reasons, even if the Third Award were indeed invalid, the Fourth Award should not have been set aside. Contrary to the Judge's view, the validity of the Fourth Award did not depend on the validity of the Third Award.

CA 94

76 As we have allowed Prima's appeals in respect of the Third Award and the Fourth Award in CA 95 and CA 96 respectively, its appeal in CA 94 in respect of the Costs Award (which relates, *inter alia*, to the costs of the proceedings leading to the Third Award and the Fourth Award) is also allowed.

Removal of the Arbitrator and remission to a freshly-constituted arbitral tribunal

77 In the court below, the Judge, after setting aside the Three Awards, remitted the Arbitration back to the Arbitrator as she found no reason to order the Arbitrator to be removed and the Arbitration to continue before a freshly-constituted arbitral tribunal. In view of our decisions, we agree that there is no basis to consider Kempinski's request for the Arbitrator to be removed. Accordingly, the Arbitrator will now have to decide how to proceed further with the Arbitration.

Conclusion

78 In the result, we allow Prima's appeals in CA 94, 95 and 96, and dismiss Kempinski's cross-appeal in CA 98. Accordingly, we reinstate each of the Three Awards and order that the costs of these appeals and the proceedings below be paid by Kempinski, with the usual consequential orders to apply.

[note: 1] See para 3 of the Fourth Award (at vol 2, p 21 of the Core Bundle filed by Prima for CA 96 ("CB-CA 96")).

[note: 2] *Ibid*.

[note: 3] *Ibid*.

[note: 4] See the Core Bundle filed by Prima for CA 95 ("CB-CA 95") at vol 2, p 55.

[note: 5] See the Core Bundle filed by Kempinski for CA 98 ("CB-CA 98") at vol 2, p 90.

[note: 6] See para 6 of the Fourth Award (in CB-CA 96 at vol 2, p 22).

[note: 7] See CB-CA 95 at vol 2, pp 22–23.

[note: 8] See para 19 of the Fourth Award (in CB-CA 96 at vol 2, p 25); see also para 21 of the First Award (in CB-CA 95 at vol 2, pp 194–195).

[note: 9] See para 30 of the Second Award (in CB-CA 95 at vol 2, p 251).

[note: 10] See paras 26–28 of the Fourth Award (in CB-CA 96 at vol 2, pp 28–30).

[note: 11] See para 10 of the Fourth Award (in CB-CA 96 at vol 2, p 22).

[note: 12] See CB-CA 98 at vol 2, pp 129–131.

[note: 13] See CB-CA 95 at vol 2, p 232.

[note: 14] *Ibid*.

[note: 15] See CB-CA 95 at vol 2, p 230.

[note: 16] See para 39 of the Fourth Award (in CB-CA 96 at vol 2, p 36).

[note: 17] See para 46 of the Second Award (in CB-CA 95 at vol 2, pp 260–261).

[note: 18] See, *inter alia*, CB-CA 98 at vol 2, p 269.

[note: 19] See para 5 of the Third Award (in CB-CA 95 at vol 2, p 265).

[note: 20] See para 4 of the Third Award (in CB-CA 95 at vol 2, p 265).

[note: 21] See CB-CA 95 at vol 2, p 274.

[note: 22] See CB-CA 95 at vol 2, p 22.

[note: 23] See para 23 of the Fourth Award (in CB-CA 96 at vol 2, p 27).

[note: 24] See para 21 of the Fourth Award (in CB-CA 96 at vol 2, pp 26–27).

[note: 25] See para 25 of the Fourth Award (in CB-CA 96 at vol 2, p 28).

[note: 26] *Ibid*.

[note: 27] See, *inter alia*, CB-CA 98 at vol 2, p 269.

[note: 28] See CB-CA 95 at vol 2, pp 269–270.

[note: 29] See CB-CA 95 at vol 2, p 22.

[note: 30] *Ibid*.

[note: 31] See CB-CA 98 at vol 3, pp 12–29.

[note: 32] See CB-CA 98 at vol 3, pp 30–42.

[note: 33] See CB-CA 98 at vol 3, pp 48–66.

[note: 34] See CB-CA 98 at vol 3, pp 43–44.

[note: 35] See CB-CA 98 at vol 3, pp 91–94.

[note: 36] See CB-CA 98 at vol 3, pp 135–142.

[note: 37] See CB-CA 98 at vol 3, pp 170–171.

[note: 38] See CB-CA 98 at vol 2, pp 236–237.

[note: 39] See CB-CA 98 at vol 4, p 14.

[note: 40] See CB-CA 98 at vol 4, p 52.

[note: 41] See para 20 of the Third Award (in CB-CA 95 at vol 2, p 273).

[note: 42] *Ibid*.

[note: 43] See CB-CA 95 at vol 2, p 274.

[note: 44] See CB-CA 95 at vol 2, p 56.

[note: 45] See CB-CA 98 at vol 2, pp 236–237.

[note: 46] See CB-CA 98 at vol 3, p 94.

[note: 47] See CB-CA 98 at vol 3, pp 136–137.

[note: 48] See CB-CA 96 at vol 2, p 149.