Triulzi Cesare SRL
v
Xinyi Group (Glass) Co Ltd

[2014] SGHC 220

High Court — Originating Summons No 1114 of 2014
26–27 February; 1 April 2014

Arbitration — Award — Recourse against Award — Setting Aside

Arbitration — Arbitral Tribunal — Powers

30 October 2014 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 The plaintiff, Triulzi Cesare SRL ("Triulzi"), a company incorporated in Italy, is in the business of, *inter alia*, manufacturing and producing horizontal and vertical washing machines for glass sheets. The defendant, Xinyi Group (Glass) Company Limited ("Xinyi"), a company incorporated in Hong Kong, is in the business of manufacturing and selling, *inter alia*, float glass products, solar glass products, automobile glass products and other associated products in the People's Republic of China.

2 Triulzi and Xinyi entered into three contracts on 17 November 2009 for Xinyi's purchase of Triulzi's washing machines. The precise contractual arrangements between the parties are not relevant to the present application.

Suffice to say for now, the three contracts provided for any disputes between the parties to be resolved by arbitration in Singapore.

3 Disputes arose between the parties that led to Xinyi commencing an arbitration in the International Court of Arbitration of the International Chamber of Commerce ("ICC") *vide* Case No. 18848/CYK) ("the Arbitration"). The sole arbitrator, Mr Woo Tchi Chu ("the Tribunal"), was appointed by the end of September 2012. The Arbitration was governed by the ICC Rules of Arbitration 2012 ("the ICC Rules 2012").

4 On 12 August 2013, the Tribunal issued a final award dated 12 August 2013 ("the Award") which was forwarded to the parties by the ICC Secretariat on 19 August 2013. The Tribunal allowed Xinyi's claim and dismissed Triulzi's counterclaim.

5 Triulzi filed Originating Summons No 1114 of 2013 ("OS 1114/2013") on 18 November 2013 to set aside the Award under Art 34(2) of the UNCITRAL Model Law on International Commercial Arbitration 1985 ("the Model Law"), as set out in the First Schedule to the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"), and s 24(*b*) of the IAA.

6 Mr Paul Tan ("Mr Tan") represented Triulzi in OS 1114/2013 while Mr Shum Wai Keong ("Mr Shum") was Triulzi's counsel in the Arbitration. Ms Koh Swee Yen ("Ms Koh") represented Xinyi in both OS 1114/2013 and the Arbitration.

Gist of the underlying dispute in the Arbitration

Xinyi's case

7 By cl 15 of each contract, upon the installation of each washing machine at Xinyi's premises, an acceptance test would be conducted by both parties in accordance with the technical specifications. This involved an 8-hour uninterrupted test with different sizes of glass sheets. If the installed machine failed the acceptance test, Xinyi could then cancel the respective contract and Triulzi would have to refund Xinyi the purchase price. Triulzi was allowed to make modifications to the machine twice but the acceptance period must not extend beyond 70 days.

8 Xinyi's case, as stated in the Award, was that sometime during July 2010, the first washing machine was delivered to and installed at Xinyi's facility by Triulzi pursuant to the first contract. The machine was found to be faulty on several occasions and it underwent modifications. Despite all that, the machine still failed to meet the technical specifications stipulated in the first contract. Stains were found on the glass sheets after being washed in the machine. An acceptance test was carried out from 7 to 12 May 2011 and the machine failed the acceptance test. In or around May 2011, Xinyi cancelled the first contract by asking Triulzi to take back the machine.

9 On or around 15 February 2011, the second washing machine was delivered to and installed at Xinyi's facility by Triulzi pursuant to the second contract. Xinyi informed Triulzi that the machine also failed to meet the technical specifications stipulated in the second contract. Xinyi cancelled the second contract on 8 June 2011.

10 On or around 5 March 2011, Xinyi paid 10% of the purchase price of the third washing machine pursuant to the third contract. In view of the defects found in the second machine, Triulzi was requested, on or around 25 April 2011, to conduct a detailed factory inspection of the third machine before delivering it to Xinyi's facility. Triulzi did not respond to this request and did not deliver the third machine to Xinyi. Thereafter, Xinyi cancelled the third contract on or around 8 June 2011.

11 In the Arbitration, Xinyi claimed for a refund of the purchase price paid under all three contracts as well as damages.

Triulzi's case

12 Triulzi's Answer and Counterclaim in the Arbitration was that the first washing machine was fully operational by late December 2010 or early January 2011. Triulzi alleged that the first machine's faulty performance was due to the dirty and dusty environment of Xinyi's premises where it was installed and the lack of proper maintenance of the machine by Xinyi. Furthermore, the stains on the glass sheets were not caused by the first machine but from another machine which processed the glass sheets in the manufacturing process. According to Triulzi, all issues with the first machine were resolved by March 2011. Xinyi did not reject the first machine and did not ask Triulzi to take the machine back.

13 As regards the second washing machine, Triulzi's position was that its technician could not properly install and test the second machine as Xinyi failed to provide the necessary facilities for proper testing. However, the second machine was thereafter found to be operational during the technician's second visit. Despite the fact that the first and second washing machines were

properly installed and functional, Xinyi failed to make full payment of the purchase price for both machines.

14 Triulzi also claimed that the third machine was never delivered because of Xinyi's stated intention to reject the delivery of the machine in a letter dated 8 June 2011 to Triulzi.

15 Triulzi therefore counterclaimed for the balance of the purchase price owing under the first two contracts and specific performance of the third contract.

The Award

16 The evidential hearing was held from 22 to 25 April 2013. The events, prior to 22 April 2013 and at the evidential hearing itself, are at the heart of OS 1114/2013. A chronology of the relevant events is set out below (at [25]–[43]). Paragraphs of the Award that are relevant to OS 1114/2013 are set out in the course of this Judgment.

Outline of the issues in OS 1114/2013

17 Triulzi alleges a number of serious breaches in the Tribunal's conduct of the arbitral proceedings which had caused it prejudice. According to Mr Tan, the Tribunal's conduct violated a number of obligations under the IAA and the Model Law. Triulzi submits that the Award should be set aside on the following grounds:

(a) on the basis of Art 34(2)(*a*)(iv) of the Model Law in that the Tribunal's decision to admit Xinyi's expert witness statement was in breach of the parties' agreed arbitral procedure ("Issue 1");

(b) on the basis of Art 34(2)(*a*)(ii) of the Model Law and s 24(*b*) of the IAA in that Triulzi was, *inter alia*, not afforded a reasonable opportunity to be heard in respect of expert evidence ("Issue 2"); and

(c) on the basis of Art 34(2)(*b*)(ii) of the Model Law in that the decision of the Tribunal not to apply the United Nations Convention on the International Sale of Goods ("the CISG") as the applicable law of the three contracts does not accord with the public policy of Singapore ("Issue 3").

18 Mr Tan's fall-back argument, which is an alternative to Issue 1, arises in the absence of a procedural agreement to exclude expert evidence. His fall-back argument is that the Award may be set aside under Art 34(2)(*a*)(iv) if it was not in accordance with Art 18 of Model Law ("Issue 1A").

19 The outline of Issues 1 and 2 above is set out in board terms based on the challenges advanced in court. As I see it, the nub of the complaints for Issues 1 and 2 are the same in that they are challenges to the procedural orders or directions made in the course of the arbitral proceedings rather than a challenge to the making of the Award. This distinction is important. As stated below (at [52]–[53]), complaints against procedural orders or directions cannot give rise to the setting aside of an award unless the procedural orders or directions in question resulted in a breach of an agreed arbitral procedure or a breach of natural justice (*ie*, the procedural nature of the right to be heard), as a result of which a party's rights have been prejudiced (see s 24(*b*) of the IAA). This is the first legal obstacle that Triulzi has to overcome. I will elaborate on the case management powers of the arbitral tribunal later in this decision.

20 Significantly, a singular query that foreshadows the outcome of OS1114/2013 is whether Triulzi's complaints are due to either circumstances attributable to the Tribunal *or* circumstances that resulted from Triulzi's own failures or choices (tactical or otherwise). The features in the present case that fashioned the circumstances that gave rise to Triulzi's complaints described below (at [25] to [43]) will be scrutinised in due course. For now, it is appropriate to state that there can be no basis whatsoever to set aside the Award under Art 34(2)(*a*) of the Model Law and s 24(*b*) of the IAA if Triulzi's complaints are *not* premised upon circumstances attributable to the Tribunal.

21 Finally, Triulzi's application cited Art 31(2) of the Model Law as a ground for setting aside the Award. However, this ground was not developed in Triulzi's submissions, and I need say no more.

Outline of Triulzi's criticisms of the Tribunal

22 I now outline the specific criticisms of the Tribunal said to give rise to the present application to set aside the Award. The specific complaints or criticisms alleged against the Tribunal are as follows:

(a) Conduct prior to 22 April 2013:

(i) The Tribunal admitted Xinyi's expert witness statement in breach of the parties' purported agreed arbitral procedure to file only factual witness statements.

(ii) Alternatively, the Tribunal failed to afford Triulzi a reasonable opportunity to file a meaningful expert witness

statement in response to Xinyi's expert witness, thereby resulting in a denial of a fair hearing.

(b) Conduct at the evidential hearing on 25 April 2013:

(i) The Tribunal's refusal to admit Triulzi's expert witness statement on 25 April 2013 was tantamount to a failure to afford Triulzi a reasonable opportunity to respond to Xinyi's expert witness, thereby resulting in a denial of a fair hearing.

23 The failures described are said to be cumulative in effect with the result that Triulzi suffered prejudice from the fact that:

(a) Triulzi was prevented from advancing arguments to the Tribunal that the machines in dispute had complied with the contractual technical specifications, and that any non-performance was due to Xinyi's lack of maintenance and the very dirty environment of Xinyi's facility; and

(b) Triulzi was prevented from refuting the Tribunal's reliance on Xinyi's expert evidence concerning the contractual requirement to run the subject machines for 8 hours in the conduct of the acceptance test.

Chronology of events relevant to Issues 1 and 2

24 On 25 September 2012, the Tribunal was formally constituted.

Conduct prior to 22 April 2012

10 to 13 December 2012

25 The Tribunal circulated a draft procedural timetable to both parties on 10 December 2012 ("the Draft Procedural Timetable"). According to the Draft Procedural Timetable, "Witness Statements" were to be filed by 28 January 2013 and the evidentiary hearing was to take place from 18 to 21 February 2013. The parties then attended a Case Management Conference before the Tribunal held on 11 December 2012 ("the CMC"). The timelines in the Draft Procedural Timetable were then adjusted to accommodate the various commitments of each counsel before a revised procedural timetable was adopted by the Tribunal ("the Procedural Timetable"). The revised timelines that were formalised provided, *inter alia*, as follows:

(a) "Filing of Witness Statements" by 25 March 2013; and

(b) Hearing dates fixed for 22 to 25 April 2013.

At the CMC, a preliminary issue relating to the governing law of the three contracts was heard. The Tribunal determined the governing law of the contracts to be Singapore law.

26 Before the close of the CMC, Mr Shum proposed adopting the International Bar Association Rules on the Taking of Evidence in International Arbitration ("the IBA Rules") for the purposes of the Arbitration. Ms Koh did not object and the Tribunal duly directed that the IBA Rules be adopted.

27 The Tribunal forwarded to the parties the Procedural Timetable and the minutes of the CMC in its e-mail dated 13 December 2012. In the same e-

mail, the Tribunal emphasised the need to strictly adhere to the timelines in the Procedural Timetable:[1]

> … The Arbitration should be completed and Award issued by 27 May 2013. *The Tribunal intends to follow the agreed timelines strictly*. [emphasis added]

Subsequently, at the parties' request on 22 March 2013, the Tribunal allowed witness statements to be filed and exchanged by 1 April 2013. No changes were made to the hearing dates.

1 to 5 April 2013

28 On 1 April 2013, Xinyi filed the expert witness statement of Dr Bao Yiwang ("Dr Bao") along with other factual witness statements. Dr Bao's statement contained a 22-paragraph report pertaining to the design and specifications of the first and second washing machines as well as the operating environment of Xinyi's facility ("Dr Bao's Report").

29 On 2 April 2013, Triulzi wrote asking the Tribunal to exclude Dr Bao's Report from the arbitral proceedings. Triulzi alleged that it was indicated to the Tribunal at the CMC that the parties would not be filing any expert witness statements and that, consequently, the Procedural Timetable did not provide a timeline for expert witness statements to be filed. Triulzi's letter dated 2 April 2013 made clear that Triulzi's position was that the parties' "agreement" to dispense with expert evidence was reached at the CMC.[2] Triulzi further complained that no notice of Xinyi's intention to file Dr Bao's

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[1] Core Bundle ("CB"), Tab 6, p 149.

[2] CB, Tab 10, p 445.

Report was given to Triulzi before 1 April 2013. In the circumstances, admitting Dr Bao's Report would thus be contrary to the alleged procedural agreement reached during the CMC. Triulzi also argued in its lawyer's letter that the admission of Dr Bao's Report would be prejudicial as Triulzi would not have an opportunity to verify the contents of Dr Bao's Report. Besides, Dr Bao's Report had no probative value as the inspection by Dr Bao took place 21 months after the disputes over the washing machines arose.

30 As an alternative to its application to exclude Dr Bao's Report, Triulzi sought an order from the Tribunal to allow it to engage an expert to inspect the two washing machines at Xinyi's facility and to file an expert witness statement thereafter. Triulzi further applied for the evidentiary hearing dates in April to be vacated. Triulzi requested a total period of eight weeks: (a) four weeks from the date of the Tribunal's order for inspection of the first and second washing machines at Xinyi's facility; and (b) an additional four weeks for the expert's report to be filed.

31 On 4 April 2013, the Tribunal replied that the minutes of the CMC contained no record of any agreement that the parties would not be filing expert evidence. The Tribunal's e-mail of 4 April 2013 reads as follows:[3]

> …
>
> 3) [Triulzi] requests that [Xinyi's] expert witness report be excluded on the ground that during the case management conference, the parties had indicated to the Tribunal that the parties will not be filing any expert witness statements.
>
> I would like to have [Xinyi's] comments on this by noon tomorrow. I have looked at the brief minutes of the CMC,

[3] CB, Tab 11, p 1179.

> copies of which were forwarded to the parties on 13 December 2012. The minutes, short though they are, made no mention of any indication or understanding on the part of the parties not to include expect witness statements.
>
> …
>
> [emphasis in original)

32 On 5 April 2013, Xinyi replied stating that it had never indicated at the CMC that it would *not* file any expert witness statements. There was no agreement between the parties to dispense with expert evidence. Besides, the Tribunal's minutes did not record any agreement between the parties. Ms Koh's position was that the Tribunal's reference to the "Filing of Witness Statements" in the Procedural Timetable meant that there was "no limit placed on the type or number of witness statements to be filed".[4] She pointed out that, having elected not to call an expert, Triulzi had waived its right to do so and should not be permitted to file an expert witness statement at that late a stage. Filing an expert witness statement at that time would prejudice Xinyi as Triulzi would have had the benefit of Dr Bao's Report. However, if the Tribunal was minded to grant Triulzi an opportunity to file an expert witness statement, then it should be filed within seven days.

33 Triulzi replied on 5 April 2013. It maintained that there was an agreement between parties to dispense with expert evidence and that the agreement was indicated to the Tribunal at the CMC. Triulzi repeated its request that it be given time to inspect the washing machines and to thereafter file an expert witness statement.

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[4] CB, Tab 12, p 448.

34 The Tribunal thereafter issued directions on the same day which provided as follows:[5]

> …
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> (1) The statement of [Xinyi's] expert (Dr Bao Yiwang) is admitted;
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> (2) [Triulzi] has until 4pm of 15 April 2013 to file its own expert witness statement and report, if it wishes to. [Xinyi] should give reasonable supervised access to [Triulzi's] expert to inspect the 2 glass-washing machines. Inspection should of course be confined to these 2 machines under dispute and not extend to other units in the same or other premises. The Tribunal notes that it took [Xinyi's] own expert 4 hours to inspect on 16 March 2013.
>
> (3) The hearing dates (22–25 April 2013) will not be vacated.
>
> …
>
> [emphasis in original]

12 to 16 April 2013

35 On 12 April 2013, Triulzi wrote to the Tribunal complaining that the time given by the Tribunal for it to find an expert was "just too short", and again raised the matter of vacating the hearing dates.[6]

36 On 16 April 2013, a hearing was convened for the Tribunal to give parties further directions. At that hearing, Triulzi disclosed an e-mail from one Jonathan Peter Wigg ("Mr Wigg") whom it had intended to call as an expert witness. In that e-mail, Mr Wigg stated that he would only have been available from early June 2013 onwards. Triulzi also disclosed an e-mail which advised

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[5] CB, Tab 14, p 1179.

[6] CB, Tab 16, p 455.

that an application made in Italy for a visa to China should be submitted one month before the date of travel.[7]

37 Triulzi's second attempt to vacate the evidential hearing in April was rejected by the Tribunal. In its e-mail dated 16 April 2013, the Tribunal directed, *inter alia*, that the hearing from 22 to 25 April 2013 would proceed as stated in the Procedural Timetable. The Tribunal also noted:[8]

> …
>
> Counsel for [Triulzi] has asked the Tribunal to record his dissatisfaction at the Tribunal's unwillingness to vacate the dates for the hearing. His main grounds are that … there was an agreement between the parties at the CMC that no expert witness would be called and in any event [Triulzi] was not given enough time now by the Tribunal to engage its own expert, send him to China for the inspection and come up with a report.
>
> The Tribunal overruled [Triulzi's] submissions and if necessary will refer to them in more detail at a more appropriate stage.
>
> …

38 On the same day, Xinyi wrote to the Tribunal expressing its disapproval of Triulzi's conduct in relation to calling an expert witness.[9] It said that after the Tribunal's decision on 5 April 2013, Triulzi did not raise any issue with the Tribunal's directions until 12 April 2013 when Mr Shum wrote to the Tribunal stating that Triulzi did not have enough time. Triulzi also did not contact Xinyi at all to arrange for an inspection at Xinyi's factory premises.

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[7] CB, Tab 17, pp 457-458; Tab 19; Tab 20.

[8] CB, Tab 21.

[9] CB, Tab 22.

Conduct at the evidential hearing on 25 April 2013

39 At the evidentiary hearing which began on 22 April 2013, Xinyi called two witnesses of fact and Dr Bao. On the last day of hearing, 25 April 2013, and before Triulzi's last factual witness took the stand, Mr Shum applied to the Tribunal to adduce the expert witness statement of one Dr Alberto Piombo ("Dr Piombo"). Dr Piombo's expert evidence pertained to the operation of the first and second washing machines ("Dr Piombo's Report"). The date of the report was 22 April 2013 and it coincided with the first day of the hearing. Mr Shum explained that he only received Dr Piombo's Report on the morning of 25 April 2013.

40 Ms Koh objected to Mr Shum's very late application to admit Dr Piombo Report after two undeniable events: (a) Triulzi had, by its own conduct, elected not to file an expert witness statement having missed the original and extended deadlines for doing so; and (b) Dr Bao had already testified. She surmised that Dr Piombo's Report would have been prepared with the benefit of Dr Bao's Report, including evidence given under cross-examination.

41 In response, Mr Shum explained that Triulzi had difficulties with the time frame of 10 days set by the Tribunal previously on 5 April 2013 and wanted the Tribunal to hear further submissions on the admissibility of Dr Piombo's Report now that it was in hand. He stated that if the Tribunal were to admit Dr Piombo's Report, then a further hearing could be fixed for the cross-examination of Dr Piombo. As Dr Piombo was not in attendance at the hearing on 25 April 2013, Mr Shum explained that he would not be using Dr Piombo's Report at the hearing on 25 April 2013. Rather, he was bringing it up in order to have it placed before the Tribunal in light of the fact that Xinyi had adduced

expert evidence at the hearing. He disagreed with Ms Koh's contention that Triulzi had elected not to call an expert.

42 After Mr Shum's confirmation that Dr Piombo was not present at the hearing, the Tribunal remarked:[10]

> Arbitrator: I think it's a bit late in the day, you know, Mr Shum. We are at the last day of the arbitration.
>
> Mr Shum: Sure, sir, but as I explained earlier, if I could have adduced this earlier, I would --
>
> Arbitrator: I didn't say it was your fault, but clearly it was somebody's fault, right, you know, that it's adduced so late in the day.
>
> Mr Shum: Sure, sir. That's my submissions.
>
> Arbitrator: Unless you can really come up with some compelling arguments, I will not admit it.
>
> Ms Shum: Sure. We stand guided by the tribunal.

43 Critically, the Tribunal's view was that Mr Shum had not raised any compelling arguments to persuade it to admit Dr Piombo's Report. The evidentiary hearing hence continued without Dr Piombo's Report being admitted. The Tribunal subsequently rendered the Award in favour of Xinyi, and Triulzi now seeks to set it aside.

Issue 1: Breach of an agreed arbitral procedure

44 Issue 1 focuses on the Tribunal's decision to admit Dr Bao's Report (see [34] above). The contention here is that the Tribunal's decision to admit Dr Bao's Report was in breach of a procedural agreement to dispense with

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[10] CB, Tab 27, pp 821-822.

expert evidence and that the Award should therefore be set aside pursuant to Art 34(2)(*a*)(iv) of the Model Law. In response, Xinyi maintains that there was no agreement to dispense with expert evidence. Thus, Triulzi's criticisms of the Tribunal's conduct of the arbitral proceedings, including the Tribunal's procedural orders and directions prior to 22 April 20l3 (see [25]–[38] above) that related to the admission of Dr Bao's Report, are unfounded.

Relevant legal principles

45 Before turning to the question whether there was, in existence, a procedural agreement between the parties, it is useful, at this juncture, to outline some of the relevant general principles underlying the application of Art 34(2)(*a*)(iv) of the Model Law with regard to a breach of an agreed arbitral procedure. Art 34(2)(*a*)(iv) provides:

> **Article 34. Application for setting aside as exclusive recourse against arbitral award**
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> …
>
> (2) An arbitral award may be set aside by the court specified in Article 6 only if:
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> (a) the party making the application furnishes proof that:
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> …
>
> (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
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> …

46 I start with the important features of party autonomy in international arbitration. There are two aspects to this concept of party autonomy – the

restricted role of the courts in the arbitral process and the procedural freedom and flexibility enjoyed by the parties. Section 15A(1) of the IAA provides that "a provision of rules of arbitration agreed to or adopted by the parties … shall apply and be given effect, except to the extent that such provision is inconsistent with a provision of the Model Law or [Part II of the IAA] from which the parties cannot derogate." Article 19 of the Model Law reads:

> **Article 19. Determination of rules of procedure**
>
> (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
>
> (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

This article undoubtedly reflects the principle of party autonomy in fixing the procedure to be adopted and followed by the arbitral tribunal. The parties have the freedom and flexibility to determine the rules of procedure that governs the arbitration, and failing an agreement by the parties, the arbitral tribunal is permitted to conduct the arbitration in such a manner as it considers appropriate. Notably, the parties' freedom under Art 19(1) is subject to the mandatory, *ie* non-derogable, provisions in the Model Law. One example of a mandatory provision is Art 18 of the Model Law which prescribes the minimum procedural requirements of equality of treatment and natural justice (*ie*, reasonable opportunity to be heard and to present one's own case).

47 In the absence of any procedural agreement, Art 19(2) of the Model Law gives the arbitral tribunal wide procedural powers to determine the applicable rules of evidence on admissibility, relevance, materiality and

weight of any evidence. To this end, the power of the arbitral tribunal under Art 19(2) is discretionary and the arbitral tribunal is required to exercise its discretion within the confines of the mandatory provisions of Model Law and Part II of the IAA.

48 It follows that within the boundaries of the minimum procedural requirements noted in Art 18, parties are free to agree on the institutional rules that govern the arbitration. This can happen prior to or subsequent to the commencement of the arbitration. The Arbitration was an ICC case and it was governed by the ICC Rules 2012. Besides the freedom to choose the procedural rules for the conduct of the arbitration, other matters that parties are free to agree to may include the matters mentioned in *PT Perusahaan Gas Negara (Persero) TBK v + Joint Operation* [2010] 4 SLR 672. In that case, it was stated at [39] that the parties' agreed procedure, in the context of arbitration, may relate to "timelines for submission of answers in response to the request for arbitration, the information required to be provided in the submissions, notification to the parties of the names of the members of the arbitral tribunal, *etc*."

49 Arguably, an agreement to dispense with expert evidence may be regarded as a procedural agreement. Once the parties have agreed upon the procedure to be adopted for the arbitration, the arbitral tribunal will be obliged to conduct the arbitration in accordance with the procedure agreed by the parties.

50 An award may be set aside under Art 34(2)(*a*)(iv) of the Model Law if: (a) the award is not in accordance with the parties' agreed procedure, unless the agreed procedure is in conflict with a mandatory provision of the Model

Law; or (b) the award is "not in accordance with this Law" (see [45] above). As stated, equality of treatment and natural justice prescribed in Art 18 are two of the non-derogable minimum procedural requirements under the Model Law as regards the procedural conduct of the arbitration.

51 On the other hand, Article 34(2)(*a*)(iv) of the Model Law is *not* engaged if the non-observance of either an agreed procedure (Art 19(1)) or the minimum procedural requirements of Art 18 is *not* due to circumstances attributable to the arbitral tribunal but is derived from the applicant's own doing. A helpful commentary that stresses the same point is made in respect of the purpose of Art 18 in the *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (United Nations, 2012) ("the 2012 Digest") at p 98, para 7:

> … The purpose of article 18 is to protect a party from egregious and injudicious conduct by an arbitral tribunal, and it is not intended to protect a party from its own failures or strategic choices. …

52 Separately, Art 34(2)(*a*)(iv) is again *not* engaged if the challenge to the award is against the arbitral tribunal's procedural orders or directions which fall within the exclusive domain of the arbitral tribunal. As stated in *Singapore International Arbitration: Law & Practice* (David Joseph and David Foxton gen eds) (LexisNexis, 2014) ("*SIA: Law & Practice*") at ch 6, para 4.1:

> Once the parties have agreed upon the procedure to be adopted for the arbitration and a tribunal has been appointed, the way in which the matter will go forward including the decisions that must be made over time as to the progress of the reference, are matters falling within the exclusive province of the arbitral tribunal.

53 *SIA: Law & Practice* continues in the same chapter at para 5.3 that if a party is dissatisfied with procedural orders or directions, there is no right of

recourse to set aside the order or direction by the Singapore courts. There are two reasons for this:

> … First, Article 5 of the Model Law provides that "*in matters governed by this Law, no court shall intervene except where so provided in this Law*", and as was noted in para 3, Article 19(2) provides that the tribunal may conduct the arbitration in such manner as it considers appropriate (subject to contrary agreement of the parties, and the to the terms of Model Law). Secondly, procedural orders are not an "award" within the meaning of Article 34 of the Model Law or s 24 of the IAA, and therefore cannot be set aside under those provisions. [emphasis in original]

54 I now come to technical and minor breaches committed by an arbitral tribunal. It cannot be the case that any breach of an agreed arbitral procedure, even that of a technical provision or minor formality, will invariably result in an award being set aside. Most supervising courts inquire into the *materiality* of the procedural requirements that was not complied with and the nature of the departures from the parties' agreed arbitral procedures. The cases below (see [55]–[58]) illustrate the element of prejudice (whether procedural or substantive) that eventuates as a result of a violation of an agreed procedure to support the materiality of the breach.

55 In *Compagnie des Bauxites de Guinee v Hammermills, Inc* 1992 WL 122712 (DDC, 1992) ("*Hammermills*"), an application was brought under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("the New York Convention") as a defence to the confirmation of an award on, *inter alia*, the ground that the arbitral tribunal had breached the agreed ICC procedure when rendering its award. The complaint was that the arbitral tribunal had inserted into the award the amount of the legal costs to be assessed against a party after the draft award had been approved by the ICC

Court. Although the United States District Court held that this did not amount to a breach of the ICC procedure, it also observed at [5] that:

> …
>
> The Court does not believe that section 1(d) of Article V [of the New York Convention] was intended, as CBG argues, to permit reviewing courts to police every procedural ruling made by the Arbitrator and to set aside the award if *any* violation of ICC procedures is found. Such an interpretation would directly conflict with the "pro-enforcement" bias of the [New York] Convention and its intention to remove obstacles to confirmation of arbitral awards. … Rather, the Court believes that a more appropriate standard of review would be to set aside an award based on a procedural violation only if such violation worked substantial prejudice to the complaining party. … [emphasis in original]

56 This passage quoted above was approved in another US District Court decision of *Karaha Bodas Company, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 190 F Supp 2d 936 (SD Tex, 2001). It was held at 945 that for a complaining party to succeed in an application under Art V(1)(*d*) of the New York Convention on the ground that the arbitral tribunal departed from the agreed arbitral procedure, it "must show that there is a violation of an arbitration agreement between the parties and that the violation actually caused [that party] substantial prejudice in the arbitration." In applying this principle, the United States District Court in *Williams v National Football League* 2012 WL 2366636 (D Colo, 2012) confirmed an award even though it was rendered after a specified time limit agreed upon by the parties as the complaining party was not substantially prejudiced by the delay.

57 Although the US decisions dealt with Art V(1)(*d*) of the New York Convention, the observations are relevant to an application of Art 34(2)(*a*)(iv) of the Model Law since Art 34 of the Model Law was drafted to "align the

grounds for setting aside with the grounds for recognition and enforcement that were listed in Article V of the New York Convention" (see Howard M Holtzmann and Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation Publishers, 1989) ("*Holtzmann and Neuhaus*") at p 912). It must be noted that the UNCITRAL Working Group on International Contract Practices ("the Working Group") had also discussed and rejected the suggestion to include additional grounds for setting aside under Art 34 in favour of keeping to the scope delineated by Art V of the New York Convention. As stated by the Working Group in the *Report of the Working Group on International Contract Practices on the Work of its Fifth Session* (A/CN.9/233, 28 March 1983) at para 187:

> That solution [to align Art 34(2)(a)(iv) of the Model Law with Art V of the New York Convention] would facilitate international commercial arbitration by enhancing predictability and expeditiousness and would go a long way towards establishing a harmonized system of limited recourse against awards and their enforcement. It was [further] stated in support that the reasons set forth in article V of the New York Convention provided sufficient safeguards, and that some of the grounds suggested as additions to the list were likely to fall under the public policy reason.

58 The Québec Supreme Court has also adopted an approach similar to that of the US Courts in the context of a setting-aside application on the ground that there was a violation of the agreed arbitral procedure. In *Holding Tusculum BV v Louis Dreyfus Holding SAS* [2008] QCCS 5904, it was argued that an award should be set aside as the tribunal had revisited issues that have already been decided in breach of an implied term of the applicable arbitration procedure. Articles 940.6 and 948 of the Code of Civil Procedure (chapter C-25) (Québec) required the Québec Supreme Court to take into consideration the Model Law and New York Convention respectively when dealing with

international arbitral awards. In this regard, the Québec Supreme Court agreed with and cited at [129] the opinion of one, Fabien Gélinas, who was called by the applicant to provide expert evidence as to matters of international commercial arbitration:

> The standard of a "material breach of procedure" or a breach that "presumably affected the award" and the requirement of prejudice, *simpliciter*, sufficient or substantial, have one thing in common: they all operate to **avoid the trivialization of judicial review in cases of minor violation of the procedure** … [emphasis in italics in original, emphasis added in bold]

59 I now come to the supervising court's discretionary powers under Art 34(2) of the Model Law.

60 Even though the decisions above (at [55]–[58]) address the issue of prejudice when deciding whether to set aside an award, it is also clear that prejudice is not expressly stipulated to be a requirement for setting aside an award under Art 34(2)(*a*)(iv) of the Model Law. The issue of prejudice should instead be understood in the context of the *discretionary* nature of the court's power to set aside awards under Art 34(2). As stated in Gary B Born, *International Commercial Arbitration* vol 3 (Wolters Kluwer, 2nd Ed, 2014) at p 3177:

> It is equally clear that the grounds specified in Article 34(2) of the Model Law are permissive and discretionary, not mandatory. That is, a court *may* annul an award if one or more of the Article 34(2) grounds are satisfied, but the court is not *mandatorily required* to annul the award, even where one of these grounds applies. This is made express by Article 34(2), which provides that an "award *may* be set aside by the court … only if" specified grounds are present. … [emphasis in original]

Notably, the operative word which is found in the opening sentence of Art 34(2) of the Model Law is "may", and this word underscores the discretionary powers of the supervising court to refuse to set aside an award even if there was a breach of the agreed procedure.

61 In *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1)* [2012] 4 HKLRD 1 ("*Grand Pacific*"), the Hong Kong Court of Appeal opined (*obiter*) that the Hong Kong courts have a discretion to refuse to set aside an award even where a violation of Article 34(2)(*a*) is established. The Hong Kong Court of Appeal opined at [105] that even if the circumstances described in Art 34(2)(*a*) are established, "the Court may refuse to set aside the award if the Court is satisfied that the arbitral tribunal could not have reached a different conclusion." Emphasis was once again placed on the word "may". The Hong Kong Court of Final Appeal, in upholding the decision of the Court of Appeal, did not disturb the latter's *obiter dictum*.

62 Other Model Law jurisdictions like New Zealand and Australia have similarly recognised the existence of the court's discretion in a setting-aside application (see, for example, *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 at [103]; *Cargill International SA v Peabody Australia Mining Ltd* [2010] NSWSC 887 at [242]). Some national versions of the Model Law go even further than the Model Law in providing specifically that the power to annul an award is discretionary. For example, s 30 of the Arbitration Act (c 55) (British Columbia) provides that where the court finds that the arbitrator has "committed an arbitral error", but that "the error consists of a defect in form or a technical irregularity," the court may refuse to set aside the award where "refusal would not constitute a substantial wrong or miscarriage of justice".

63 Most notably, in the Singapore Court of Appeal decision of *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*CRW Joint Operation (CA)*"), V K Rajah JA also observed in general terms at [100] that "the court may, in its discretion, decline to set aside an arbitral award even though one of the prescribed grounds for setting aside has been made out".

64 Understood in the context of a general discretion, my view is that prejudice is a factor or element relevant to, *rather than* a legal requirement for the application of Art 34(2)(*a*)(iv) of the Model Law. In other words, prejudice is merely a relevant factor that the supervising court considers in deciding whether the breach in question is serious and, thus, whether or not to exercise its discretionary power to set aside the award for the breach. As the Hong Kong Court of Appeal observed in *Grand Pacific* at [105]:

> … How a court may exercise its discretion in any particular case will depend on the view it takes of *the seriousness of the breach*. Some breaches may be so egregious that an award would be set aside *although the result could not be different*. [emphasis added]

It can be gleaned from this passage that the Hong Kong Court of Appeal recognises that there may be certain instances where the court will nonetheless set aside an award despite the absence of prejudice.

65 Rajah JA in *CRW Joint Operation (CA)* at [100] observed that where prejudice was shown, the court ought not to exercise its discretion to refuse to set aside an award. As to whether Rajah JA's observation is ostensibly inconsistent with the Hong Kong position just stated above, I do not think so. Depending on the facts of the particular case at hand, it may be possible to present the breach in question either in terms of prejudice or in terms of the

seriousness of the breach. In my view, the singular point to be derived from both *Grand Pacific* and *CRW Joint Operation (CA)* is that every case is fact-sensitive and much depends on the circumstances of each case. I should also point out that *Grand Pacific* was a decision on the case management powers of the arbitral tribunal, whereas *CRW Joint Operation (CA)* was not.

66 As seen from the discussion above, the inquiry in a setting-aside application in respect of Art 34(2)(*a*)(iv) should focus on the materiality, or seriousness, of the procedural breach. From this perspective, an applicant wishing to set aside an award would endeavour to show the materiality of the procedural requirements that were not complied with. An applicant may do so by establishing the fact that the applicant had been prejudiced, or was reasonably likely to have been prejudiced, by the arbitrator's conduct of the arbitral proceedings, including his procedural directions and orders. However, this does not mean that the setting-aside application would necessarily be rebuffed in the event that he fails to establish prejudice although he would have to advance alternative submissions to evince the materiality or seriousness of the breach.

67 Finally, I come to a separate principle that has general application to Triulzi's challenges brought under Art 34(2) in respect of all four issues identified in [17] above. This is the "second bite at the cherry argument" that was frowned upon by the Court of Appeal in *BLC and others v BLB and another* [2014] 4 SLR 79 ("*BLC v BLB*"). In that case, the Court of Appeal cautioned in general terms against the use of the setting-aside procedure to raise new arguments that were not previously before the tribunal. The supervising court would also be wary of any attempts by a party to re-package or re-characterise its original case and arguments that were previously

advanced in the arbitration for the purpose of challenging the award. As the Court of Appeal observed at [53]:

> In considering whether an arbitrator has addressed his mind to an issue, however, the court must be wary of its natural inclination to be drawn to the various arguments in relation to the substantive merits of the underlying dispute between the parties. In the context of a setting aside application, it is crucial for the courts to recognise that these substantive merits are *beyond* its remit notwithstanding its natural inclinations. Put simply, there is no right of recourse to the courts where an arbitrator has simply made an error of law and/or fact. *A fortiori*, the courts should guard against attempts by a disgruntled party to fault an arbitrator for failing to consider arguments or points which were never before him. *The setting aside application is not to be abused by a party who, with the benefit of hindsight, wished he had pleaded or presented his case in a different way before the arbitrator.* [emphasis added]

Accordingly, a supervising court would not hesitate to scrutinise how the parties had approached their case in the arbitration and, in particular, to review the respective issues and arguments that had been put before the tribunal.

Discussion and decision

68 With the principles set out above in mind, I now turn to consider Issue 1 in the context of the following matters:

(a) The existence of a procedural agreement to dispense with expert evidence;

(b) If (a) is established, whether there was a breach of the procedural agreement; and

(c) If (a) and (b) are established, whether the breach was so material that the court should exercise its discretion in favour of setting aside the Award.

69 Specifically, any inquiry into the materiality of the procedural requirements that was not complied with and the nature of the departures from the parties' agreed arbitral procedures will be examined and tested in light of Triulzi's allegation of prejudice eventuated by the Tribunal's conduct in the course of the arbitral proceedings including the latter's procedural orders and directions.

The existence of a procedural agreement

(1) Alleged agreement reached at CMC

70 I now turn to the alleged agreement to dispense with expert evidence. As I alluded to above (at [49]), an agreement to dispense with expert evidence may be regarded as a procedural agreement. Triulzi maintains that there was such an agreement and that the admission of Dr Bao's Report amounted to a violation of this agreement. Conversely, Xinyi argues that there was no such agreement to dispense with expert evidence . A resolution of this point in favour of Xinyi is enough on its own to defeat Triulzi's application to set aside the Award under Art 34(2)(*a*)(iv) of the Model Law on the ground that the "arbitral procedure was not in accordance with the agreement of the parties".

71 Mr Shum's letter dated 2 April 2013, which was addressed to the Tribunal, specifically referred to an alleged agreement to exclude expert

evidence that was reached at the CMC. It alleged that Xingyi had, by its conduct, reneged on it. Mr Shum further wrote:[11]

> However, [Xinyi] filed [its] Expert Report yesterday, taking [Triulzi] by surprise. [Xinyi] had apparently sent its expert to inspect the 1st and 2nd Unit on 16 March 2013 in secret contrary to *the agreement reached at the case management conference*. [emphasis added]

72 Mr Shum's subsequent letter addressed to the Tribunal dated 5 April 2013 reads as follows:[12]

> …
>
> We highlight that [Xinyi's] disagreement that the parties had indicated to the Tribunal that the parties will not be filing any witness statements focused solely on the Tribunal's minutes of the case management conference on 11 December 2012. [Xinyi] did not categorically deny that there was such agreement between the parties. We express shock at [Xinyi's] conduct as we had definitely agreed with Wong Partnership that no expert witness would be called (to minimize costs due to the amount in dispute then). We maintain that the parties had indicated this to the Tribunal during the conference.
>
> …

73 Finally, at Mr Shum's request, the Tribunal recorded in its e-mail dated 16 April 2013 the following matters:[13]

(a) Mr Shum's dissatisfaction with the Tribunal's unwillingness to vacate the dates fixed for the hearing; and

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[11] CB, Tab 10, p 445.

[12] CB, Tab 13, p 451.

[13] CB, Tab 21.

(b) Mr Shum's allegation that "there was an agreement between the parties at the CMC that no expert witnesses would be called".

74 In this present challenge, Ms Mariella Triulzi ("MT"), a director of Triulzi, in her Reply Affidavit at para 9, deposed to Mr Shum's telephone conversation with Ms Koh prior to the CMC held on 11 December 2012. According to MT, during that telephone conversation, Mr Shum had proposed that both sides should dispense with expert evidence in order to minimise costs. This agreement, according to MT, was then communicated to the Tribunal at the CMC.

75 The existence of an agreement to dispense with expert evidence was categorically rejected by Mr Zhao Jinhui ("ZJ"), the in-house counsel of Xinyi. ZJ maintained that no agreement to only file factual witness statements was ever reached by the parties through their respective counsel either at the CMC held on 11 December 2012 or prior to that.

76 I make two points in relation to the alleged telephone conversation mentioned above (at [74]). First, I note that no contemporaneous telephone attendance note was produced to prove the alleged telephone conversation between counsel. Secondly, there was no mention of a telephone conversation in any of the contemporaneous written communications to the Tribunal. As ZJ pointed out in his affidavit, the alleged telephone conversation surfaced for the first time in MT's Reply Affidavit. Triulzi's contention all the while during the Arbitration was that the alleged agreement was reached at the CMC and it cannot be afforded a "second bite at the cherry" now by raising a fresh allegation that the Tribunal was not informed of.

77 The Tribunal confirmed that there was no record of the alleged agreement in the Tribunal's minutes of the CMC (see [31] above). Notably, the same minutes had been sent to the parties on 13 December 2012 and the accuracy of the contents was never queried by Triulzi prior to 1 April 2013. This was neither raised to the Tribunal on 22 March 2013 when parties sought an extension for the filing of witness statements to 1 April 2013 (see above at [27]).

78 The evidence adduced by Triulzi therefore does not stand up to scrutiny. Mr Tan was also aware of the weakness of the evidence to make good the existence of an agreement reached in a telephone conversation between Mr Shum and Ms Koh which was ostensibly communicated to the Tribunal at the CMC. He conceded that he was really relying on the Procedural Timetable to deduce the existence of the alleged agreement.

(2) Alleged agreement as evidenced by the Tribunal's direction on "Filing of Witness Statements"

79 Mr Tan argues that the Tribunal's direction pertaining to the "Filing of Witness Statements" in the Procedural Timetable meant only factual witness statements in light of the IBA Rules that both parties agreed to be bound by on 11 December 2012. Xinyi disagrees and contends that the direction on the "Filing of Witness Statements" in the Procedural Timetable was intended to encompass both factual and expert witness statements.

80 I make three points. First, Mr Tan's argument goes further than the stated position taken by Mr Shum during the course of the Arbitration. The latter had previously based Triulzi's case on the existence of an agreement to dispense with expert evidence that was reached at the CMC which was then

communicated to the Tribunal. Mr Tan's reliance on the IBA Rules to define the meaning of the direction "Filing of Witness Statements" was not argued before the Tribunal. It was a new argument brought up for the first time in the present proceedings and, needless to say, is another attempt by Triulzi to have a "second bite at the cherry".

81 Secondly, the Tribunal could not have contemplated the adoption and operation of the IBA Rules when it issued its direction on the "Filing of Witness Statements" in the Procedural Timetable. Significantly, prior to the CMC, the Tribunal prepared and circulated to the parties on 10 December 2012 the Draft Procedural Timetable that provided a deadline for the "Filing of Witness Statements". This Draft Procedural Timetable was sent to the parties before the IBA Rules were raised on 11 December 2012 at the CMC. As can be seen from the Tribunal's minutes of the CMC, the parties had first discussed the Draft Procedural Timetable and made modifications to the proposed deadlines so as to accommodate the schedules of counsel before formalising the Procedural Timetable. The IBA Rules were raised by Mr Shum *after* the directions for "Filing of Witness Statements" in the Procedural Timetable were finalised. In short, there was nothing to suggest that the direction on the "Filing of Witness Statements" in the Procedural Timetable was intended to mean anything different from what was initially intended by the Tribunal on 10 December 2012, and cannot be interpreted in light of the IBA Rules which came after the finalisation of the Procedural Timetable. Triulzi's reliance on the IBA Rules to interpret the words "Filing of Witness Statements" in the Procedural Timetable is thus without merit.

82 Thirdly, Mr Tan's reliance on the direction on the "Filing of Witness Statements" in the Procedural Timetable to deduce the existence of an agreed

procedure to dispense with expert witness does not cohere with the nature of a procedural timetable under the ICC Rules 2012 and is rejected for the reasons below.

83 Mr Tan's written submissions, taken to its logical conclusion, must mean that the Procedural Timetable embodied the agreement as to arbitral procedure between the parties. However, this contention does not sit well with the nature of the Tribunal's procedural order, issued in the form of the Procedural Timetable, after the CMC. The CMC was held and the Procedural Timetable was issued by the Tribunal in accordance with Art 24 of the ICC Rules 2012 which states:

> **Article 24: Case Management Conference and Procedural Timetable**
>
> (1) When drawing up the Terms of Reference or as soon as possible thereafter, the arbitral tribunal shall convene a case management conference to consult the parties on procedural measures that may be adopted pursuant to Article 22(2). Such measures may include one or more of the case management techniques described in Appendix IV.
>
> (2) During or following such conference, the arbitral tribunal shall establish the procedural timetable that it intends to follow for the conduct of the arbitration. The procedural timetable and any modifications thereto shall be communicated to the Court and the parties.
>
> (3) To ensure continued effective case management, the arbitral tribunal, after consulting the parties by means of a further case management conference or otherwise, may adopt further procedural measures or modify the procedural timetable.
>
> (4) Case management conferences may be conducted through a meeting in person, by video conference, telephone or similar means of communication. In the absence of an agreement of the parties, the arbitral tribunal shall determine the means by which the conference will be conducted. The arbitral tribunal may request the parties to submit case management proposals in advance of a case management conference and may request the attendance at any case

> management conference of the parties in person or through an internal representative.

84 It is clear from Art 24(2) of the ICC Rules 2012 that a procedural timetable is established by the arbitral tribunal and not by way of an agreement by the parties. Even though the arbitral tribunal is required to consult the parties under Art 24(1), the directions formalised by the arbitral tribunal are its own procedural order. It is well within the arbitral tribunal's power and discretion to accept or reject the views of the parties expressed during a case management conference as regards establishing the procedural timetable. Article 24(3) further empowers the arbitral tribunal to modify the established procedural timetable without being bound by the views of the parties as well. The establishment of a procedural timetable therefore falls under the arbitral tribunal's exercise of its case management powers which will be discussed in greater detail when dealing with Issue 2.

85 Since the Procedural Timetable constitutes a procedural order issued by the Tribunal, the direction on "Filing of Witness Statements" cannot be characterised as an agreed procedure between the parties for the purposes of a setting-aside application under Art 34(2)(*a*)(iv) of the Model Law.

(3) The Tribunal's implicit acceptance that there was no agreement to dispense with expert evidence

86 I now refer to the Tribunal's directions on 5 April 2013 (see [34] above). Ms Koh explained that the Tribunal considered the arguments of the parties in the exchanges of communication and must have implicitly agreed with Xinyi that there was no agreement to dispense with expert evidence. She elaborated that the Tribunal's direction to admit Dr Bao's Report supports her position that the direction on the "Filing of Witness Statements" in the

Procedural Timetable should be interpreted as allowing for the filing of both factual and expert witness statements.

87 It is possible to construe the Tribunal's directions on 5 April 2013 in Ms Koh's way. Since the Tribunal's minutes did not record any agreement to dispense with expert evidence, and considering the fact that the criticisms of the Tribunal now raised by Mr Tan are new, I see no reason to view the position taken by the Tribunal differently. Besides, Mr Tan's criticisms simply do not stand up to analysis.

Conclusion on the existence of the alleged procedural agreement

88 For the reasons stated, there was no agreed procedure to dispense with expert evidence. Triulzi's application to set aside the award under Art 34(2)(*a*)(iv) of the Model Law on the ground that the Award was not in accordance with the parties' agreed arbitral procedure is premised on the existence of an agreement to dispense with expert evidence. This premise is not made out and the application fails *in limine*.

Other Matters

89 Having reached the conclusion that there was no agreement to dispense with expert evidence, it is not necessary to decide on the matters described above (at [68(b)] and [68(c)]). However, I propose to discuss some aspects of the matters raised in argument such as waiver and prejudice. The discussions below are connected to Triulzi's criticisms that Triulzi was prejudiced from the fact that without its own expert's witness statement, it was prevented from refuting the Tribunal's reliance on Xinyi's expert.

Waiver of procedural irregularity

90 In relation to Xinyi's waiver argument, it relies on Art 39 of the ICC Rules 2012. It argues that Triulzi is precluded from relying on the IBA Rules to interpret the direction on the "Filing Witness Statements" in the Procedural Timetable since Triulzi failed to raise that issue with the Tribunal. As such, Triulzi had lost its right to object on the basis of the IBA Rules.

91 It is now appropriate to refer to Triulzi's request to the Tribunal to record Triulzi's dissatisfaction with the Tribunal's procedural directions issued on 16 April 2013 (see [37] above). Needless to say, Triulzi's insistence that the tribunal recorded its dissatisfaction was nothing more than a precautionary attempt to state its objection at that time to overcome any argument that the right to complain has been forgone by waiver. However, the objections recorded did not cover the specific waiver argument that is discussed here.

92 Article 39 of the ICC Rules 2012 Rules states:

> **Article 39. Waiver**
>
> A party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object.

93 One of the objectives of Art 39 of the ICC Rules 2012 is to ensure that any objection as to the conduct of the proceedings is made promptly. If a party does not object, then it may well be deemed to have waived its right to object pursuant to Art 39. There is no need to waive in writing, although, as a matter of proof, an objection should be in writing or recorded in the transcript. A bare

objection without any substantiation may not avoid a waiver of a procedural right. As stated in Michael W Bühler and Thomas H Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (Sweet & Maxwell, 2nd Ed, 2008) at para 33-27:

> If there are objections to the procedure, they *must be identified and in general substantiated*. In the *Bombadier* case, the Respondent raised general procedural objections and the Tribunal on several occasions requested that the Respondent specify the procedural objections *so that they could be dealt with*. The Respondent failed to do so and eventually brought proceedings to annul the Award. The Paris Court of Appeal rejected the request for annulment and noted in particular that:
>
> > "Considering that in order to be heard in annulment proceeding, the grievance needs to have been invoked in front of the arbitral tribunal each time it was possible to do so; that this rule, which protects procedural loyalty and arbitral awards, would be rendered useless if it was enough to utter menaces and critics in front of the Tribunal, as shown by Bombardier, in order to keep its options open when the time has come, to isolate an element of the procedure and present it as a violation of the adversarial principle."
>
> [emphasis added]

94 The passage quoted above is important. It emphasises the need to allow the Tribunal to deal with the objections promptly and properly. In order to do so, any party objecting to the procedural irregularity must put forward the arguments which are available to it so as to allow the Tribunal an opportunity to consider them. This concern also constitutes part of the purpose behind Art 39 of the ICC Rules 2012 as stated in Jason Fry, Simon Greenberg and Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (ICC, 2012) at pp 418–419:

> **Purpose.** Article 39 ensures that if a party fails to raise objections with respect to the constitution of the arbitral

> tribunal or the conduct of the proceedings it will be deemed to have waived its right to object. This is especially relevant with regard to any subsequent court proceedings. *The provision is intended to force parties to raise any genuine procedural concerns promptly during the arbitration, so that, where possible, the concern can be addressed immediately and within the arbitration.* This prevents parties from holding back any objections for use in a later attempt to attack the award. A party that proceeds with an arbitration without raising a procedural objection runs a serious risk that it will be prevented (either by the Rules or relevant law) from relying on any procedural issue in subsequent court proceedings to set aside or resist enforcement of an award. [emphasis added]

The rationale is that a party should not be allowed to withhold any arguments that it could have made before the Tribunal but make it at a later stage in a setting-aside application in the event that the arbitral award turns out to be unfavourable.

95 In arguing for the exclusion of Dr Bao's report, Mr Shum wrote in his letter addressed to the Tribunal dated 2 April 2013:[14]

> …
>
> During the abovementioned case management conference, the parties had indicated to the Tribunal that the parties will not be filing any expert statements. Consequently, the Procedural Timetable dated 11 December 2012 did not provide a timeline for expert witness statements to be filed. We have also not been given any notice that [Xinyi] will be filing any expert witness statements.
>
> …

96 Apart from a bare assertion that the Procedural Timetable did not provide for expert witness statements to be filed, Triulzi's objections did not mention, let alone rely on, the IBA Rules to draw the distinction made in the

[14] CB, Tab 10, p 445.

IBA Rules between factual and expert witness statements. As stated above (at [81]), the IBA Rules were adopted after the Tribunal's direction on the "Filing of Witness Statements" was made and there was no reliance placed on the IBA Rules to limit the direction on the "Filing of Witness Statements" to the filing of only factual witness statements. On the face of it, Triulzi's failure to raise this issue in relation to the IBA Rules in the Arbitration precluded it from making such a submission in this setting-aside application.

97 Even if waiver is not made out under Art 39 of ICC Rules 2012, the use of the IBA Rules to draw a distinction between factual witness statements and expert witness statements in order to ascribe a different meaning to the direction on the "Filing of Witness Statements" in the Procedural Timetable is plainly an afterthought. It is based on *ex post facto* reasoning derived from facts that were not before the Tribunal when it issued its procedural direction on the "Filing of Witness Statements".

Admission of Dr Bao's Report

98 Mr Tan raises the question of prejudice in his submissions (see [23] above). For the sake of argument, if there was a procedural agreement as alleged, it would then mean that expert evidence should have been excluded from the arbitral hearing. Consequently, the examination of prejudice in the context of Xinyi's breach of the parties' agreed arbitral procedure is really a question of whether the exclusion of expert witness statements, *ie*, Dr Bao's Report, would have made a reasonable difference to the Tribunal's deliberation (see *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 at [54]). The alleged prejudice that eventuated as a result of the breach must have a causal connection with the admission of Dr Bao's Report. This question does not involve an inquiry into

what would have happened if Triulzi had been allowed to adduce its own expert evidence.

99 From this perspective, Triulzi's argument that there would be a real or likely difference to the Tribunal's deliberation if it had been allowed to adduce its own expert evidence is not relevant to this issue of prejudice in the context of a setting-aside application under Art 34(2)(*a*)(iv) of the Model Law where the complaint relates to an alleged breach of an agreed arbitral procedure. In this context, one is concerned with the right to have the arbitration conducted in accordance with the agreed arbitral procedure. The scenario here is quite different from those cases where there is an alleged breach of natural justice which, in this case, would concern Triulzi's right to adduce its own expert witness statements that flows from the right to be afforded a reasonable opportunity to present its case. That consideration is relevant in the context of Triulzi's allegations of breach of natural justice which I shall deal with when discussing Issue 2.

100 In connection with this aspect of the application to set aside the Award under Art 34(2)(*a*)(iv) of the Model Law, the theoretical inquiry here (assuming that the admission of Dr Bao's Report was in breach of an agreed procedure) is whether an exclusion of Dr Bao's Report would have reasonably made a difference to the deliberations of the Tribunal. I now turn to Dr Bao's Report to examine how the Tribunal dealt with it in the Award.

101 Dr Bao's Report dealt with three issues that was considered by the Tribunal:

(a) Whether there were design defects in the washing machines;

(b) Whether the cleanliness of Xinyi's facility affected the performance of the washing machines; and

(c) Whether a full 8-hour acceptance test should have been conducted by Xinyi for the washing machines.

102 It is clear that as to the first issue, Dr Bao was not an expert in industrial washing machines and the Tribunal treated Dr Bao's opinion as a "matter of conjecture".[15] As for the second issue on the cleanliness of Xinyi's facility, the Tribunal found that Dr Bao's opinion on the cleanliness of the facility was not satisfactory since his inspection was conducted more than 21 months after the washing quality issues arose. The Tribunal stated in [101] of the Award:[16]

> Furthermore, Dr Bao's conclusion that the cleanliness of the air at the Wuhu Facility was normal, did not assist the Tribunal in determining the cleanliness of the Wuhu Facility at the relevant time period when the washing quality issues were raised (December 2010 to May 2011), as Dr Bao's inspection and observations were made more than 21 months after the Claimant raised the alleged washing quality issues.

103 In summary, Dr Bao's Report had no bearing on the Tribunal's determination in respect of the first and second issues. As for the third issue, the Tribunal agreed with Dr Bao that there was no need for Xinyi to conduct a full 8-hour acceptance test. Whilst Triulzi argues that this is evidence of prejudice, it must be noted that in the same paragraph of the Award where the

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[15] CB, Tab 28, p 1244, [100].

[16] CB, Tab 28, p 1244, [101].

Tribunal seemingly agreed with Dr Bao on this point, the Tribunal further held:[17]

> … [I]t is immaterial that [Xinyi] did not carry out a full 8 hour acceptance test, *given the evidence* that there were several areas that did not comply with the contract specifications within the period of time when the acceptance test was conducted from 7 to 12 May 2011. [emphasis added]

104 This finding of the Tribunal is significant for the reason that the final determination of the Tribunal in relation to Triulzi's defence would not have been affected even if he disagreed with Dr Bao's opinion on the third issue.

105 For the reasons stated, an exclusion of Dr Bao's Report would not have reasonably made a difference to the deliberations of the Tribunal. There is consequently no reason to set aside the award even if such a procedural agreement excluding expert evidence existed.

Issue 1A: Award was not in accordance with Art 18 within the meaning of Art 34(2)(*a*)(iv)

106 Mr Tan's fall-back argument is that the Award should be set aside under Art 34(2)(*a*)(iv) of the Model Law as it was not in accordance with Art 18 of the Model Law which sets out the non-derogable minimum procedural requirements as regards the procedural conduct of an arbitration. In my view, Mr Tan's fall-back argument does not assist Triulzi because the evidence in this case pointed, at best, to a misunderstanding of the scope of the direction on the "Filing of Witness Statements" or some other mistake on Triulzi's part. Plainly, the non-filing of Triulzi's expert evidence by 1 April

[17] CB, Tab 28, p 1245, [103].

2013 was entirely its own fault, and Triulzi was in delay, even at that stage, in complying with the Tribunal's direction on the Filing of Witness Statements. Furthermore, for the reasons explained below (at [110] to [116]), the Tribunal's subsequent procedural orders and directions cannot be relied upon as a ground for challenging the eventual Award. In the circumstances of this case, Art 18 is not engaged. I have already set out the purpose of Art 18 above (at [51]) which is about protecting a party from the arbitral tribunal's conduct. It is certainly not intended to protect a party from its own "failures or strategic choices".

107 It is now appropriate to set out Article 18 of the Model Law in full:

> **Article 18. Equal treatment of parties**
>
> The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

108 I accept that Art 18 of the Model Law, described as a key element of the "Magna Carta of Arbitral Procedure" in the *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary General* (A/CN.9/264, 25 March 1985) ("*Analytical Commentary*") at p 44, is a mandatory provision, and the breach of which would be, as stated in Art 34(2)(*a*)(iv) of the Model Law, "in conflict with the provision of this Law" or "not in accordance with this Law". Consequently, a breach of Art 18 may give rise to a ground for setting aside an award under Art 34(2)(*a*)(iv).

109 It must be recognised however that Art 18 is worded with reference to the abstract notions of "equality" and "full opportunity". As observed by *Holtzmann and Neuhaus* at p 551:

> The terms of Article 18 were modelled on Article 15(1) of the UNCITRAL Arbitration Rules. The Commission Report provides no authoritative guidelines to interpreting the terms "treated with equality" and "full opportunity of presenting his case"; nor do the reports of the Working Group. It is submitted that this may be because the delegates considered that the terms were so well understood in all legal systems that comment was unnecessary and that detailed definitions might limit the flexible and broad approach needed to ensure fairness in the wide variety of circumstances that must be encountered in international arbitration.

Therefore, the exact content of Art 18 that is engaged by a complaint of a breach of Art 18 must depend upon the level of abstraction at which the complaint is described or characterised.

110 In this case, Mr Tan argues that even without the alleged procedural agreement, the Tribunal nonetheless violated Art 18 of the Model Law as Triulzi was not treated equally compared with Xinyi. Mr Tan raises the point that the Tribunal should have appreciated the fact that Triulzi was under the mistaken belief that expert evidence was to be dispensed with. In this regard, Xinyi had the benefit of the entire duration from 11 December 2012, after the CMC, to 1 April 2013, the deadline for the "Filing of Witness Statements", to produce an expert report whereas Triulzi was effectively not afforded such an ample amount of time as the Tribunal only gave it a ten-day time period. The crux of Mr Tan's complaint is that only Xinyi, and not Triulzi, presented its expert evidence during the hearing from 22 to 25 April 2013.

111 I make several points. First, the Tribunal's decision to extend time by ten days for Triulzi to file its expert witness statement must not be considered in isolation. I concluded that there was no agreement to dispense with expert evidence, and as such, Triulzi would have had the same amount of time as Xinyi (11 December 2012 to 1 April 2013) to prepare and file an expert

witness statement. It is thus fanciful to now complain of inequality because the Tribunal gave Triulzi only ten days to prepare an expert report. Besides, it is risible that Triulzi now complains of inequality when the perceived disadvantage was occasioned by its own doing. The Tribunal's decision to extend time by another ten days to file Triulzi's expert witness statement was decidedly made after taking into account parties' arguments and a myriad of factors including the arbitral tribunal's obligation to conduct the arbitration fairly and expeditiously. The Tribunal had come to grips with Triulzi's desire to inspect the two washing machines, but it was not told why Triulzi needed four weeks to inspect and another four weeks to prepare the expert report when Xinyi took four hours to inspect the two washing machines. In those circumstances, Triulzi's contention relating to inequality must be rejected on this point alone.

112 Secondly, the term "equality" must be "interpreted reasonably in regulating the procedural aspects of the arbitration" (see *Holtzmann and Neuhaus* at p 551). It cannot be the case that each party must have the exact same amount of time afforded in relation to the production of an expert report. Article 18 does not require the arbitral tribunal to ensure that both parties are treated identically. Notably, the principle of equality in Art 18 is about applying *similar* standards to all parties throughout the arbitral process (see the 2012 Digest, p 97 at para 5). Furthermore, *SIA: Law & Practice* make the following comments at ch 6, paras 2.11–2.13 and 2.15:

> 2.11 The first requirement, that the parties be 'treated with equality', means that the parties are to be treated in equal fashion. This does not mean that the tribunal must treat the parties identically, but it must accord them equal treatment in the procedure adopted for the conduct of the reference. It seems that the requirement of equal treatment must be observed by the parties and the tribunal alike.

> 2.12 Nevertheless the principle of equal treatment should not, it is suggested, be confused with that of mandating an exact equal amount of time or an equal number of pleadings, or speeches. Whilst such a procedure may be adopted in the discretion of the tribunal it is not mandated. …
>
> 2,13 The fundamental reason that equality of treatment does not mandate such an approach is that equality of treatment is ultimately considered together with a full opportunity to present its case. In other words, if a party is accorded a full opportunity to present its case including to comment upon the case advanced against it, then it is suggested that a tribunal is not concerned with whether or not an exactly equal time or an exact equal number of pleadings or speeches is accorded to each party.
>
> …
>
> 2.15 Yet further, it is even possible to express at the extremes a potential tension between the two concepts of equality of treatment and a full opportunity to present its case. Thus every tribunal is likely to make some provision for a procedural timetable for the disposal of the matter in as reasonably expeditious fashion as is permitted in all the circumstances. Such a timetable will inevitably limit the amount of time given to each party to prepare and present a case. Thus it frequently transpires that one party or other applies to the tribunal for further permission to extend time or present further evidence out of time or an additional submissions. All will depend upon the circumstances of the particular case; nonetheless a tribunal must balance the need to accord equality to the parties which will include adherence to the timetable applicable to each side to prepare and present its case and the requirement to accord each party a full opportunity to present its case. …

113 I now refer to a German decision by the Oberlandesgericht Celle: *8 Sch 3/01* (2 October 2001) which was discussed by Dr Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 3rd Ed, 2010) at pp 279–280:

> In this case the respondent alleged a violation of its right to be heard and the equal treatment of parties (art.18 of the model Law) due to the fact that the arbitral tribunal had conducted the proceedings only in the Russian language, which the respondent could not understand, this despite the fact that

> the contract itself was drafted in two languages. The Higher Regional Court Celle held that the defendant had been given *sufficient possibility to raise defences* before the arbitral tribunal. Lacking any specific agreement of the parties to the contrary, it was self-evident that the Russian Court of Arbitration would conduct the arbitral proceedings in Russian. The court emphasised that it was the defendant's obligation to obtain assistance from an interpreter in order to *participate fully in the proceedings*. [emphasis added]

As can be seen from this excerpt, the mere fact that there was some "inequality" as a result of the fact that it was more convenient for the applicant, who understood Russian, to participate in the arbitration does not amount to a violation of Art 18.

114 Likewise the commentary from *SIA: Law & Practice* above (at [112]) recognises that the amount of time to be afforded to a party cannot be based solely on the amount of time afforded to the other party. Other circumstances may bear upon the judgment of the Tribunal. A relevant consideration is the conduct of the parties. The stage of the arbitral proceedings at the material time also matters.

115 In this regard, I note that in Triulzi's letter dated 5 April 2013, Mr Shum had only requested time for Triulzi to engage an expert *to inspect the two washing machines at Xinyi's facility and produce a report based on such an inspection*. Obviously, the Tribunal had relied on Triulzi's submission that it only wanted to inspect the two machines at Xinyi's facility. In this regard, the Tribunal: (a) noted that Dr Bao took four hours to inspect the machines; and (b) confined Triulzi's inspection to the two washing machines and that its inspection should "not extend to other units in the same premises or other

premises".[18] At the same time, the Tribunal was mindful that the extension of time to file an expert witness statement was being sought very close to the evidentiary hearing dates in April. In this regard, the Tribunal's consideration of urgency in the conduct of the arbitral proceedings was a relevant factor. Notably, the Tribunal must have regard: (a) to the fact that Xinyi filed its expert witness statement on time on 1 April 2013; and (b) to its obligation to get on with the arbitral proceedings with reasonable expedition (see also [131]–[132] below). Seen against this backdrop of circumstances, the Tribunal could not be said to have treated Triulzi unequally. I also note that all these factors are also relevant to the issue of whether Triulzi was afforded a reasonable opportunity to be heard and they will be discussed in greater detail when I deal with Issue 2.

116 Lastly, it cannot be the case that Triulzi was treated unequally for the sole reason that Xinyi was the only party armed with expert evidence at the hearing. The Tribunal is only required to ensure that both Triulzi and Xinyi had an opportunity to submit expert evidence. It is not required to ensure that both Triulzi and Xinyi made full and best use of such an opportunity. Triulzi cannot complain of its own failure to make use of the opportunity given to it by the Tribunal. Triulzi's complaint, in effect, is premised on it being denied an opportunity to adduce expert evidence rather than the bare fact that it did not adduce such evidence at the hearing. From this perspective, Triulzi's main contention does not relate to equality of treatment under Art 18 of the Model Law and should be re-characterised as an allegation that it was not afforded a reasonable opportunity to present expert evidence. The question then is

[18] CB, Tab 14, p 1179.

whether Triulzi was afforded a reasonable opportunity to be heard in the arbitration and this is raised by Triulzi under Issue 2.

Issue 2: Breach of natural justice

Criticisms of the Tribunal's procedural orders and directions

117 Mr Tan's alternative argument to the agreed procedural breach point is founded on s 24(*b*) of the IAA and Art 34(2)(*a*)(ii) of the Model Law. Issue 2 is premised on three specific criticisms of the Tribunal's procedural orders and directions that were said to have effectively denied Triulzi a reasonable opportunity to present its own expert evidence. In particular, Triulzi was prevented from advancing arguments before the Tribunal that the subject machines complied with the contractual technical specifications, and that any non-compliance was due to Xinyi's lack of maintenance and the very dirty environment of Xinyi's facility. Triulzi was further prevented from refuting the Tribunal's reliance on Xinyi's expert evidence in respect of the contractual requirement to run the subject machines for 8 hours for the acceptance test. Mr Tan also argues that, as a result of such procedural orders and directions, Triulzi was treated unequally as compared with Xinyi (this inequality point is already discussed above). The three procedural orders and directions are:

(a) The direction on 5 April 2013 for Triulzi to file its expert witness statement by 4pm on 15 April 2013;

(b) The direction on 16 April 2013 refusing Triulzi's application to vacate the hearing dates; and

(c) The refusal to admit Dr Piombo's Report on 25 April 2013.

118 As I alluded to above (at [19]), Triulzi's challenge is effectively against the procedural orders and directions made in the course of the arbitral proceedings rather than a challenge to the making of the Award. In this case, Triulzi has to persuade the court that the Tribunal's procedural decisions were, albeit a matter of case management, amounted to a breach of natural justice (*ie*, the procedural nature of the right to be heard) as a result of which Triulzi's rights are prejudiced (see s 24(*b*) of the IAA). Notably, the accusations are not that the Tribunal had not dealt with all the central issues of the dispute or that the Tribunal had dealt with the issues without hearing the parties. Triulzi's difficulty resides in establishing that Triulzi's complaints arise from circumstances attributable to the Tribunal, or that the circumstances were not a result of Triulzi's own failures or choices (tactical or otherwise). In the final analysis, the three procedural orders and directions could not even be treated as evidence of the Tribunal's culpability and this means that Triulzi's criticisms of the Tribunal (see also [22]–[23] above) must fail. In my view, these criticisms were unfounded.

Triulzi's arguments

119 In brief, Triulzi's allegations as part of its natural justice arguments are as follows: (a) that ten days to produce an expert report did not afford it a meaningful opportunity to file an expert report; and that this short time extension was further compounded by (b) the Tribunal's rejection of Triulzi's application to vacate the hearing dates and (c) its refusal to admit Dr Piombo's Report which Triulzi had attempted to file on the last day of the hearing.

120 Triulzi's submits that the Tribunal's procedural orders and directions described in [117(a)] and [117(b)] and the Tribunal's decision described in [117(c)] violated its right to be heard as embodied in Art 18 of the Model Law

that requires the arbitral tribunal to give each party "a full opportunity of presenting his case". As a result of this violation of its right to be heard, Triulzi argues that the Award should be set aside under s 24(*b*) of the IAA and Art 34(2)(*a*)(ii) of the Model Law.

Parties' approach in OS 1114/2013

121 Section 24(*b*) of the IAA provides that:

> **Court may set aside award**
>
> **24.** Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if —
>
> **…**
>
> (b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

122 Article 34(2)(*a*)(ii) of the Model Law provides that:

> **Article 34. Application for setting aside as exclusive recourse against arbitral award**
>
> …
>
> (2) An arbitral award may be set aside by the court specified in article 6 only if:
>
> (a) the party making the application furnishes proof that:
>
> …
>
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> …

123 Both parties drew no distinction between s 24(*b*) of the IAA and Art 34(2)(*a*)(ii) of the Model Law. Vinodh Coomaraswamy J in *ADG and another v ADI and another* [2014] 3 SLR 481 ("*ADG v ADI*") recognised at [118] that there is "no distinction between the right to be heard as an aspect of the rules of natural justice under s 24 (*b*) of the IAA and as an aspect of being able to be heard within the meaning of Article 34(2)(*a*)(ii)."

124 Furthermore, although Art 18 uses the word "full opportunity" to present one's case, both parties proceeded on the understanding that this only requires the Tribunal to accord each party a "reasonable opportunity" to present its case. Coomaraswamy J also held in *ADG v ADI* at [105] that "full opportunity" to be heard as mandated by Art 18 is no different from a requirement to afford a party a reasonable opportunity to be heard. There is in effect no need to rely on Art 18 since the principles there accord with the principles of natural justice in both s 24(*b*) of the IAA and Art 34(2)(*a*)(ii) of the Model Law.

125 I therefore propose to deal with s 24(*b*) of the IAA and Art 34(2)(*a*)(ii) together since both provisions involve a single inquiry as to whether Triulzi was denied a reasonable opportunity to be heard ("the fair hearing rule"). It is noteworthy that the content of the fair hearing rule can vary greatly from case to case depending on the circumstances of each case since what may be a breach in one context may not be a breach in another. At this juncture, it is useful to refer to the Queensland Supreme Court's observations on procedural fairness in the decision of *Sugar Australia Pty Ltd v Mackay Sugar* Ltd [2012] QSC 38 ("*Sugar Australia*") at [33]:

> The question is whether the applicant was deprived unfairly of an opportunity to put its case, by argument and if relevant by evidence, against the reasoning by which the arbitrator had

> rejected the applicant's case. The answer largely turns upon whether the applicant should reasonably have anticipated that, without the arbitrator providing such an opportunity to the applicant, the arbitrator might determine the dispute by that reasoning. In *Re Association of Architects ex parte Municipal Officers Association*, Gaudron J said:
>
> > "As was pointed out by Deane J in *Sullivan v Department of Transport* (1978) 20 ALR 323 at 343, procedural fairness requires only that a party be given 'a reasonable opportunity to present his case' and not that the tribunal ensure 'that a party takes the best advantage of the opportunity to which he is entitled'. And it is always relevant to enquire whether the party or his legal representative should reasonably have apprehended that the issue was or might become a live issue: see *Re Building Workers' Industrial Union of Australia; ex parte Gallagher* (1988) 62 ALJR 81 at 84; 76 ALR 353 at 358."

126 If Triulzi is able to establish that it was denied a reasonable opportunity to present its case, it must then establish how this denial bore upon the adverse decision or in other words that it was prejudiced as a result. At this juncture, it is appropriate to repeat here my comments above (at [118]). Triulzi has to first and foremost show that the Tribunal's procedural orders and decisions were not a matter of case management, but a breach of natural justice (*ie*, the procedural nature of the right to be heard). Evidentially, were Triulzi's complaints due to circumstances attributable to the Tribunal, or were the circumstances due to Triulzi's own failures or choices (tactical or otherwise)?

Case management powers of the Tribunal

127 Triulzi's complaints revolved around the exercise of the Tribunal's case management powers. The Tribunal's discretion to determine procedure, in the absence of agreement between the parties on such matters, is enshrined in Art 19 of the Model Law which is set out above (at [46]).

128 Furthermore, by adopting the ICC Rules 2012, the parties have also agreed to grant the Tribunal broad and flexible case management powers. As stated in Art 22(2) of the ICC Rules 2012:

> **Article 22: Conduct of the Arbitration**
>
> (1) The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.
>
> (2) In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.
>
> …
>
> 4) In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.
>
> 5) The parties undertake to comply with any order made by the arbitral tribunal.

129 A similarly broad and flexible authority is granted to the Tribunal to deal with evidence under Art 9(1) of the IBA Rules which the parties have also adopted:

> **Article 9. Admissibility and Assessment of Evidence**
>
> (1) The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.

130 In this regard, I refer to Tay Yong Kwang J's description of the role of the Tribunal as the "master of his own procedure" with wide discretionary powers in *Anwar Siraj v Ting Kang Chung* [2003] 3 SLR(R) 287 ("*Anwar Siraj*") at [41]:

> The arbitrator is, subject to any procedure otherwise agreed between the parties as applying to the arbitration in question,

> master of his own procedure and has a wide discretionary power to conduct the arbitration proceedings in the way he sees fit, so long as what he is doing is not manifestly unfair or contrary to natural justice.

131 This passage was cited with approval by the Court of Appeal in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [60]. That the Tribunal is the master of his own procedure is one of the foundational elements of the international arbitral process. Nonetheless, as observed by Tay J, the arbitral tribunal's case management powers are not without limits. The exercise of case management powers is subject to the rules of natural justice which includes the right to be heard. However, this right only encompasses a reasonable opportunity to present one's case, the fair hearing rule, which must be considered in light of other competing factors. For instance, the Tribunal is also obligated under Art 22(1) of the ICC Rules 2012 to "make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute." Weight must be accorded to "the practical realities of the arbitral ecosystem such as promptness and price" (see *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [103]).

132 In this regard, an arbitral tribunal exercising case management powers will take into consideration a myriad of factors, including the arbitral tribunal's obligation to conduct the arbitration fairly and expeditiously. The supervisory role of the court over the Tribunal's exercise of his case management powers should therefore be "exercised with a light hand" in the context of a challenge on the basis of the fair hearing rule (see *Anwar Siraj* at [42]).

133 The decision in *Grand Pacific* which I have discussed above (at [61]) in relation to Art 34(2)(*a*)(iv) is also relevant here. In that case, the applicant also sought to set aside an arbitral award under Art 34(2)(*a*)(ii) of the Model Law on the ground that it had been unable to present its case as a result of certain case management decisions taken by the tribunal. One of these decisions was a refusal to consider additional authorities which the applicant sought to rely on. The High Court set aside the award but the decision was reversed by the Hong Kong Court of Appeal. In its decision at [68], the Hong Kong Court of Appeal emphasised the broad and flexible case management powers of the arbitral tribunal:

> The learned Judge concluded at para.129 that the refusal to receive and consider the additional authorities prevented [the applicant] from presenting its case and therefore a violation of art.34(2)(a)(ii) has been established. With respect, I cannot agree with Saunders J. *I do not believe he was entitled to interfere with a case management decision, which was fully within the discretion of the [arbitral tribunal] to make.* [emphasis added]

134 The Hong Kong Court of Appeal proceeded to highlight at [94] that in relation to the exercise of the arbitral tribunal's case management powers, "the conduct complained of must be sufficiently serious or egregious so that one could say a party has been denied due process." In this regard, I note that this phrase was also considered by Coomaraswamy J in *ADG v ADI* and I agree with his interpretation at [116]:

> … [The Hong Kong Court of Appeal] held [in *Grand Pacific*] … that before a court finds that a party was unable to present its case within the meaning of Article 34(2)(a)(ii) of the Model Law, "the conduct complained of must be sufficiently serious or egregious so that one could say a party has been denied due process". Although the term "due process" originates in English law (see the Liberty of Subject Act 1354, still in force in England today), it is not a term of art in English, Singapore or indeed Hong Kong law. Read in context, the concept of "due process" referred to by the Hong Kong Court of Appeal directs

> the focus to the elemental or fundamental aspects of the right to be heard rather than to its technical or incidental aspects. The violation of that right which is necessary to amount to a party being "unable to be heard" must be a radical breach of that right which is "serious or egregious", though not so radical that the public policy grounds under Article 34(2)(b)(ii) are engaged.

135 With these case management principles in mind, I now turn to examine whether Triulzi is able to show that the Tribunal's procedural decisions were a breach of natural justice (*ie*, the procedural nature of the right to be heard) and brought them within the ambit of s 24(*b*) of the IAA and Art 34(2)(*a*)(ii) of the Model Law.

The direction on 5 April 2013 for Triulzi to file its expert witness statement by 4pm on 15 April 2013

136 In connection with this aspect of the application, the case management powers of the Tribunal need to be addressed in the context of five other matters. First, the Tribunal's duty was to proceed with the conduct of the arbitration fairly and expeditiously. The history here is that the parties were supposed to be ready for an evidentiary hearing starting 22 April 2013; the hearing dates having been fixed since 11 December 2012 in the Procedural Timetable. The Tribunal had also given notice to the parties on 13 December 2012 that it expected the parties to strictly adhere to the Procedural Timetable (see [27] above). There was already a departure from the prescribed timeline following a request by both parties to extend the deadline for the "Filing of Witness Statements" by a week to 1 April 2013. I also observe that according to Art 30(1) of the ICC Rules 2012, the Tribunal was required to render its final award six months from the Terms of Reference, *ie* 28 May 2013, and this also contributed to the urgency of the matter. It does not matter that the Tribunal had in fact issued the Award after 28 May 2013 as what is important

is that the Tribunal was concerned with this deadline when it issued its procedural orders and directions. Considering all those factors at play, and in light of Art 22 of the ICC Rules 2012 which requires the Tribunal to conduct matters expeditiously, the Tribunal, on learning of Triulzi's application to vacate the April hearing dates on the basis that it required a total of eight weeks to inspect and file its expert witness statement, was quite entitled to conclude that in those circumstances, it was better for the hearing to proceed on the dates fixed and grant a time extension of ten days to Triulzi for it to file an expert witness statement. It seems to me that the Tribunal had, within its case management discretion, acted fairly and was entitled to conclude that proper case management of the Arbitration required the April hearing to go ahead.

137 Secondly, I have already concluded that Triulzi's excuse for not filing its expert's witness statement by 1 April 2013 was not credible. The fact of the matter is that Xinyi had in hand Dr Bao's Report on 1 April 2013 but Triulzi, on the other hand, despite having the same amount of time as Xinyi, was without an expert witness statement. Triulzi's predicament was created by its own doing and it did not matter whether this was due to a mishap, mistake or misunderstanding that it had an agreement with Xinyi. The suggestion that the Tribunal's time extension was not meaningful is symptomatic of Triulzi's approach throughout the entire Arbitration in that its own mistakes and misunderstandings should not matter. As I see it, the Tribunal had conducted itself fairly in the face of a predicament that was entirely of Triulzi's own doing.

138 Triulzi's predicament was further compounded by what it had told the Tribunal – it wanted its expert to inspect the two washing machines in dispute.

It was also compounded by what it had *not* told the Tribunal. Notably, the Tribunal's decision to grant Triulzi a time extension of ten days was set against the back drop of the following matters: (a) the Tribunal was only told in a letter on 5 April 2013 that Triulzi wanted its expert to inspect the two machines and to file an expert's report on that matter; (b) the Tribunal was neither told that the expert evidence would cover other aspects of the dispute nor was it told that it was Triulzi's intention to instruct a non-Chinese expert, and that Triulzi could face difficulties in relation to the availability of its expert and the visa application for its expert; (c) the Tribunal observed that the length of time it took Dr Bao to inspect the two machines was four hours; and (d) the scheduled hearing was less than three weeks away. Besides the time extension, the Tribunal directed Xinyi to give Triulzi's access to the two machines in dispute so as to expedite matters.

139 Thirdly, when issuing procedural directions, an arbitral tribunal must consider the interests of both parties (see *Sanko Steamship Co Ltd v Shipping Corp of India and Selwyn and Clark (The Jhansi Ki Rani)* [1980] 2 Lloyd's Rep 569). The Tribunal therefore had to balance the interest of Xinyi to ensure that it was not inconvenienced for what might be termed Triulzi's "lapses" or, in a more charitable term, "mishaps".

140 Fourthly, the parties were supposed to be ready for a hearing starting 22 April 2013, which hearing dates had been fixed since 11 December 2012. Triulzi was not ready and wanted the hearing dates of 22 to 25 April to be vacated. It must be remembered that: (a) the dispute over the alleged agreement to dispense with expert evidence arose on 2 April 2013 which was less than 3 weeks before the start of the scheduled hearing; and (b) Triulzi missed the deadline for filing an expert witness statement on 1 April 2013. It

was, however, given another opportunity to prepare an expert report and an additional ten days was given after the Tribunal heard Triulzi's application for more time and vacation of the April hearing.

141 For the reasons given, the Tribunal's conduct is not capable of criticism whatsoever. Triulzi's complaints are misconceived. In my view, the Tribunal had made its decision fairly in consideration of all points raised by Triulzi at that stage. It is not for the supervising court to interfere in an entirely legitimate case management decision, and one which was necessary in the light of the matters set out above.

The direction on 16 April 2013 refusing Triulzi's application to vacate the hearing dates

142 On 12 April 2013, Triulzi wrote to the Tribunal to complain that the time extension of ten days for the Triulzi to file an expert's report was too short and invited the Tribunal to reconsider its decision not to vacate the April hearing dates. By that time, seven of the ten days afforded to Triulzi had passed.

143 In that communication, Triulzi informed the Tribunal that its choice of expert was not available. This formed the basis of Triulzi's subsequent contention in OS 1114/2013 that it was not given a meaningful opportunity to file an expert report. Triulzi relies on the fact that its first choice expert, Mr Wigg, was only available from early June 2013 onwards. It also relies on the fact that its Italian experts had to apply for a visa one month before travel to China. This would mean that it was impossible for either Mr Wigg or another Italian expert to produce an expert report between 5 April 2013 and 15 April 2013.

144 I cannot accept this argument criticising the Tribunal's conduct on and prior to 16 April 2013. Bearing in mind what was said to the Tribunal at that stage, a reasonable opportunity to present Triulzi's case does not equate to a reasonable opportunity to optimally present *everything* that it wants to present. Triulzi's inability to engage either Mr Wigg or an Italian expert is not a basis for finding that 10 days did not constitute a reasonable opportunity to file its expert report. Neither should Triulzi's failure to reasonably apprehend the new issues that were, or might have become, live issues constitute a want of procedural fairness.

145 I have already stated that the Tribunal was not told prior to the 5 April 2013 decision that Triulzi wanted to engage Mr Wigg who would need to apply for a visa to China. It was not Triulzi's case that it could not engage an expert that was already in China. Triulzi also submits that aside from securing an expert, the ten days granted by the Tribunal was insufficient for it to:

> (a) liaise with Xinyi to ensure that the washing machines were available for inspection at Xinyi's facility; and
>
> (b) have the expert prepare the report that not only deals with the issue of inherent design defects within the machine, but also the impact of the environmental conditions of the facility on the washing machines, the adequacy of Xinyi's maintenance of the machines and the interpretation of technical terms.

146 As regards point (a), the Tribunal had on 5 April 2013 directed Xinyi to "give reasonable supervised access to [Triulzi's] expert to inspect the 2

glass-washing machines."[19] It transpired that Triulzi did not contact Xinyi and Ms Koh submits that Triulzi cannot complain of having insufficient time when its own behaviour shows that it was not making full use of the ten days granted to it. I agree with Ms Koh's submissions.

147 On point (b), Mr Shum's letter dated 5 April 2013 and 12 April 2013 only related to the inspection of the two machines in dispute. Notably, Mr Wigg was also only instructed to inspect the two machines in dispute, as seen in his e-mail to Triulzi dated 12 April 2013. Right through to the hearing on 16 April 2013, the complaint related to insufficient time "to engage [an] expert witness, send him to China for the inspection and come up with a report" as seen from the Tribunal's e-mail of 16 April 2013 set out above (at [37]). Significantly, it is clear from the contemporaneous documentary evidence that in April 2013, the Tribunal was *not told* by Triulzi that it needed its expert not only for the inspection of the two machines, but also for the environment of the facility and Xinyi's maintenance regime.

148 Again, Triulzi's complaint that the Tribunal's time extension was not meaningful and it was not given an opportunity to present its own expert evidence that covered other matters is again symptomatic of Triulzi's approach throughout the entire Arbitration. Triulzi seeks to criticise the Tribunal's conduct for something that Triulzi itself had not seen fit to put before the Tribunal for consideration. There is no explanation as to why the Tribunal was not told on 16 April 2013 that Triulzi wanted its expert to inspect the environmental conditions of Xinyi's facility, Xinyi's maintenance regime,

[19] CB, Tab 14, p 1179.

or for the expert report to deal with the interpretation of technical terms. Triulzi's stated position in April 2013 was that it wanted its expert to inspect the two machines only and to file an expert statement on this, a position that is very different from the one it is taking in OS 1114/2013. It plainly now wants to have a "second bite at the cherry" having seen the Tribunal's findings and reasoning in the Award. In particular, the Tribunal rejected Triulzi's factual witness evidence on these issues, and knowing that, Triulzi, with the benefit of hindsight, now alleges that time should have been given for it to prepare an expert report to buttress its factual witness evidence on those issues. It is also noteworthy that the issue relating to the interpretation of technical terms, which was not part of Triulzi's original pleaded case, was only "brought up belatedly at the hearing"[20] by its factual witness. It is highly unlikely that any expert report filed by Triulzi before the hearing would have dealt with this issue in the first place.

149 Following *BLC v BLB*, this court should reject Triulzi's attempts to re-package the original arguments that were previously advanced in the Arbitration for the purpose of challenging the Award on the ground that it was not given a reasonable opportunity to file an expert report.

150 For the reasons above, in my view, the Tribunal's refusal to vacate the April hearing dates and to go ahead with the April hearing was a proper and legitimate case management decision. There is nothing to the contention that by refusing the application, the Tribunal denied Triulzi its right to be heard.

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[20] CB, Tab 28, p 1242, [95].

151 I would also add that the right of each party to be heard does not mean that the Tribunal must "sacrifice all efficiency in order to accommodate unreasonable procedural demands by a party" (see *Holtzmann and Neuhaus* at p 551). The Tribunal was entitled to take "the view that Triulzi have had a chance to inspect the machines" within the ten days.[21]

152 Lastly, I also agree with the observation in the passage from *Sugar Australia* quoted above (at [125]) that procedural fairness requires only that a party be given "a reasonable opportunity to present his case" and not that the tribunal needs to ensure "that a party takes the best advantage of the opportunity to which he is entitled". Here, the Tribunal did not have to ensure that Triulzi took the best advantage of the ten days it was given. It is obvious from the narrative above that it was Triulzi who has to take the blame for the predicament it faced.

The decision refusing the admission of Dr Piombo's Report on 25 April 2013

153 Triulzi's contention in this regard is that the Tribunal's refusal of its application to admit Dr Piombo's Report was a breach of natural justice. This contention is baseless. It is quite clear from the transcripts that Triulzi's application to admit Dr Piombo's Report was made on the last day of the hearing and that Mr Shum could not satisfy the Tribunal that there were compelling reasons for his very late application to admit it. The same points raised previously to persuade the Tribunal to vacate the April hearing were rehashed to persuade the Tribunal to admit Dr Piombo's Report and for the hearing to be part heard. This was Triulzi's third attempt to stop the

[21] CB, Tab 20.

Arbitration having failed twice to vacate the April hearing in order to buy more time to obtain expert evidence.

154 That Dr Piombo was not at the hearing to take the stand meant that the Arbitration must be definitely left part-heard if Dr Piombo's Report was admitted at such a late stage of the arbitral proceedings. His absence was also not explained and his non-attendance was plausibly viewed as entirely of Triulzi's own making and quite deliberate. Besides, there were no compelling arguments to satisfy the Tribunal that Dr Piombo's Report had to be admitted on the last day of the hearing (see [42] above).

155 It would seem that Triulzi was once again adopting a tactical ploy to adjourn the hearing. In this regard, the observation made in *Analytical Commentary* at p 46 is apposite:

> "[F]ull opportunity of presenting one's case" does not entitle a party to obstruct the proceedings by dilatory tactics and, for example, present any objections, amendments, or evidence only on the eve of the award."

156 It is difficult to see how, in those circumstances, the Tribunal could be said to have been deserving of criticism in not admitting Dr Piombo's Report. The Tribunal was justified in concluding that the right course was to go ahead to complete the hearing on 25 April 2013. Taking everything together, Triulzi was indeed seeking to admit evidence at the last day of the hearing and to have the proceedings part-heard. As stated, the absence of Dr Piombo at the hearing to take the stand on 25 April 2013 was not explained. Furthermore, there was no prior indication at all that Triulzi was still trying to admit expert evidence long after it failed to persuade the Tribunal to reconsider vacating the April hearing on 16 April 2013 and after it had missed the 15 April 2013 deadline for filing its expert witness statement.

Conclusion on Triulzi's right to be heard

157 For the reasons given above, I reject Triulzi's criticisms of the conduct of the Tribunal. Triulzi was not denied a reasonable opportunity to file an expert witness statement and the Tribunal had also exercised his case management powers reasonably and properly. I find that Triulzi's application to set aside the arbitral award under s 24(*b*) of the IAA and Art 34(2)(*a*)(ii) of the Model Law must fail.

Prejudice

158 For the sake of completeness, I will comment on the issue of prejudice on the assumption that there was a breach of a natural justice.

159 Triulzi argues that an expert report which dealt with the environmental conditions at Xinyi's facility, Xinyi's maintenance of the washing machines and the interpretation of technical terms could have reasonably made a difference to the Tribunal's deliberations. I have observed above (at [147]–[148]) that Triulzi's contention that it would have dealt with these issues *via* its expert report is premised upon hindsight. Given what was said to the Tribunal in April 2013, Triulzi was not intending to file an expert report dealing with these issues at that time. As such, there would consequently be no impact on the Tribunal's deliberation since such material would not even have been present before the Tribunal for its consideration. Triulzi is therefore unable to show that it suffered any prejudice even if I had found that there was a breach of natural justice. Its application to set aside the arbitral award under s 24(*b*) of the IAA and Art 34(2)(*a*)(ii) of the Model Law would have failed on this basis as well.

Issue 3: Breach of public policy

160 On Issue 3, Mr Tan submits that the Tribunal was obliged to apply as the governing law of the contracts the CISG which is an international treaty that Singapore has signed and ratified. He argues that the Award which failed to apply the CISG is in conflict with Singapore's public policy. I proceed to deal with this final ground of setting aside raised by Triulzi.

161 During the CMC on 11 December 2012, a preliminary issue as to the applicable law to the three contracts was tabled for determination. According to the minutes of the CMC, the Tribunal heard oral submissions from both parties and decided that the governing law for all three contracts was to be Singapore law. Mr Tan argues that the Tribunal did not apply the CISG. He did not identify the relevant Articles in the CISG that ought to have been applied by the Tribunal. I do not follow Mr Tan's point that the Tribunal did not apply CISG. First, as I understand it, there is domestic legislation in the form of the Sale of Goods (United Nations Convention) Act (Cap 283A, 2013 Rev Ed) ("International Sale of Goods Act") giving effect to the CISG and when the Tribunal decided that the governing law was Singapore law, the Tribunal would be referring to the common law and statutes in force in Singapore, including the International Sale of Goods Act. Secondly, I observe from para [111] of the Award that the Tribunal had actually made reference to the CISG and, contrary to Mr Tan's contention that the Tribunal did not apply the CISG, the Tribunal applied Art 35 of the CISG as to the requisite burden of proof. Even if there were other relevant Articles of the CISG that should have been applied, Mr Tan did not identify them. In any event, even if the Tribunal did not consider other Articles of the CISG when it ought to, it has simply made an error of law and an error of law does not engage the public

policy ground in Art 34(2)(*b*)(ii) of the Model Law (see *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*") at [57]).

162 I move on to Triulzi's other argument that the failure of the Tribunal to apply the CISG violates Singapore's policy of upholding international obligations (since it has ratified the CISG) and should therefore be set aside pursuant to Art 34(2)(*b*)(ii) of the Model Law. Art 34(2)(*b*)(ii) allows the court to set aside the award if "the award is in conflict with the public policy" of Singapore. In *PT Asuransi*, the Court of Appeal explained the operation of this ground of setting aside at [59]:

> Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would "shock the conscience" (see *Downer Connect* ([58] *supra*) at [136]), or is "clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public" (see *Deutsche Schachbau v Shell International Petroleum Co Ltd* [1987] 2 Lloyds' Rep 246 at 254, *per* Sir John Donaldson MR), or where it violates the forum's most basic notion of morality and justice: see *Parsons & Whittemore Overseas Co Inc v Societe Generale de L'Industrie du Papier (RAKTA)* 508 F 2d 969 (2nd Cir, 1974) at 974. This would be consistent with the concept of public policy that can be ascertained from the preparatory materials to the Model Law. As was highlighted in the Commission Report (A/40/17), at para 297 (referred to in *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*by Howard M Holtzmann and Joseph E Neuhaus (Kluwer, 1989) at p 914):
>
> > In discussing the term "public policy", it was understood that it was not equivalent to the political stance or international policies of a State but comprised the *fundamental notions and principles of justice* … It was understood that the term "public policy", which was used in the 1958 New York Convention and many other treaties, covered

> fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as *corruption, bribery or fraud* and similar serious cases would constitute a ground for setting aside. [emphasis added]

It cannot be said that the Tribunal's failure to apply the CISG "would shock the conscience". It is also neither "clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public" nor does it violate Singapore's "most basic notion of morality and justice."

163 Furthermore, what Triulzi is essentially saying is that upholding the Award amounts to a breach of Singapore's international obligations and this has to fall within the domain of Singapore's public policy in the wide sense. But this is contrary to the view of the Court of Appeal in *PT Asuransi* that "public policy" in Art 34(2)(*b*)(ii) of the Model Law refers to Singapore's public policy in the narrow sense. Singapore has honoured its obligations as a signatory to the CISG by passing domestic legislation giving legal effect to the CISG. It is not surprising that Mr Tan cannot point to any legal basis that engages Singapore's international public policy to require this particular Tribunal or other arbitral tribunals, private institutions that are not bound by the CISG, to apply the CISG. Arbitral tribunals are first and foremost bound by the agreement of the parties which includes the agreed institutional rules. In this case, Art 21(1) of the ICC Rules 2012 provides that:

> **Article 21: Applicable Rules of Law**
>
> (1) The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. *In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.* [emphasis added]

164 Given that there is no choice of law agreement in any of the three contracts, it is therefore clearly within the Tribunal's powers, granted to it by mutual consent of the parties, to determine Singapore law to be the governing law of the contract. There is no strict obligation on the Tribunal to apply the CISG and it is entitled to prefer another rule of law which it "determines to be appropriate". Triulzi, by agreeing to apply the ICC Rules, also agreed to have its dispute resolved in accordance with this rule of law determined by the Tribunal. It cannot complain about the rule of law chosen by the Tribunal even if it disagrees with the Tribunal's choice since it has agreed to be bound by the Tribunal's choice.

165 For these reasons, Triulzi's application to set aside the award under Art 34(2)(*b*)(ii) also fails.

Conclusion

166 For the reasons stated, Triulzi's application in OS 1114/2013 is without merit and must be refused. Accordingly, OS 1114/2013 is dismissed. The evidential foundation of Triulzi's complaints had nothing to do with conduct of the Tribunal and the predicaments Triulzi faced were entirely of its own doing. This was clearly reflected in the way it conducted its case in the Arbitration. In this application, Triulzi's characterisation of its case as an award that was not in accordance with Art 18 in order to engage Art 34(2) of the Model Law and s 24(*b*) of the IAA simply ignores the evidential foundation of Triulzi's complaints. Its public policy argument is no better. Triulzi must bear the consequences of its own failures and choices (tactical or otherwise) that it made at the Arbitration.

167 I will hear parties on the costs of OS1114/2013. At the costs hearing, parties are to address me on whether or not the circumstances of the present case favour an order for costs to be taxed on an indemnity basis.

Belinda Ang Saw Ean
Judge

Paul Tan (Rajah & Tann LLP) for the plaintiff;
Koh Swee Yen and Paul Loy (WongPartnership LLP) for the defendant.