IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2024] SGHC(I) 10

Originating Summons No 2 of 2023 (Summonses Nos 11, 589, 606 and 607 of 2023)

Between

(1) Navayo International A.G.
(2) MEHIB – Hungarian Export Credit Insurance Pte Ltd

… *Plaintiffs*

And

Ministry of Defence, Government of Indonesia

… *Defendant*

JUDGMENT

[Arbitration — Enforcement — Application to set aside order granting leave to enforce an arbitral award in the same manner as a judgment of the court]
[Civil Procedure — Extension of time — Application for a retrospective extension of time to file an application to set aside an enforcement order]
[Civil Procedure — Service — Requirements for valid service of documents out of jurisdiction on a "State" within the meaning of the State Immunity Act 1979]
[Arbitration — Confidentiality — Application for redaction and sealing orders]
[Civil Procedure — Affidavits — Application for leave to file further affidavits]

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Navayo International AG and another
v
Ministry of Defence, Government of Indonesia

[2024] SGHC(I) 10

Singapore International Commercial Court — Originating Summons 2 of 2023 (Summonses Nos 11, 589, 606 and 607 of 2023)
S Mohan J, Sir Jeremy Lionel Cooke IJ, Roger Giles IJ
11, 12 September, 7 November 2023

22 April 2024 Judgment reserved.

Roger Giles IJ (delivering the judgment of the court):

1 The plaintiffs, Navayo International A.G. ("Navayo") and MEHIB – Hungarian Export Credit Insurance Pte Ltd ("MEHIB"), are respectively a company incorporated under the laws of Liechtenstein in the business of creating end-to-end secured communication systems,[1] and a Hungarian state-owned entity incorporated under the laws of Hungary carrying on business as an export credit insurance provider[2] (together, the "Plaintiffs"). The Chief Executive Officer of Navayo is Mr Gabor Kuti ("Kuti").[3]

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1 Yong Wei Jun Jonathan's Affidavit dated 27 January 2022 ("YWJJ") at [4].

2 YWJJ at [5].

3 Gabor Kuti's Affidavit dated 19 April 2023 ("GK") at [1].

2 In a Singapore-seated arbitration (the "Arbitration"), the Plaintiffs obtained an arbitral award (the "Award")[4] against the Ministry of Defence, Government of Indonesia (the "MOD"), who is the defendant in these proceedings. The Award was for a total of US$16,000,000.00 (not including interest and costs): US$10,200,000.00 was awarded to Navayo,[5] and US$5,800,000.00 to MEHIB.[6] The claim in the Arbitration was for amounts invoiced by Navayo to the MOD in relation to a contract for the supply of equipment and services,[7] with MEHIB claiming as assignee of the receivables under one of the invoices (or pursuant to a right of subrogation as insurer of those receivables).[8] Other than as co-claimant and co-Award creditor, MEHIB did not play any material part in the events canvassed in this judgment.

3 By an *ex parte* originating summons filed on 27 January 2022 in the General Division of the High Court ("OS 94"), the Plaintiffs obtained leave to enforce the Award in the same manner as a judgment of the court (the "Enforcement Order"). By a series of cross-summonses, the MOD applied for:

(a) Leave to set aside the Enforcement Order – this is HC/SUM 589/2023 ("SUM 589");

(b) Leave to file further affidavits setting out further grounds in support of SUM 589 – this is HC/SUM 606/2023 ("SUM 606"); and

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4 YWJJ at pp 68–234 (the "Award").

5 The Award at para 16.1(vi).

6 The Award at para 16.1(vii).

7 The Award at paras 6.2–6.11.

8 The Award at para 6.16.

(c) Sealing and redaction orders – this is HC/SUM 607/2023 ("SUM 607").

4 On 20 April 2023, the proceedings were transferred in their entirety to the Singapore International Commercial Court (the "SICC") and re-assigned the case number SIC/OS 2/2023 ("OS 2"). The MOD subsequently filed a fourth application in SIC/SUM 11/2023 ("SUM 11") on 9 May 2023 seeking a retrospective extension of time to make its application in SUM 589.

5 Although it was not explicitly framed as such, it is clear that the MOD's application to set aside the Enforcement Order (*ie*, SUM 589) is brought pursuant to s 31(4)(*b*) of the International Arbitration Act 1994 (2020 Rev Ed) (the "IAA"), namely, that enforcement of the Award would be "contrary to the public policy of Singapore". The MOD contended that there was fraud in the procurement, execution, and performance of the contract for the supply of equipment and services; in the institution, prosecution, and presentation of the ensuing Arbitration on a false basis to procure the Award; and in the conduct of the MOD's defence in the Arbitration.

6 By agreement of the parties, we first heard on 11 and 12 September 2023 the applications for (a) an extension of time to file SUM 589 (*ie*, SUM 11); (b) leave to file further affidavits (*ie*, SUM 606); and (c) sealing and redaction orders (*ie*, SUM 607); with (d) the substantive hearing of SUM 589 held over to a later date, depending on whether the extension of time was granted. This judgment sets out our determination of those preliminary questions.

7 As will be explained later in this judgment, for the purposes of deciding whether to grant the extension of time sought in SUM 11, we had regard, *de bene esse*, to the further affidavits that were the subject of SUM 606. For the

reasons which follow, we dismiss the MOD's application in SUM 11 for an extension of time, although we allow SUM 606 and grant leave for the further affidavits to be filed. It follows from our refusal to allow the extension of time sought by the MOD that the substantive application to set aside the Enforcement Order (*ie*, SUM 589) is also to be dismissed and we so order. Finally, we decline to make any orders for sealing or redaction and accordingly, SUM 607 is also dismissed.

The facts

The background to the parties' dispute

The SatKomHan Programme

8 On or around 7 January 2015, the Indonesian Ministry of Communications and Information was notified that the "Garuda 1" – which was an Indonesian satellite that provided communications services to Asia – had deorbited from its GSO 123 East Longitude orbital slot (the "Orbital Slot"). This information was conveyed to the MOD on 26 June 2015.[9]

9 The MOD was tasked with "ensuring that Indonesia's rights on the [Orbital Slot], and its associated L-band spectrum, were secured".[10] In that connection, the Government of Indonesia (through the MOD) instituted a new policy to "develop and operate communication satellites as well as ground facilities" called the "SatKomHan Programme".[11] The SatKomHan Programme – which was led by the MOD – was aimed at establishing a "Mobile Satellite

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9 Kiki Yonata's 1st Affidavit dated 6 March 2023 ("KY-1") at [10]–[11].

10 KY-1 at [11].

11 KY-1 at [11].

Service" that was intended to "provide (a) military communications, and (b) telecommunications in rural and frontier areas of Indonesia".[12]

10 The MOD had little experience in the satellite sphere, and so it appointed "experts" to support the MOD in the implementation of the programme.[13] These experts were:

(a) Thomas van der Heyden ("Thomas"). Thomas is variously described as a "satellite" consultant, Director, and the Chief Technology Officer of PT Dini Nusa Kusama ("PT DNK"), which is an Indonesian private company in the business of providing satellite communications;[14]

(b) Surya Cipta Witoelar ("Surya"). Surya was then the President Director of PT DNK;[15] and

(c) Kanaka Hidayat ("Kanaka"), who was a representative from another Indonesian company known as PT Len Industri (Persero) ("PT Len Industri").[16]

11 PT DNK informed the MOD that it was necessary that Indonesia have a legitimate satellite contract (to fill the Orbital Slot) in place prior to a meeting of L-band spectrum satellite operators in December 2015, lest it risk losing the Orbital Slot and the corresponding L-band spectrum rights.[17] On 20 May 2015, a presentation was given by Thomas and Surya to Rear Admiral Agus Purwoto

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12 KY-1 at [11].

13 KY-1 at [12].

14 KY-1 at [13].

15 KY-1 at [13].

16 Sigit Jatiputro's Affidavit dated 27 June 2023 ("SJ") at p 17, para 8(a).

17 KY-1 at [14].

("Agus"), the then-Director General of the Defence Forces of the MOD; other MOD officials, who are unidentified in the evidence;[18] and a Lieutenant Colonel Jon Keneddy Ginting ("Ginting"), of whom more will be said later. After this presentation and following a tender process,[19] a contract dated 1 December 2015 (the "SatKomHan Contract") was executed between the MOD – represented by Rear Admiral Leonardi, the then-Head of the Defence Facilities Agency within the MOD ("Leonardi") – and Airbus Defence and Space SAS ("Airbus"), a French aerospace vendor, to procure a new L-band mobile capable GEO satellite for operation at Indonesia's assigned orbital position. The expected launch of the satellite was estimated to be in the fourth quarter of 2019.[20]

12 While expressed to be intended as a binding contract, the SatKomHan Contract[21] also said that it was to be superseded by a "Detailed Contract" containing complete and detailed contractual terms and conditions together with annexes, to be "constructed and agreed based on the Contract" and "planned to be signed on March 2016 [*sic*] subject to budget availability".[22] It is however not clear what happened in that respect; so far as appears from the available evidence before us, the detailed contract never eventuated.

13 Given that the satellite was expected to be launched only in late-2019, Indonesia was without a presently operating satellite station at its assigned Orbital Slot. To fill this gap, a leasing agreement was signed on 6 December 2015 with Avanti Communications Ltd ("Avanti"), a satellite operator based in

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18 KY-1 at [15]–[16].

19 KY-1 at [16].

20 KY-1 at [17].

21 KY-1 at p 202.

22 KY-1 at p 208, cl. 1.1.1–1.1.2.

the United Kingdom, for the use of Avanti's Artemis satellite (which was expected to be in orbit by 2016) (the "Artemis Lease").[23] Looking ahead for the moment, the Artemis satellite was moved to the Orbital Slot in November 2016, and substantial lease payments were made to Avanti.[24]

The Navayo Agreement

14 According to the evidence, the SatKomHan Contract comprised four elements – the Space Segment; the Ground Segment; the User Segment; and the Support Segment.[25] While it was originally intended that Airbus would enter into subcontracts with vendors for the supply of equipment and services for the SatKomHan Contract, the MOD eventually decided to enter into direct contracts with vendors (including contracts for the User Segment).[26]

15 The User Segment "comprised end-user terminals (such as mobile phones) which would receive the signals and data from the satellite, and the programmes associated with the operation of such terminals".[27] The vendor with which the MOD contracted was Navayo.[28] There were executed:

(a) An "Agreement for the Provision of User Terminals and Related Services and Equipment" between Navayo and "Government of Indonesia / Ministry of Defence" dated 1 July 2016, expressed to be

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23 Dedy Nurmawan Susilo's Affidavit dated 6 March 2023 ("DNS") at [16]–[17].

24 KY-1 at [21].

25 KY-1 at [19].

26 KY-1 at [25].

27 KY-1 at [24].

28 KY-1 at [26].

"[f]or incorporation into the SatKomHan Satellite System Agreement dated December 1, 2015" (the "Original Agreement");[29] and

(b) An amendment to the Original Agreement dated 15 September 2016 (the "Amendment Agreement").[30]

We will refer to both agreements jointly as the "Navayo Agreement". Both agreements were in fact signed by the MOD on 12 October 2016, and backdated to their respective dates.[31]

16 Under the Original Agreement, Navayo contracted to:[32]

> [P]rovide the Deliverables in accordance with this Agreement, including the Statement of Work attached as Schedule 1 and the Detailed Specification attached as Annex A.

The contract price was US$34,194,300.00.[33] The "Deliverables" referred to were:[34]

> … those services, development and terminals to be used in connection with the Artemis and SatKomHan satellites, as set forth in this Agreement, including all services and items of deliverable hardware described in the Schedules and Annexes attached hereto, including Terminals, Terminal design, development, testing, manufacture, delivery, field test and then modification into production prototypes that may be ordered by customers.

17 In summary:

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29 KY-1 at pp 341–398.

30 KY-1 at pp 399–417.

31 KY-1 at [27].

32 KY-1 at p 347, cl 3.1.

33 KY-1 at p 347, cl 3.2.

34 KY-1 at p 343-344, cl 1.1.

(a) Schedule 1 was a Statement of Work, set out in eleven items;[35]

(b) Schedule 2 was an itemised breakdown of the price and a payments programme;[36]

(c) Schedule 3 contained a scheme for the timing of the Deliverables against particular payment amounts, with what were referred to in the agreement as "Milestones" and a *pro forma* "Certificate of Conformity" by which Navayo would certify that "the Milestone(s) set forth in the attached invoice have been duly met and that the Work has been performed in accordance with the Contract terms".[37] The Certificate of Conformity provided for signature by Navayo's authorised signatory, but there was no provision for signature on behalf of the MOD as some kind of acceptance or acknowledgement of the work performed by Navayo;[38] and

(d) Schedule 4 was a *pro forma* invoice.[39]

Annex A, which was titled the "Detailed Specification", followed these Schedules.[40]

18 The body of the Original Agreement provided, among other things, that:

35 KY-1 at p 379.

36 KY-1 at p 391.

37 KY-1 at p 394.

38 KY-1 at p 396.

39 KY-1 at p 397.

40 SJ at pp 233–320.

(a) Navayo should deliver the Deliverables to the MOD's designated facility[41] and notify the MOD of "the total achievement of each milestone or phase of work … including completion of any Deliverable, together with the documentation including results of acceptance testing specified in Annex A (Statement of Work)";[42]

(b) Within ten days of performance or delivery, the MOD was to "conduct such inspections and testing as it determines to be appropriate" and either accept the Deliverables or require that deficiencies be remedied;[43] and

(c) Navayo was to provide *pro forma* invoices, and then to invoice the MOD four times per year in the form of the Schedule 4 invoice. The MOD would then pay within 30 days of the date of the invoice.[44]

The Certificate of Conformity in Schedule 3 was not specifically referred to in the agreement, but inferentially was to accompany the invoicing when a Milestone was achieved.

19 The Original Agreement named persons to whom any notice required to be given under the agreement "or in connection with the matters contemplated by it" should be given.[45] The persons on the MOD side were:

(a) The "SatKomHan program contractual point of contact", who was Colonel Bursok Pardede ("Pardede") at the MOD;

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41 KY-1 at p 358, cl 9.1.

42 KY-1 at p 358-359, cl 9.2.

43 KY-1 at p 358-359, cl 9.2.

44 KY-1 at p 353, cl 7.3.

45 KY-1 at p 374, cl 19.9.

(b) The "SatKomHan program operator point of contact", who was Colonel Anompe Permadi at the MOD; and

(c) The "SatKomHan program technical point of contact", who was Thomas.

20 On the Navayo side, the persons were:

(a) Kuti;

(b) One Dr Zoltan Karparti, Navayo's Chief Operating Officer; and

(c) One Mr Peter Sooki.

21 The Amendment Agreement changed the contract price to US$29,900,000.00[46] and slightly altered the invoicing arrangement.[47] More significantly, it replaced:

(a) Schedule 1 and Schedule 2;

(b) The "timeline of deliverables" in Schedule 3;

(c) The *pro forma* invoice in Schedule 4 (but not the Certificate of Conformity); and

(d) The Detailed Specification in Annex A.

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46 KY-1 at p 399, cl 2.

47 KY-1 at p 400, cl 3.

The statement of work now had eight items.[48] The Schedule 2 breakdown[49] and payments programme and the Schedule 3 milestones[50] reflected the new items and contract price. Schedule 3 also recorded, amongst other things, that Navayo had already "completed considerable terminal development and specifications work".[51] The change in the Schedule 4 invoice appears to have been in the wire transfer information.[52]

The invoices by Navayo for work done

22 As indicated in the amended Schedule 3, Navayo had begun work before the actual signing of the Navayo Agreement. In the period from 2 November 2016 to 30 June 2017, Navayo submitted four invoices to the MOD. Each was in the form of the Schedule 4 *pro forma* invoice.[53]

23 The first, an invoice bearing serial number 0048-08-2016 and dated 2 November 2016 ("Invoice 1"), was for a total of US$5,800,000.00.[54] It stated that it was for "Milestone 1 (work completed in 2016)", and detailed the work as including the completion of "line items" in the Statement of Work Deliverables item numbers 1, 2, 3, 5 and 6. For example, the first amount was for "Completion of Statement of Work (SoW) Deliverable No. 1 – SatSleeve Development / Line item 1 – "Requirement specification"", in the sum of US$2,000,000.00, which appears to be the line item "Requirement

48 KY-1 at p 403.

49 KY-1 at p 413.

50 KY-1 at p 415.

51 KY-1 at p 415.

52 KY-1 at p 416.

53 KY-1 at [30].

54 KY-1 at p 419.

Specification" under the (new) Schedule 3 item number 1 "SatSleeve Development", with a box indicating the timing of a payment amount of US$2,000,000.00 in mid-2016.[55] In the space for Notes in the *pro forma* invoice,[56] it was said that the amounts were chargeable to the "Airbus Satellite Program under [the SatKomHan Contract]", and:

> Navayo attests that, through the investment of its own time and resources in anticipation of the execution of the Amendment, dated September 15, 2016, it completed all of the Deliverables included in the above reference Milestone section.

24 It appears that the invoice was first sent to the MOD with a letter dated 18 October 2017, accompanied by a Certificate of Conformity dated 18 October 2017; after some discussion as to its form, it was replaced by a corrected invoice.[57]

25 In relation to Invoice 1, Navayo obtained from the MOD a document entitled "Certificate of Performance".[58] As a number of such certificates were issued, we will refer to each as a "COP", collectively as "COPs" or the "COPs", and this particular COP as "COP 1". At its head it bore an MOD logo and a reference to the Airbus contract and the "SatKomHan Contract Office", followed by the title "CERTIFICATE OF PERFORMANCE FOR NAVAYO INTERNATIONAL AG'S 1ST MILESTONE DATED SEPTEMBER 15, 2016". It then read:

> This Certificate of Performance hereby confirms the acceptance for payment of the 1st Invoice submitted by Navayo

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55 KY-1 at p 415.

56 KY-1 at p 419.

57 GK at p 126, para 36.

58 KY-1 at p 429.

> International AG ("Navayo") in accordance with the 1st Milestone as defined in the following Invoice and Contract documents.
>
> [Particulars of Invoice 1 and the Navayo Agreement were given.]
>
> This Certificate of Performance has been issued this 31st day of October 2016 by the undersigned on behalf of the Indonesian Ministry of Defenses [*sic*] SatKomHan Program Office.

26 The document was signed by Ginting as "SatKomHan Program Office Authorized Signatory".[59]

27 Navayo submitted three further invoices:

(a) An invoice bearing serial number 0050-01-2017 and dated 6 January 2017 ("Invoice 2") was for another US$5,800,000.00, upon reaching Milestone 2 by completion of line items in the Statement of Work Deliverables items 3, 4 and 5.[60]

(b) An invoice bearing serial number 0051-03-2017 and dated 10 March 2017 ("Invoice 3") was for US$2,300,000.00, upon reaching Milestone 3 by completion of line items in the Statement of Work Deliverables items 1, 2 and 6.[61]

(c) An invoice bearing serial number 0052-06-2017 and dated 30 June 2017 ("Invoice 4") was for US$2,100,000.00, upon reaching Milestone 4 by completion of line items in the Statement of Work Deliverables items 2, 5 and 6.[62]

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59 KY-1 at p 429.

60 KY-1 at p 420.

61 KY-1 at p 421.

62 KY-1 at p 422.

All had the same note as the note in Invoice 1 (see [23] above). It was noted in the Award that all four invoices were accompanied by a Certificate of Conformity.[63]

28 In relation to each of these invoices, there was again obtained from the MOD a COP, in the terms set out above but referring to the relevant Milestone and invoice. The COPs relating to Invoice 2 ("COP 2") and Invoice 3 ("COP 3") were dated "January 2017" and "March 2017" respectively (without specifying the date). However, the evidence is that COP 2 and COP 3 were in fact both signed sometime in April 2017 by Colonel Masri Adenan ("Masri") as the "SatKomHan Program Office Authorized Signatory".[64] The COP referring to Invoice 4 ("COP 4") was dated 31 July 2017 and signed by Ginting in the same capacity.[65]

29 As will be seen from the Award (which we discuss below), the COPs were instrumental to the Plaintiffs obtaining the Award in their favour, but on the MOD's case in these proceedings they were part of the fraud that tainted the Arbitration and the Award. We will return later to consider in greater detail the circumstances in which the COPs were obtained.

The Navayo Agreement is terminated

30 The Award states that by a letter dated 18 August 2017, "the MoD notified [Navayo] to "*pause*" all further work until further notice from the [SatKomHan] Programme".[66] Navayo responded that it could not stop work

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63 The Award at paras 13.32, 13.39, 13.49, and 13.51.

64 KY-1 at pp 430–431.

65 KY-1 at pp 432.

66 The Award at para 6.5.

overnight, and that there would be financial consequences as a result of such instructions to pause or suspend work.[67] By an invoice bearing serial number 0001-04-2018 dated 9 April 2018 ("Invoice 5"), Navayo claimed US$4,862,822.00 as "[c]osts under the SatKomHan program contract between July 1st, 2017 and March 31st, 2018, in addition to the four (4) previously submitted invoices".[68] In the Award, it was said that these costs were claimed as "running cost incurred for the SKH Program from 18 August 2017 through 31 March 2018 as well as costs incurred in demobilising its capital and assets for the SKH Program".[69]

31 None of the invoices was paid. There was correspondence and a number of meetings concerning payment, but these did not result in payment.[70] The Award noted that by a letter dated 28 May 2018, Navayo terminated the Navayo Agreement due to non-payment of the invoiced sums.[71]

The SatKomHan Programme is terminated

32 The evidence on the termination of the SatKomHan Programme was sparse. It was said that "it subsequently transpired that [the] Indonesian government did not in fact have in place the necessary budget for the SatKomHan Program (including the Artemis Lease)", and that "[t]his consequently led to [the] termination of the entire SatKomHan program on 15 October 2018."[72]

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67 The Award at para 6.5.

68 KY-1 at 423.

69 The Award at para 6.6.

70 KY-1 at [38]–[40].

71 The Award at para 6.9.

72 KY-1 at [22].

The arbitral proceedings

33 The Navayo Agreement provided for a dispute resolution procedure, culminating in arbitration administered by the International Chamber of Commerce and in accordance with its Rules. The place of arbitration was to be Singapore.[73]

34 The Arbitration was initiated by Navayo's Request for Arbitration dated 22 November 2018. MEHIB was subsequently joined as co-claimant. They claimed the unpaid amounts under Invoices 1 to 5, plus interest and costs.

35 In due course the Tribunal was constituted, comprising Mr Ciccu Mukhopadhaya as President, Ms (then Professor) Lucy Reed, and Mr Nicholas Hough Stone. The procedural history was complex, but it is sufficient for our purposes to note that there were pre-hearing written submissions by the parties, an evidentiary hearing on 18 and 19 September 2020, followed by written closing submissions. The Award was issued on 22 April 2021.

36 The Plaintiffs were represented in the Arbitration by Drew & Napier LLC, and also by Viktor Szoenyi Law Firm for Navayo. The MOD was represented by Schinder Law Firm, along with representatives from the Indonesian Attorney General's Office, and also by Dr Herald Sippel of Sippel Law as lead counsel for the MOD's legal team.[74] In support of its case, Navayo relied on a witness statement of Kuti; the MOD did not call any witnesses, but according to the Award cross-examined Kuti extensively.[75] We will say more

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73 KY-1 at p 223, cl 10.1.

74 The Award at paras 2.3 and 2.5.

75 The Award at para 8.53.

concerning the MOD's legal representation during (and its conduct of) the Arbitration later in this judgment.

The Award

37 By Terms of Reference dated 29 August 2019, the parties framed nine issues for the Tribunal's determination.[76]

Issue One

38 The first was, in brief, whether the reference to arbitration by the Plaintiffs had been premature because the pre-arbitration dispute resolution procedures had not been satisfied. After an extensive discussion, it was held that they had been satisfied.[77]

Issue Two

39 The second was whether MEHIB was "a valid claimant", and it was held that it was.[78]

Issue Three

40 The third was whether the Navayo Agreement had been validly terminated by Navayo, and it was held that it had been.[79]

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76 The Award at para 7.1.

77 The Award at paras 8.1–8.158.

78 The Award at paras 9.1–9.93.

79 The Award at paras 10.1–10.10.

Issue Four

41 The fourth was whether the MOD had been excused from performance by any reasons beyond its control: the Tribunal noted that it appeared that the contentions in the Statement of Defence in that regard had not been pursued, but nonetheless considered the issue and rejected the MOD's position.[80]

Issue Five

42 The fifth was whether the MOD had been entitled to suspend Navayo's work under the Navayo Agreement, and had valid cause to do so: again, the Tribunal noted that this defence had not been pursued, but considered it nevertheless. It held that the MOD did not have a right to suspend the work but had effectively done so with financial consequences.[81]

Issues Six and Seven

43 The Tribunal jointly considered the sixth and seventh issues, which related to the claims for the amounts in Invoices 1 to 5.[82] As to Invoices 1 to 4, the Tribunal began its analysis and its decision was as follows:[83]

> The Tribunal has considered the contemporaneous correspondence on record, summarised below, including the CoPs for each of Invoices Nos. 1 to 4, which indisputably have been signed by representatives of the Respondent. The Tribunal can conclude only that the GoI/MoD has in fact admitted liability for Invoices Nos 1 to 4 and has no real defence and has not been able to set up any real defence to its liability to pay Invoices Nos 1 to 4.

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80 The Award at paras 11.1–11.12.

81 The Award at paras 12.1–12.5.

82 The Award at paras 13.1–13.95.

83 The Award at para 13.31.

44 The Tribunal then referred in more detail to Invoices 1 and 2. The Tribunal's reasoning may be summarised as follows:

(a) Navayo had provided the invoices and Certificates of Conformity.

(b) The MOD "has not contended nor placed on record any document notifying of any deficiencies in the Deliverables in Milestone 1", nor did the MOD "lead any oral evidence to assert any such deficiencies".[84]

(c) The COPs had been issued, by which the MOD "accepted and admitted the liability to pay" the invoices; and other correspondence showed the same.[85]

(d) Among the correspondence referred to was an email of 25 December 2016 from Thomas "to GoI/MoD officials in the SatKomHan program" (copied to Kuti and others) which "makes it clear that [Thomas] … found the Milestone 2 Deliverables to be in compliance with the requirements of the Agreement. At this stage, there was no dispute as to the payment obligations of the Respondent."[86]

(e) There was a further email of 18 January 2017 from Thomas in reply to an enquiry from MEHIB on the same day regarding payment. In his reply, Thomas said that the MOD was arranging for payment and noting that he was copying his reply to Major General Bambang Hartawan ("Hartawan") (the Director General of the Ministry of

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84 The Award at para 13.34.

85 The Award at para 13.38.

86 The Award at paras 13.40–13.41.

Defence responsible for the programme) and Leonardi (who was described as "the head of all Ministry procurements") as they were "personally involved on a daily basis in taking care of this problem".[87] The Tribunal noted that Thomas' email was copied to "[t]he responsible GoI/MoD officials", and no "concerns or dispute as to [the MOD's] responsibility to pay Invoice No. 2 [were] mentioned".[88]

(f) Finally, the Tribunal also referred to an internal letter from Hartawan to the Minister of Defence dated 20 January 2017, requesting payment of the various overdue invoices, including Invoice 1.[89]

45 For Invoice 3, the Tribunal referred to (a) the submission of the invoice and a Certificate of Conformity on 10 March 2017; (b) Thomas's acknowledgement of receipt with the note that "you guys at Navayo are doing a super job"; and (c) a letter from Leonardi to Kuti concerning the outstanding invoices "with copies to several MoD officials" which "again acknowledged liability to pay for Invoices Nos. 1 to 3 and expressed regret for the payment delays".[90] The terms of the letter were set out, and included, "[a]s you know we have provided you signed acknowledgements on each of the three invoices when you were in Jakarta with us last week", an apparent reference to the COPs.[91] The Tribunal did not otherwise refer to COP 3.

46 As for Invoice 4, the Tribunal referred to the invoice; the accompanying Certificate of Conformity; a letter to Hartawan requesting a clear commitment

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87 The Award at para 13.46.

88 The Award at para 13.47.

89 The Award at para 13.48.

90 The Award at paras 13.49–13.50.

91 The Award at para 13.50.

to pay all invoices; and COP 4.[92] Although under a separate heading, the Tribunal then referred to correspondence and meetings concerning payment of all invoices, with the conclusion that with regard to all the invoices, there was no denial of liability, but rather an acknowledgement of liability to pay them.[93] The correspondence from the MOD was:

(a) The "pause" letter of 18 August 2017 from Hartawan (see [30] above);

(b) A subsequent letter from Hartawan which, amongst other things, said that "[w]e are working to address your point regarding payment of past due";[94]

(c) A letter dated 22 November 2017 from Hartawan;[95] and

(d) A letter from the MOD dated 28 February 2018, with the author unstated, speaking of ways to find a solution and thanking Navayo for its patience.[96]

47 Thus, in relation to Invoices 1 to 4, the Tribunal's conclusions were as follows:

> 13.65 The Tribunal finds it evident from the contemporaneous exchanges between the Parties, supported by Mr Kuti's testimony, that at no stage whatsoever did the Respondent contest its liability to pay Invoices Nos. 1 to 4.
>
> 13.66 The Respondent's purported defences are, in the Tribunal's view, without any merit.

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92 The Award at paras 13.51–13.64.

93 The Award at paras 13.65–13.78.

94 The Award at para 13.56.

95 The Award at para 13.61.

96 The Award at para 13.63.

13.67 The defence that Navayo failed to submit formally sufficient documentation, testing and inspection etc. is not supported by the Respondent's own conduct on receipt of the Deliverables nor by any evidence in this arbitration. In terms of Article 9.2 of the Agreement, if Navayo had failed to submit the required documentation, the Respondent had to notify Navayo of any deficiency in 10 days – and no deficiencies were ever notified. On the contrary, the record reflects that the Respondent's own senior Technical Consulting Expert, Mr van der Heyden, was fully satisfied that Navayo's Deliverables conformed to contractual requirements, and even complimented Navayo's '*super job*'.

13.68 Similarly, the objection to Invoices Nos. 3 and 4 on the ground that implementation Milestones were not verified and did not involve an Indonesian counterpart is again unsupported by the Respondent's conduct on receipt of the Deliverables. Even assuming that the Respondent chose not to verify the Deliverables, it cannot now seek to reject the Invoices on that basis.

13.69 The objection that Invoice No 1 was invalid, because there was no joint development of hardware between Navayo and an Indonesian counterpart, is unsupported by any terms of the Agreement. The Respondent's objection to Invoice No. 2 on the ground that Navayo failed to store 500 phones in a suitable temperature-controlled warehouse, as per the relevant Agreement annex, is again a plea which is not supported by any evidence on record.

13.70 The Respondent's further contention that Navayo failed to meet Good Industry Practice and applicable legal requirements is bereft of any particulars.

13.71 The Tribunal considers the CoPs to be compelling evidence that the Respondent accepted Invoices Nos. 1–4. There is no evidence, whether documentary or witness evidence, to support the Respondent's defence that the CoPs were invalid.

13.72 The plea that the CoPs were invalid because the two signing offices lacked specific authorisation and expertise is directly contrary to the documentary evidence on record, which demonstrates that the GoI/MOD had engaged a specialised consultant, Mr van der Heyden, to examine the Deliverables for conformity with Navayo's obligations – and he found no deficiencies. The Respondent's further contention that the officers who signed the CoPs were misled to believe that their signatures were required only to show proof of receipt (versus adequacy) of the Deliverables is unsupported by any evidence, conspicuously by the absence of witness statements from the concerned officers. Nor can the Tribunal find any support in the

> record for the contention that the Respondent issued the CoPs as a goodwill gesture to assist in obtaining facilities from EXIM.
>
> 13.73 Most persuasive in relation to the importance of the CoPs is that, at no stage prior to this arbitration – despite the many payment demands and meetings and warnings of arbitration – did the Respondent raise any issue concerning the validity of the CoP signatures. On the contrary, the Respondent repeatedly acknowledged its obligation to pay the CoP-supported Invoices, and offered only budgetary problems as an excuse for the delay in payment.

48 The Tribunal then referred to and addressed certain points regarding an "Advance Payment Bond" and a "Performance Bond" to be procured by Navayo. The conclusion was that the claimants were "entitled to full payment of Invoices Nos. 1 to 4."[97]

49 Finally, with regard to Invoice 5, the Tribunal considered and rejected the claim for the invoiced amount for lack of proof of entitlement to payment of the amounts claimed in the invoice.[98] For the present proceedings, no more need be said of that claim.

Issues Eight and Nine

50 The Tribunal went on to consider, as regards the eighth and ninth issues, questions of interest and costs.[99] In the result – and as noted at [2] above – the Award was issued in favour of Navayo for the amounts in Invoices 2, 3 and 4 (totalling US$10,200,000.00), and in favour of MEHIB for the amount in Invoice 1 (*ie*, US$5,800,000.00), in each case together with interest and costs.[100]

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97 The Award at paras 13.74–13.78.

98 The Award at para 13.95.

99 The Award at paras 14.1–15.35.

100 The Award at para 16.1.

The Plaintiffs' action to enforce the Award

51 Following receipt of the Award in their favour, the Plaintiffs sent letters of demand for payment of the sums due under the Award, but there was no response from the MOD.[101]

52 As a result, the Plaintiffs brought proceedings in Indonesia to enforce the Award. On 30 December 2021, the Central Jakarta District Court issued an exequatur award (the "Exequatur Award") declaring that the Award could be enforced in Indonesia.[102] On 31 January 2022, the MOD filed a challenge against the Exequatur Award (the "Challenge").[103] We say more about the Challenge later on in this judgment. The Central Jakarta District Court has held a number of hearings in the proceedings, but the evidence does not show the outcome of the Challenge.

53 On 27 January 2022, the Plaintiffs filed OS 94 in the Singapore High Court, seeking leave *ex parte* to enforce the Award. The Enforcement Order was made on 29 January 2022 giving leave to enforce the Award in the same manner as a judgment, and fixing a period of 14 days after service of the order for the MOD to apply to set it aside. The form of the order included a notice pursuant to O 69 r 6(4) of the Rules of Court 2014 (the "ROC 2014") in the following terms:

> The Defendant may apply to set aside this Order within 14 days after service of the Order, and the Final Award referred to at prayer 1 above shall not be enforced until after the expiration of 14 days from the date of service of the Order or, if the Defendant applies within the aforesaid period to set aside the Order, until after the application is finally disposed of.

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101 YWJJ at [16].

102 GK at [56(c)(i)].

103 GK at [56(c)(ii)].

54 On the basis that the MOD was a "State" within the meaning of s 14 of the State Immunity Act 1979 (2020 Rev Ed) (the "SIA"), the Plaintiffs filed HC/SOD 9/2022 ("SOD 9") on 21 February 2022 requesting that the Enforcement Order "be sent through the proper channel to Indonesia" for service on the MOD, for which an address was given.[104] The form went on to set out three avenues through which the documents may be served, namely the government of Indonesia; the judicial authority of Indonesia; and "a Singapore consular authority at Indonesia [*sic*]". The Plaintiffs were required to tick the appropriate box in the form, and the last box was ticked (*ie,* service via "a Singapore consular authority at Indonesia").

55 As we later describe at [81]–[89] below, the Enforcement Order was transmitted to the Indonesian Ministry of Foreign Affairs (the "Indonesian MFA") in accordance with s 14(1) SIA. It was delivered to the Indonesian MFA on 26 April 2022; receipt was acknowledged on the same day.[105] It is the Plaintiffs' evidence that they did not know of this until 14 February 2023.[106]

56 Looking ahead for the moment, an issue that arose for our consideration in these proceedings was whether the Enforcement Order was thereby served on the MOD (as the Plaintiffs contended), or whether it was not served on the MOD until there was actual service on the MOD on 19 December 2022 (as the MOD contended was required by Indonesian law). This was central to determining the extent of the MOD's delay (if any) in making the application to set aside the Enforcement Order (*vide* SUM 589), a point that was in turn

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104 Request for Service of Document out of Singapore in HC/SOD 9/2022 filed on 21 February 2022.

105 GK at p 98.

106 GK at p 101.

material to whether the MOD required an extension of time to file SUM 589 (and if so, whether that application should be allowed).

The MOD's applications

SUM 589: The MOD's application to set aside the enforcement order

57 SUM 589 was filed at around midnight on 6 March 2023 (or the morning of 7 March 2023). The exact timing is significant, and we will go to it in more detail later.

58 The supporting affidavits initially filed by the MOD in support of SUM 589 were:

(a) The 1st Affidavit of Mr Kiki Yonata ("Kiki") dated 6 March 2023; and

(b) The Affidavit of Mr Dedy Nurmawan Susilo ("Dedy"), also dated 6 March 2023.

59 The Plaintiffs, for their part, responded by way of an affidavit by Kuti filed on 20 April 2023.

60 Between 9 May 2023 and 11 May 2023, the MOD filed the following affidavits in further reply:

(a) The 1st Affidavit of Mr Arif Budi Praceko ("Praceko") dated 9 May 2023;

(b) Ginting's Affidavit dated 9 May 2023;

(c) Kiki's 3rd Affidavit dated 10 May 2023;

(d) Masri's Affidavit dated 11 May 2023;

(e) The 2nd Affidavit of Muhamad Idris ("Idris") dated 9 May 2023;

(f) The 1st Affidavit of Dr Meiditomo Sutyarjoko ("Meiditomo") dated 9 May 2023, by which he gave his expert evidence on Indonesian law; and

(g) The Affidavit of Mr Nurman Setiawan dated 9 May 2023.

61 The MOD sought subsequently to rely on the following further affidavits (the "Further Affidavits") in support of SUM 589, all of which were dated 27 June 2023:

(a) Praceko's 2nd Affidavit (although that was only intended to correct parts of his 1st Affidavit);

(b) Kiki's 6th Affidavit;

(c) Idris' 5th Affidavit;

(d) Meiditomo's 2nd Affidavit;

(e) The 1st and 2nd Affidavits of Ms Nindya Asih Martha Utami SH., MH. ("Nindya");

(f) The Affidavit of Mr Muhammad Shidqon ("Muhammad"), by which he gave his expert evidence on "matters pertaining to the transaction between [the MOD] and [Navayo]";[107] and

(g) The Affidavit of Mr Sigit Jatiputro ("Sigit"), by which he likewise gave his expert evidence on "matters pertaining to the transaction between [the MOD] and [Navayo]".[108]

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107 Muhammad Shidqon's Affidavit dated 27 June 2023 ("MSQ") at [2].

108 SJ at [2].

Leave to file and rely on the Further Affidavits was the subject matter of SUM 606.

SUM 606: The MOD's application for leave to file further affidavits and grounds in support of its setting-aside application

62 Concurrently with the filing of SUM 589, the MOD filed SUM 606 on 7 March 2022 applying for leave to "file further ground(s) and affidavit(s) to set aside the [Enforcement Order] within 16 weeks from the date of this application".

63 SUM 606 was supported by Kiki's 2nd Affidavit dated 6 March 2023. Further evidence in respect of SUM 606 was given in Kiki's 3rd Affidavit and Idris' 2nd Affidavit (both dated 9 May 2023).

64 Whether the MOD was entitled to file and rely on the Further Affidavits is also a matter that we will return to at [237]–[241] below.

SUM 607: The MOD's application for sealing, redaction, and confidentiality orders

65 By SUM 607 filed on 6 March 2023, the MOD applied for orders that the proceedings herein be heard otherwise than in open court, and for sealing and redaction orders. SUM 607 was supported by Idris' 1st Affidavit dated 6 March 2023.

SUM 11: The MOD's application for a retrospective extension of time to file SUM 589

66 As mentioned at [56] above, it eventually became apparent that there was an issue as to when service of the Enforcement Order on the MOD had been effected. The parties – or at least, certainly the MOD – came to realise that

depending on the answer to that question, SUM 589 may or may not have been filed within time. The MOD therefore applied (by SUM 11 filed in the SICC on 9 May 2023) for a retrospective extension of time up to and including 7 March 2023 for it to apply to set aside the Enforcement Order.

67 The following affidavits were filed by the MOD in support of SUM 11:

(a) The Affidavit of Dr Bayu Seto Hardjowahono ("Bayu") dated 9 May 2023, by which he gave his expert evidence on Indonesian law;

(b) Kiki's 4th Affidavit dated 9 May 2023;

(c) Idris' 3rd Affidavit dated 9 May 2023; and

(d) The Affidavit of Tay Yiam Siah Johnny ("Johnny") dated 18 May 2023.

SUM 589 was filed out of time

The preliminary issue of whether the court should have regard to the MOD's further affidavits

68 As earlier noted, we had regard, *de bene esse*, to the Further Affidavits (enumerated at [61] above) which the MOD purported to file in support of SUM 589 (and in respect of which leave to file was sought in SUM 606). In our view, reference to those affidavits was necessary for the fair disposal of the MOD's application for an extension of time in SUM 11.

69 Following the transfer of the proceedings to the SICC, a case management conference (the "CMC") was held on 11 May 2023. The parties' proposal for a preliminary hearing on questions other than the substantive merits of SUM 589 was debated. It was pointed out that whether there was an arguable

case of fraud was material to whether the MOD should be granted the extension of time to file its setting-aside application, so that a decision in SUM 606 would affect the material on which the MOD could rely in both SUM 11 and SUM 589:

> Court: Do we assume for the purposes of the extension of time application that there is an arguable case of fraud so we don't have to go into it? Because there's another factor in this. If we do have to go into it, if you are going to invite us to go into it, then Mr Xavier [counsel for the MOD] is going to be able to say, 'But hang on a minute. We really shouldn't be going into this unless and until Summons 606 has been decided, because we'll be going into it on less than the material I want to have'.
>
> Yong [counsel for the Plaintiffs]: I take the point, Your Honour. Thank you. Thank you, Your Honour, for clarifying the point. I think under the circumstances, we would be prepared to assume for the purposes of determining Summons 607 [*sic*] that there is an *prima* … an arguable case of fraud.

70 Later on in the CMC, it was pointed out that the 16 weeks permitted for the filing of the Further Affidavits would expire on 27 June 2023, prior to the anticipated date for the preliminary hearing. It was agreed that the affidavits should be filed but sealed without access granted to any other party or the court unless SUM 606 was allowed.

71 At the hearing on 11 and 12 September 2023, there was substantial disagreement over whether the application for an extension of time was to be decided on the basis that, for that limited purpose, the MOD had an arguable case of fraud. On behalf of the MOD, it was said (with some justification) that that had been established (or agreed by Navayo's counsel) at the CMC, and that the MOD's written submissions reflected its belief that it had demonstrated an arguable case of fraud, although also to some extent entering upon the merits of its case.

72 On behalf of the Plaintiffs, however, reliance was placed on the reference by their counsel, Mr Yong, to *SUM 607* (which was the MOD's application for sealing and redaction orders) and not SUM 11 (which was the application for an extension of time) (see [69] above). The Plaintiffs' position was that the strength of the MOD's case, as a factor in whether an extension of time should be granted, remained at large.

73 Submissions were received on the materials as they then stood. The Further Affidavits had by then been filed. In our view, the better course in the circumstances was to have regard to them *de bene esse* in our deliberations, and the parties were so informed by way of a letter from the court dated 2 October 2023. The Further Affidavits were unsealed, and we received further written submissions, the last on 7 November 2023, on whether, in light of the Further Affidavits, the MOD had demonstrated a *prima facie* or arguable case of fraud and/or corruption.

The MOD's submissions

74 Early in its written submissions, the MOD contended that an extension of time was not necessary because SUM 589 was filed within time – implicitly, on the basis that the Enforcement Order had been served on the MOD on 19 December 2022. On that basis, the last day for filing SUM 589 was 6 March 2023.[109]

75 That SUM 589 was filed within time was, however, contradicted by Kiki[110] and Idris,[111] both of whom said that SUM 589 was filed at 12.06am on 7

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109 Defendant's Written Submissions ("DWS") at [3] and [12].

110 Kiki Yonata's 4th Affidavit dated 9 May 2023 ("KY-4") at [8(a)].

111 Muhamad Idris' 2nd Affidavit dated 9 May 2023 ("MI-2") at [19].

March 2023 and that the MOD therefore sought a short extension of time to regularise the filing. It was also contradicted later in the MOD's written submissions when it was accepted that SUM 589 "was filed at 12.06 am on 7 March 2023".[112] In oral submissions, after an initial assertion that SUM 589 was filed within time, counsel for the MOD, Mr Francis Xavier SC, rather equivocally submitted that "even on [his] submission that SUM 589 was filed on time, [the MOD] would require an extension of time to cover the six minutes". There, it was effectively left.

76 In our view, SUM 589 *was* filed out of time. However, the extent of the delay is a factor in whether an extension of time should be granted, and it is convenient to address here both whether it was filed within time and, if it was not, the extent of the delay. That involves the issue earlier mentioned of when the Enforcement Order was served on the MOD (at [56] above).

The times of service in contention

77 Section 14 SIA relevantly provides that:

> 14.—(1) Any writ or other document required to be served for instituting proceedings against a State must be served by being transmitted through the Ministry of Foreign Affairs, Singapore, to the ministry of foreign affairs of that State, and service is deemed to have been effected when the writ or document is received at that ministry.
>
> (2) Any time for filing and serving a notice of intention to contest or not contest (whether prescribed by Rules of Court or otherwise) begins to run 2 months after the date on which the writ or document is so received.
>
> …

78 Section 16 (1) SIA explains that:

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112 DWS at [5].

> … references to a State include references to —
>
> (*a*) the sovereign or other head of that State in his or her public capacity;
>
> (*b*) the government of that State; and
>
> (*c*) any department of that government,
>
> but not to any entity (called in this section a separate entity) which is distinct from the executive organs of the government of the State and capable of suing or being sued.

79 It was not in dispute that s 14 SIA applied to the Enforcement Order in OS 94 (which later became OS 2) as being a document by which proceedings were instituted against the MOD: *Josias Van Zyl v Kingdom of Lesotho* [2017] 4 SLR 849 ("*Josias Van Zyl*") at [41]–[49]. The Enforcement Order gave the MOD 14 days to apply to set it aside, but it was also not in dispute that by virtue of s 14(2) SIA, that time was extended by a further two months. It was observed in *CNX v CNY* [2022] 5 SLR 368 ("*CNX*") (at [43]) that:

> … s 14(2) of the SIA and the ROC are meant to work in tandem, such that any time period fixed by the court under O 69A r 6(4) of the ROC begins to run two months *after* the date of service. Where a foreign State has been served with a leave order to enforce an arbitral award, the effect of s 14(2) of the SIA is therefore this: the foreign State has two months under s 14(2) SIA to set aside the leave order, *plus* any *further* time afforded to it by the court in exercise of its discretionary powers under O 69A r 6(4) of the ROC.
>
> [emphasis in original]

80 Therefore, if the Enforcement Order was served on the MOD when it was delivered to the Indonesian MFA on 26 April 2022, the time for applying to set it aside expired on *12 July 2022*. If it was served on the MOD on 19 December 2022, the time for applying to set it aside expired on *6 March 2023*.

Service of the Enforcement Order and the filing of SUM 589

81 We have referred to the Plaintiffs' request on 21 February 2022 that the Enforcement Order be "sent through the proper channels to Indonesia" for service on the MOD through "a Singapore consular authority at Indonesia" (see [54] above). We take up the account from there.

82 On 2 March 2022, the Registry of the Supreme Court of Singapore forwarded the Enforcement Order (together with a translation and other documents) to the Singapore Ministry of Foreign Affairs (the "Singapore MFA"). The covering letter stated that the Enforcement Order was being forwarded "to effect service on the Defendant, Mnistry [*sic*] of Defence, Government of Indonesia, at the following address as stated in the Request for Service".[113] The letter noted that s 14(1) SIA provides that service shall be deemed to have been effected when the writ or document is received at the ministry of foreign affairs of the State, and asked that the Singapore MFA request an acknowledgement of receipt from the Indonesian MFA when the documents were delivered to them.

83 On 14 February 2023, the Registry advised the Plaintiffs that:[114]

> We have been informed that the documents were delivered to the Ministry of Foreign Affairs in the Government of Indonesia ('KEMLU'), and they had acknowledge [*sic*] receipt on 26 April 2022. KEMLU has also informed that the documents were conveyed to the Supreme Court of Indonesia on 19 May 2022.

84 There was no more direct evidence of the delivery of the documents to the Indonesian MFA, including whether the Singapore MFA in turn drew the

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113 MI-2 at p 53.

114 MI-2 at p 48.

Indonesian MFA's attention to s 14 SIA. So far as appears, the acknowledgement of receipt by the Indonesian MFA was not otherwise received by the Registry.

85 Other than the reference to the documents having been conveyed to the Supreme Court of Indonesia, little is known of their actual handling within Indonesia until they were received by the MOD. They may have been handled in the manner described by Bayu (which we discuss at [131]–[132] below) but in the absence of more concrete evidence, such a conclusion would be purely conjectural. However they were handled within Indonesia, it took some seven months from their conveyance to the Supreme Court of Indonesia until their receipt by the MOD itself.

86 The little that is known is drawn from Idris' third affidavit. Idris is a First Marshal of the Indonesian Air Force and the Chief of the Legal Bureau of the MOD.[115] It was his evidence that:[116]

> The MOD only first became aware of the existence of Singapore proceedings against the MOD in around June 2022, when the MOD was verbally informed by the Minister of Political, Legal and Security Affairs that an application had been taken out to enforce the Final Award in Singapore. At that time, the MOD was also told that the process of service of the relevant court documents would go through the prescribed process of service in Indonesia and would therefore take some time. At that time, the MOD did not receive any of the court documents pertaining to the Plaintiffs' application to enforce the Final Award in Singapore. It was only on 19 December 2022 that the relevant court papers … were served upon the MOD by the Jakarta DC, and the MOD had sight of the papers.

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115 Muhamad Idris' 3rd Affidavit dated 9 May 2023 ("MI-3") at [1].

116 MI-3 at [15].

87 Following service of the documents on the MOD, there is no evidence of communication between the MOD and the Plaintiffs – whether by way of foreshadowing the application to set the Enforcement Order aside or otherwise – prior to the filing of SUM 589, SUM 606, and SUM 607.

88 The events surrounding the filing of the applications was explained in Johnny's affidavit.[117] He was a Court Clerk in the employ of the MOD's solicitors in these proceedings, Rajah & Tann Singapore LLP, and he had been tasked with filing the applications. At 10.00pm on 6 March 2023, the draft summonses were provided to him "by the legal team in [the solicitors] having conduct of the matter". He composed them for filing, sent them to the legal team for approval, and was informed at 10.54pm that they were in order but instructed "to hold back on the filing of the summonses for the time being". The supporting affidavits – of which there were many, some of them voluminous – were sent to him at about 11.54pm by way of a file transfer link. He immediately commenced the filing, *ie*, uploading the summonses and affidavits to the e-Litigation portal:

(a) SUM 607 and its supporting affidavit were filed first, with the necessary steps for filing being completed by 11.55pm. Confirmation of filing was issued at 11.58pm.

(b) SUM 606 and its affidavits were filed next, with the necessary steps for filing being completed by around 11.56pm. Confirmation of filing was issued at 12.02am on 7 March 2023.

(c) SUM 589 and its affidavits were the last to be filed, with the necessary steps for filing being completed by 11.59pm. However, the uploading process took some time because there were two different

117 Tay Yiam Siah Johnny's Affidavit dated 18 May 2023 ("TYSJ") at [6]–[7].

affidavits with voluminous exhibits. Confirmation of filing was only issued at 12.06am on 7 March 2023.

89 There was no explanation in the evidence of why the filing of the summonses was left to so late.

SUM 589 would have been filed out of time even on the assumption that service out was effected on 19 December 2022

90 Although the MOD accepted in its written submissions that SUM 589 was filed at 12.06am on 7 March 2023, it was said that the necessary documents had been uploaded on 6 March 2023 and the minor delay of six minutes was due to the processing time of the system. If this was a submission that SUM 589 had in fact been filed on 6 March 2023 because Johnny had taken all the necessary steps he needed to before the stroke of midnight, counsel did not make this argument in oral submissions.

91 From ordinary experience, uploading SUM 589 and its affidavits would not be instantaneous – as Johnny said, it took some time.[118] The process of uploading could be interrupted by a problem with the documents or a computer problem, and as a matter of common sense the filing cannot be regarded as completed until *the uploading process* has been successfully completed.

92 The waters were muddied, however, by the Plaintiffs' reference to O 63A r 10(1)(a) of the ROC 2014 in support of their contention that SUM 589 was only filed on 7 March 2023. They argued that the provision states that a document is deemed to have been filed on the date and time that it was *received* in the computer system of the electronic filing service provider. We understood

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118 TYSJ at [6(d)].

that submission to be that an application is only filed at the time uploading is complete. But the rule does not say that. O 63A r 10(1)(a) of the ROC 2014 provides that:

> 10.—(1) Where a document is filed with, served on, delivered or otherwise conveyed to the Registrar using the electronic filing service and is subsequently accepted by the Registrar, it shall be deemed to be filed, served, delivered or conveyed —
>
> (a) where the document is filed, served, delivered or conveyed by electronic transmission from the computer system of the authorised user or registered user, on the date and at the time that *the first part of the transmission is received* in the computer system of the electronic filing service provider;
>
> …
>
> [emphasis added]

93 However, even if it could be said that the first part of the transmission of SUM 589 and its affidavits was received in the computer system prior to midnight on 6 March 2023, that does not avail the MOD. There were three documents – SUM 589 and the affidavits of Kiki and Dedy. It has not been shown that the first part of SUM 589, out of the three documents, was received in the computer system before midnight.

94 It should be said that indulging in these technicalities is academic because we take the view (for reasons to be given shortly) that the Enforcement Order was served on the MOD on *26 April 2022*, so that the last day for filing was *12 July 2022*. Since we do not accept the argument that service took place on 19 December 2022, we will not consider the extension of time application on the assumption that the filing of SUM 589 was six minutes late.

95 It follows that even on the assumption that service was effected on 19 December 2022, the filing of SUM 589 was out of time – perhaps by only a few

minutes, but out of time nonetheless. The MOD was accordingly exposed to the need for an extension of time to file SUM 589. It may be said that the delay was only by a few minutes, and that the Plaintiffs could not have been prejudiced by the summons being filed a few minutes after midnight rather than a few minutes before midnight. However, the default in filing cannot be so easily pardoned without an explanation of why the filing was left to almost literally the very last minute, or why Johnny was instructed at about 11.00pm to "hold back on the filing of the summonses for the time being".[119]

SUM 589 was filed out of time because service on the MOD was effected on 26 April 2022

96 In *Humpuss Sea Transport Pte Ltd (in compulsory liquidation) v PT Humpuss Intermodal Transportasi TBK and another* [2015] 4 SLR 625 ("*Humpuss*"), the issue before the court was the validity of personal service of a writ of summons in Indonesia. In holding the service valid, Steven Chong J (as he then was) restated the law on service out of jurisdiction. The starting point was that the court's jurisdiction over foreign defendants was conferred by statute, and that service in accordance with the Rules (specifically the then O 11) was a condition precedent to the exercise of that jurisdiction (at [100]). It flowed from this (at [101]):

> … that the validity of service — which is a jurisdictional matter — falls to be determined by the law of Singapore (specifically, O 11). This is because questions of jurisdiction must be decided by the *lex fori*, particularly where jurisdiction is conferred by statute (see *The "Kapitan Temkin"* [1998] 2 SLR(R) 537 at [5]). Furthermore, matters relating to service of process are procedural, which are eminently matters for the *lex fori* (see *Pacific Assets Management Ltd and others v Chen Lip Keong* [2006] 1 SLR(R) 658 ("*Pacific Assets*") at [14]).

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119 TYSJ at [6(c)].

Chong J went on to say that "[a]s a corollary of the fact that the validity of service is a matter for the *lex fori*, the provisions of foreign law are relevant only insofar as *our* laws make compliance with foreign law relevant" (at [103]).

97 In *Pacific Assets Management Ltd v Chen Lip Keong* [2006] 1 SLR(R) 658 ("*Pacific Assets*"), to which Chong J referred in *Humpuss*, it was said succinctly that "[t]his court as the *lex fori* follows its own rules of evidence and procedure, and not those of the foreign country" (at [14]).

98 In the present case, the court's jurisdiction over a foreign State is conferred by s 11 SIA and service on the State is governed specifically by s 14 SIA. Section 14 SIA provides in *mandatory terms* that the writ or other document required to be served for instituting proceedings against a State *must* be served by being transmitted between the respective Ministries of Foreign Affairs. It is then said that service is deemed to have been effected when the writ or document is received at the State's Ministry of Foreign Affairs.

99 The Plaintiffs submitted that the law of Singapore by which the validity of the service on the MOD falls to be determined is found in s 14 SIA and s 14 alone.[120] There was accordingly valid service on the MOD by the transmission between the Ministries taking effect upon receipt of the Enforcement Order by the Indonesian MFA on 26 April 2022.[121] The Plaintiffs said that Parliament had legislated for only one method of service on a foreign State – *ie*, the transmission by the Singapore MFA to the Ministry of Foreign Affairs of the foreign State – and had stipulated the precise point at which service would be deemed effective,

120 Plaintiffs' Written Submissions ("PWS") at [45]–[49].

121 PWS at [57].

namely, when the document is received at that State's Ministry.[122] Section 14 SIA does not require that the service comply with the foreign State's laws and rules on service of documents. Nor, when reference to a State includes a reference to "any department of [the] government", does the SIA require that the document be served on *the relevant department* in the government (here, the MOD) for the service to be effective.[123]

100 While not taking issue with *Humpuss* in this respect, Mr Xavier submitted that the Enforcement Order nonetheless had to be served in a manner complying with Indonesian laws and regulations, and that it had not been.[124] There were two steps in this submission: first, that service according to Indonesian law was required; and second, actual service on the MOD was required under Indonesian law.

Whether service had to comply with Indonesian law

101 We begin by addressing the first step in Mr Xavier's submission. There were three strands to this submission.

102 The overarching strand was that international comity was to be considered in the interpretation of Singapore's statutes, and this called for service of court papers on a foreign State to be performed in a manner compatible with the laws and regulations of that State.[125] The MOD referred to:

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122 PWS at [48(a)].

123 PWS at [48(b)].

124 DWS at [3].

125 DWS at [21]–[26].

(a) *Bennion, Bailey and Norbury on Statutory Interpretation* (LexisNexis, Eighth Ed, 2020) (at para 6.1);[126]

(b) Two Singapore decisions, namely, *Burswood Nominees Ltd (formerly Burswood Nominees Pty Ltd) v Liao Eng Kiat* [2004] 2 SLR(R) 436 (at [30]) and *Q & M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR(R) 494 (at [25] and [66]);[127] and

(c) Decisions from Canada, Hong Kong, and Australia, and in particular on the decision of the Supreme Court of the United Kingdom in *General Dynamics United Kingdom Ltd v State of Libya* [2022] AC 318 ("*General Dynamics*").[128]

103 In *General Dynamics*, in deciding that proceedings to enforce an arbitral award under the New York Convention fell within the scope of the equivalent to s 14(1) SIA, the majority said that the question "is to be decided having regard to the ordinary meaning of the statutory provision, its purpose, and its legal context, including considerations of international law and comity" (at [39]).

104 The second strand of Mr Xavier's submission rested on the Vienna Convention on Consular Relations (the "VCCR"), articles of which are given the force of law in Singapore by s 4(1) of the Diplomatic and Consular Relations Act 2005 (2020 Rev Ed) (the "DCRA"). The argument went as follows:

(a) Article 5(j) VCCR states as one of the "consular functions":

> (j) transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take

126 DWS at [21].

127 DWS at [23].

128 DWS at [22] and [24].

> evidence for the courts of the sending State in accordance with international agreements in force, or, in the absence of such international agreements, *in any other manner compatible with the laws and regulations of the receiving State.*
>
> [emphasis added]

(b) The Singapore MFA is "bound by the VCCR" because "the Diplomatic and Consular Corps, carriage of the DCRA, and all Overseas Singapore Missions are the responsibility of the Minister of Foreign Affairs" pursuant to the Eighth Schedule of the Constitution of the Republic of Singapore (Ministerial Responsibility) Notification 2020.[129]

(c) The VCCR also has the force of law in Indonesia pursuant to the Law of the Republic of Indonesia No 1 of 1982.[130]

(d) The Singapore MFA had exercised this consular function in transmitting the Enforcement Order to the Indonesian MFA.[131] In this regard, the MOD referred to the Plaintiffs' request on 21 February 2022 that the Enforcement Order be sent through the proper channels to Indonesia for service on the MOD through "a Singapore consular authority at Indonesia".

(e) Therefore, the Singapore MFA – exercising a consular function in transmitting the Enforcement Order – was obliged, in the absence of an international agreement, to transmit it in a manner compatible with Indonesia's laws and regulations.[132]

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129 DWS at [18].

130 DWS at [17].

131 DWS at [18].

132 DWS at [19].

105 The MOD buttressed the VCCR argument by the international comity strand, submitting that giving effect to the operation of the VCCR (and in any event effecting service in a manner compatible with Indonesia's laws and regulations) was required by considerations of international comity.[133] The MOD referred in this regard to the Hague Convention of 15 November 2015 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (to which Singapore acceded in 2023), Article 5 of which provides that service should be by a method prescribed by the country of service's internal law, or a method requested by the applicant "unless such a method is incompatible with the law of the State addressed".[134]

106 The third strand raised by Mr Xavier was that insofar as s 14(1) SIA provides that service "is *deemed* to have been effected when the writ or document is received at the ministry", the act of deeming thereunder merely creates a rebuttable presumption. The provision should be interpreted so that the presumption of service can be rebutted where it would otherwise lead to an unjust, anomalous, or absurd result.[135] It was submitted that, in this case, that presumption *was* rebutted by the evidence that the Enforcement Order had not been received by the MOD until 19 December 2022 and it would be wholly unjust to hold that service occurred on an earlier date.[136] As we understand the argument, because s 14(1) SIA should be interpreted having regard to considerations of international comity, it should be interpreted such that the presumption is also rebutted when service in the manner provided for is contrary to the laws of the receiving State (as made applicable by the VCCR).

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133 DWS at [20].

134 DWS at [26].

135 DWS at [3(e)].

136 DWS at [13].

107 Cut down to its essence, there were really two arguments being made: one resting on the VCCR as the relevant Singapore law (other than s 14 SIA) by which the validity of the service on the MOD was to be determined; and the other being an interpretation of s 14 SIA as the relevant Singapore law by which the validity of the service was to be determined. In both cases, the MOD argued that the deeming of service upon receipt at the foreign State's Ministry of Foreign Affairs (pursuant to s 14(1) SIA) is at odds with international comity.

108 As a starting point, we do not agree that the provision for service on a foreign State as set out in s 14 SIA – including the provision for deemed service – derogates from international comity. The purpose of the provision should first be appreciated.

109 In *Josias Van Zyl*, Kannan Ramesh J (as he then was) said (at [36]):

> Section 14 exists for the primary purpose of stipulating the mode of service of proceedings against a State and a minimum period regarded as sufficient for the State to react to those proceedings. It also removes any doubt as to when service is effected so that the reaction time can be accurately computed, the importance of which was pointed out in para 63 of the Explanatory Report to the European Convention on State Immunity 1972 (Basle, 16.V.1972) ("the European Convention"), on which the UK Act was modelled:
>
> > [Article 16(3)] … takes account of the interests both of the plaintiff and of the defendant State. It safeguards the plaintiffs [*sic*] interests by facilitating determination of the date on which service is deemed to have been effected. It safeguards the defendant State's rights by protecting it from any form of service which is deemed to have been effected by a fiction, such as service on the parquet, and from time-limits which begin to run from the date on which the document is posted.

110 Ramesh J referred again to "the underlying purpose" of s 14 later on in his judgment (at [45]):

> The two-month time period in s 12 serves to acknowledge "the reality that states do take time to react to legal proceedings". It is not disproportionately generous, since often "an award will be made in one country but enforcement may be sought elsewhere, perhaps in a number of jurisdictions, where assets are or are thought to be located" (*Norsk Hydro* at [25(4)]). I thus agreed with the reasoning at [19] of the AR's GD that:
>
> > States require time to respond to proceedings brought against them, and enforcement proceedings are no exception. Proceedings to enforce an award may be brought in any jurisdiction in which the respondent State has assets, independent from that jurisdiction's connection to the underlying arbitration or the merits of the substantive dispute. The need for time and opportunity to respond applies with equal force.

111 This passage was taken up in *CNX*, where it was described as noting that States require more time to react to proceedings (at [30]). Although spoken in relation to enforcement proceedings, the observation applies generally.

112 The preamble to the European Convention on State Immunity (the "ECSI"), which Ramesh J referred to in *Josias Van Zyl* (see [109] above), expresses the member States' desire "to establish in their mutual relations common rules relating to the scope of the immunity of one State from the jurisdiction of the courts of another State", and was "designed to ensure compliance with judgments given against another State". Article 16 of the ECSI provides:

> 1. In proceedings against a Contracting State in a court of another Contracting State, the following rules shall apply.
>
> 2. The competent authorities of the State of the forum shall transmit
>
> > – the original or a copy of the document by which the proceedings are instituted;
> >
> > – a copy of any judgment given by default against a State which was defendant in the proceedings
>
> through the diplomatic channel to the Ministry of Foreign Affairs of the defendant State, for onward transmission, where

> appropriate, to the competent authority. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the defendant State.
>
> 3. Service of the documents referred to in paragraph 2 is deemed to have been effected by their receipt by the Ministry of Foreign Affairs.
>
> 4. The time-limits within which the State must enter an appearance or appeal against any judgment given by default shall begin to run two months after the date on which the document by which the proceedings were instituted or the copy of the judgment is received by the Ministry of Foreign Affairs.
>
> 5. If it rests with the court to prescribe the time-limits for entering an appearance or for appealing against a judgment given by default, the court shall allow the State not less than two months after the date on which the document by which the proceedings are instituted or the copy of the judgment is received by the Ministry of Foreign Affairs.

113 In *Josias Van Zyl*, Ramesh J also referred to the Explanatory Report to the ECSI (the "Explanatory Report") (see [109] above). It was stated in the Explanatory Report (at para 64) that:

> The time-limits allowed to parties for the entering of an appearance or for bringing appeals vary from one State to another. Paragraph 4 might have been drafted so as to extend by two months the time-limits provided by the national law but that would have necessitated the incorporation in each legal system of special time-limits when the defendant is a Contracting State. It therefore seemed more convenient simply to postpone by two months the date from which time begins to run. *This two month period should be sufficient to permit the Foreign Ministry to give notice to the competent authority in its own State, and for the necessary consultations to take place in that State.*
>
> [emphasis added]

114 The import of Article 16 was enacted in the United Kingdom, as a ratifying member state of the ECSI, in s 12 of the State Immunity Act 1978 (c 33) (UK) (the "UK SIA") and adopted in Singapore in s 14 SIA. It is designed to foster – rather than conflict with – harmonious international relations. This

was recognised in *General Dynamics*, which the MOD referred to for the observation (at [39]) that considerations of international law and comity came into the interpretation of s 12 UK SIA. However, the MOD did not go far enough. The majority went on to say (at [43]) that:

> The exercise of jurisdiction by the courts of one state over another state is an act of sovereignty. The institution of such proceedings necessarily requires that the defendant state should be given notice of the proceedings. The service of process on a state in itself involves an exercise of sovereignty and gives rise to particular sensibilities. *Section 12 is intended to create a procedure whereby service may be effected on a state, in the interests of both parties and in a manner which accords with the requirements of international law and comity.*
>
> [emphasis added]

115 In our view, s 14 SIA conforms to comity by providing certainty in how a foreign State is to be subject to proceedings brought in the forum State: there is to be service of the document on the foreign State by transmission to its Ministry of Foreign Affairs, but the State has two months during which the Ministry – as a responsible organ of the government – can see to it that the document is sent to the appropriate person, department, or other body in the government so that the person/department/body can then respond to it. As the Explanatory Report notes (at para 64), the two-month period "should be sufficient to permit the Foreign Ministry to give notice to the competent authority in its own State, and for the necessary consultations to take place in that State".

116 We turn then to the deeming mechanism in s 14(1) SIA. In our view, there is no occasion to treat it as merely raising a rebuttable presumption because of comity considerations. On the contrary, the deemed effective service on receipt of the document at the Ministry of Foreign Affairs of the foreign State (in association with the two months then allowed for the State to respond)

provides certainty in the interests of *both* the serving party and the State. It respects the foreign State's sovereignty and conduces to good international relations; at the same time, the serving party is not held hostage to the foreign State's (perhaps idiosyncratic) rules on service. The foreign State is also relieved from the operation of the serving State's *ordinary* rules of service, which may be inappropriate for the foreign State's bureaucratic needs. If the deemed service were merely in the nature of a rebuttable presumption, there would be no certainty at all and much room for confusion and conflict.

117 A deeming provision is sometimes described as a statutory fiction, for example when used in statutory definitions to extend the denotation of a defined term to objects it would not ordinarily include. The MOD's submissions treat the deeming mechanism – *ie*, the deeming of service as having been effected when the Enforcement Order was received at the Indonesian MFA – as a statutory fiction that can be displaced by proof that there was no actual service on the intended defendant because a contrary interpretation would be incompatible with Indonesian law and unjust in circumstances where the MOD in fact only received the documents on 19 December 2022. In this connection, the MOD relied on *Inland Revenue Commissioners v Metrolands (Property Finance) Ltd* [1981] 1 WLR 637 (at 646):[137]

> When considering the extent to which a deeming provision should be applied, the court is entitled and bound to ascertain for what purposes and between what persons the fiction is to be resorted to. It will not always be clear what those purposes are. If the application of the provision would lead to an unjust, anomalous or absurd result then, unless its application would clearly be within the purposes of the fiction, it should not be applied. If, on the other hand, its application would not lead to any such result then, unless that would clearly be outside the purposes of the fiction, it should be applied.

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137 DWS at [37].

118 That is not a correct view of the deeming mechanism in s 14(1) SIA. A deeming provision can also "simply state the effect or meaning which some matter or thing has" without any artificiality or fiction: we take these words from the learned discussion by Windeyer J in the High Court of Australia in *Hunter Douglas Australia Pty Ltd v Permanent Blinds* (1970) 122 CLR 49 (at 65–66). That is the case with s 14(1) SIA. It states the legal result (*ie*, that service is deemed effected, for the purposes of the Singapore courts' exercise of jurisdiction) upon occurrence of a particular event (*ie*, receipt of a document at a foreign State's Ministry of Foreign Affairs). In addition to there being no reason to treat the deeming as merely raising a rebuttable presumption for reasons of comity, there is, in our judgment, no room to displace the effect that the receipt of the document was intended to have in the particular circumstances listed in s 14(1) SIA – in short, the meaning and purpose of s 14(1) is clear. Nor do we think that it makes sense to say that the presumption is rebutted by the VCCR making the laws of the foreign state applicable. If it does, that is not rebuttal of a presumption – it is giving the VCCR an effect which trumps s 14(1) SIA. For the reasons that follow, we do not think that the VCCR has such an effect.

119 We turn to the VCCR. We do not think it is possible to (a) claim the benefit of the two months' "grace period" under s 14(2) SIA, which runs from the date the Enforcement Order was "so received" (*ie*, received *pursuant to* s 14(1) SIA); and yet (b) simultaneously deny the validity of service effected pursuant to s 14(1) SIA, which service was the very act that made available the two months' grace period in the first place.

120 The MOD's argument took Article 5(j) of the VCCR as establishing a mandatory method of service of foreign process that extends to service on a State (see [104] above). The Plaintiffs submitted that this was contrary to

authority, referring to *Cosmetic Care Asia Ltd and others v Sri Linarti Sasmito* [2021] SGHC 157 ("*Cosmetic Care*") and *Regina (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 2697 ("*Sandiford*").

121 In *Cosmetic Care*, the question arose as to whether an order for substituted service on the defendant in Indonesia should be set aside. The defendant adduced an Indonesian law expert's opinion and argued that under Indonesian law, the only mode of service of foreign process was by way of sending rogatory letters through diplomatic channels – a process, it was said, that Article 5(j) of the VCCR mandated. In rejecting the argument, the court noted that nothing in Article 5(j) addressed service of foreign process or provided that any form of service of process was mandatory (at [160]).

122 *Sandiford* was more complex. In considering the UK Government's obligation to fund legal expenses for a British national in criminal proceedings in Indonesia, the UK Supreme Court considered Articles 5(i) and 5(m) of the VCCR. Article 5(i) is concerned with representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State. Article 5(m) is a catch-all of other functions entrusted to a consular post. Referring to these functions, their Lordships noted it was common ground that the UK could use its diplomatic or consular agents to fund the defence in Indonesia of a United Kingdom citizen. Importantly, it was held that the VCCR "permits, *but it is not suggested that it obliges*, the exercise of any such functions" (at [24]–[25]).

123 If, in fact, a "consular function" was being exercised in serving the Enforcement Order upon the MOD by its transmission to the Indonesian MFA, *Sandiford* does not assist since it does not address the MOD's argument. In that

event, since the consular function was being exercised, the question would not be whether it was necessary to exercise it but whether it was necessary to do so *in a manner compatible with Indonesian law*. As we explain below, the answer to the MOD's argument is more fundamental.

124 First, even if Article 5(j) was applicable in this case – that is, a case involving service under s 14 SIA as distinct from service under the ROC 2014 – it would only require that the transmission of documents *by the Singapore MFA to the Indonesian MFA* be compatible with Indonesian law, because on the MOD's own argument, *that* was the consular function being exercised. It was not suggested that there were any Indonesian laws specifically governing the conduct of *such transmissions*.

125 Second, Article 5(j) is not applicable in any event because the transmission of documents pursuant to s 14 SIA is *not* an exercise of a "consular function" within the meaning of Article 5(j) of the VCCR. The transmission of documents under s 14 SIA is its *own procedure* and may (or may not) be carried out with consular involvement. However, mere consular *involvement* in the performance of some act cannot suffice to make that act a "consular function" subject to the constraints of the VCCR.

126 Section 14(1) SIA requires that the document be transmitted from one Ministry (in the sending State) to another Ministry (in the receiving State). It does not say *how* that should be done, but on the MOD's argument it would have to be done in the exercise of a consular function *because* the Singapore MFA performs consular functions. Again, on the MOD's argument, it would mean that in every case of service of a writ or other document required to be served for instituting proceedings against a State, the service would have to be in a manner compatible with the laws and regulations of the receiving State.

That cannot stand with the explicit and mandatory stipulation in s 14(1) SIA that service is deemed to have been effected when the writ or document is received at the Ministry to which it is transmitted. On the MOD's argument, when the VCCR was given the force of law in Singapore by the DCRA in 2005, it effectively repealed the provision for service on a foreign State in s 14(1) SIA, and consequently the two months allowed by s 14(2) SIA. The time for the State's response would be left to be found elsewhere in Singapore law.

127 That is not a result we can agree with. It may be that Article 5(j) does not address service of foreign process (as *Cosmetic Care* suggests), but it also does not address service of process *on a foreign State* (which is specifically governed by s 14 SIA). The form of transmission in s 14(1) SIA is prescribed by Singapore law, and its performance is completed upon receipt of the relevant documents by the receiving Ministry. The fact of the receiving Ministry's receipt is all that is required to trigger the deeming effect of s 14(1) SIA. There is no question of compliance with an international agreement or compatibility with the laws and regulations of the receiving State.

128 We therefore do not accept the first step in the MOD's submission (*ie*, that service according to Indonesian law was required). Service in accordance with Indonesian laws and regulations was *not* required.

Whether service complied with Indonesian law

129 Our conclusion that service of the Enforcement Order did not have to comply with Indonesian law makes it unnecessary to consider the second step to Mr Xavier's submission (*ie*, that actual service on the MOD was in fact required by Indonesian law), but we will offer our views since the parties raised

arguments on the point. In this regard, the MOD relied on the expert evidence of Bayu; the Plaintiffs did not adduce any responsive evidence.

130 Bayu is a Senior Lecturer/Associate Professor in Law at the Faculty of Law of the Parahyangan Catholic University, Bandung, Indonesia. His primary academic interest is in the field of private international law. He has published a textbook and a number of papers on the subject, as well as papers on other international contractual subjects. His advanced law degrees include a LL.M in International Trade Law and Private International Law from the University of Georgia in the United States of America, and a PhD in Law and Legal Science on Private International Law and International Commercial Law from Groningen University in the Netherlands. He has been teaching and researching at the Parahyangan Catholic University since 1979.[138]

131 Bayu first addressed the process under Indonesian law for the service of foreign court documents on the MOD. He referred to the Plaintiff's request to the court of "21 February 2022" (which we assume was a reference to SOD 9) and the Registry's request dated 2 March 2022 that the Singapore MFA "effect service on the MOD at its address". He said that:[139]

> As such, subsequent steps and procedures to warrant service of [the Enforcement Order] on the addressee [MOD] entered the legal jurisdiction of the Republic of Indonesia, and falls within the system of rules and procedures prescribed in the Memorandum of Understanding between the Indonesian Ministry of Foreign Affairs and the Indonesian Supreme Court on the Handling of Technical Judicial Assistance on Civil Matters 2018 …

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138 Dr Bayu Seto Hardjowahono's Affidavit dated 9 May 2023 ("BSH") at [1].

139 BSH at pp 18–19, para 15.

132 Bayu added that the last-mentioned Memorandum of Understanding (the "MOU") is "further regulated" by a Cooperation Agreement between the Indonesian MFA and the Indonesian Supreme Court (the "Cooperation Agreement").[140] According to Bayu, under the MOU and the Cooperation Agreement, the steps for the service of a foreign court document in Indonesia were as follows:[141]

(a) A request for court document delivery from a foreign country is conveyed to the Indonesian MFA through the diplomatic representation of the foreign country in Indonesia.

(b) The Indonesian MFA conveys the request to the Indonesian Supreme Court for consideration.

(c) The Indonesian Supreme Court conveys the request to the relevant District Court.

(d) The District Court thereafter proceeds to serve on the addressed party and obtain a signed proof of receipt. The document has to be served by a court bailiff directly to the addressed party at their permanent or recorded address (as regulated under Article 390(1) of the Civil Procedural Law).

(e) The signed proof of receipt is transmitted from the District Court to the Indonesian Supreme Court.

(f) The Indonesian Supreme Court conveys the signed proof of receipt to the Indonesian MFA.

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140 BSH at pp 18–19, para 15.

141 BSH at p 19, para 16.

(g) The Indonesian MFA sends the signed proof of receipt to the diplomatic representation of the foreign country.

133 Bayu's evidence is that service of the foreign court document is considered effected upon completion of step (d) above, *ie*, when the court bailiff has served the document(s) on the addressed party at their permanent or recorded address.[142] The "Civil Procedural Law" to which he referred is also known by its Dutch name "Het Herzeine Inlandsch Reglement" (the "HIR"). Article 390(1) of the HIR, according to Bayu's translation, provides:[143]

> Every bailiff's writ, except as mentioned below, must be delivered to the person concerned personally at their place of abode or residence, and if not found there to the head of the village or to the head of the Chinese community, who is obliged to promptly inform the person concerned of the bailiff's writ. In the latter case, there is no need for a declaration according to law.

134 Bayu then considered whether the aforementioned process is mandatory. He concluded that it is, and that that mandatory process is the *exclusive* method for the service of foreign court documents.[144] His reasoning may be summarised in the following way:

(a) The MOU and the Cooperation Agreement are the only regulations in force in Indonesia regarding the service of foreign court documents. Before the MOU, there were no rules in place on the service of foreign court documents. This led the Indonesian Supreme Court and the Indonesian MFA to institute the MOU, the aim of which was to provide a single coherent set of rules to handle the service of documents

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142 BSH at p 20, para 17.

143 BSH at p 19–20, para 16(d).

144 BSH at pp 20–22, paras 18–25.

containing foreign civil elements. The MOU "standardises both the service of domestic documents abroad, as well as the service of foreign legal documents in Indonesia", and "is thus regarded as an exclusive reference for and binding upon all parties involved in the service of foreign process in Indonesia".

(b) This is borne out in the text of the MOU, specifically:

(i) Recitals (b) and (c) therein, which state that the MOU was intended to fill the legal vacuum that existed in relation to the service of foreign court documents in Indonesia and as such, it was necessary to enter into it;

(ii) Article 2(1), which states that the MOU serves as a coordination guideline for the handing of requests for judicial assistance in civil cases from the Indonesian court to the foreign court (and *vice versa*); and

(iii) Article 2(2), which states that the intention underlying the MOU is to ensure the proper implementation of such judicial assistance.

(c) The principle underlying the MOU and the Cooperation Agreement is the "receipt principle", being that under Indonesian legal usages, effective receipt is only established the moment a document reaches the final addressee. This principle is accepted not only in matters concerning the formation of contracts, but also in matters relating to the proper service of judicial documents. Receipt provides the opportunity for the addressee to read and respond to the document in a manner consistent with due process and fair notice. It also allows for proof of

delivery to be obtained. The concept of deemed service found in s 14(1) SIA does not exist under Indonesian law.

135 It was Bayu's evidence that notwithstanding its denomination as a "Memorandum of Understanding", the MOU and Cooperation Agreement "[reflect] the currently in force and practised Indonesian law for the service of foreign court document [*sic*]", and that all parties involved in the service and delivery of documents within Indonesia – which, on his list, includes the Indonesian MFA – are bound to follow their steps and procedures prescribed thereunder.[145]

136 Accordingly, in Bayu's view, "the MOD is deemed to have been served when the Court Bailiff has delivered the documents physically to it" (that is, on 19 December 2022), and that the service on the Indonesian MFA could not be regarded as effective service on the MOD.[146]

137 The Plaintiffs' response to Bayu's expert opinion was twofold. First, they argued that his opinion that the MOU and the Cooperation Agreement set out the *mandatory* and *exclusive* method for the service of foreign court documents in Indonesia should be rejected as they had been in *Humpuss* and *Cosmetic Care* (albeit in relation to an earlier version of the MOU). Secondly, the Plaintiffs submitted that nothing in the MOU (or any other document) states *when* service on an Indonesian defendant is to be regarded as completed, and that Bayu did not adequately support his opinion that service of a foreign court

145 BSH at p 22, para 24.

146 BSH at p 23, para 27.

document is considered effected only when the court bailiff serves the same on the addressed party.[147]

138 We can – indeed, must – examine the correctness of Bayu's premises and reasoning for ourselves even though the Plaintiffs have led no expert evidence to challenge Bayu's testimony: *Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)* [2010] 1 SLR 1129 at [23]. With respect, we do not find Bayu's opinion persuasive. The question has been considered in the previous cases to which the Plaintiffs referred (see [137] above). Having examined Bayu's opinion afresh, we have reached the same conclusion as was expressed in *Humpuss* and *Cosmetic Care*.

139 In *Humpuss*, it was held that personal service in Indonesia was permitted under the Singapore Rules of Court then in force. The court then considered if the method of service was contrary to the law of Indonesia (at [63]). The defendant submitted that it was, relying on the MOU then in force (which was replaced in 2018 by the MOU Bayu referred to in his expert opinion) and the HIR. The defendant argued that the document had not been served through the Indonesian MFA and the Supreme Court, as the MOU required, such that service had not been effected by the court bailiff in the form required by the HIR.

140 The parties adduced conflicting expert evidence and the court preferred the plaintiffs' for the following reasons:

(a) On the MOU then in force, the court made two observations: first, that it was facilitative and not mandatory – nothing in it purported

147 PWS at [51]–[57]; Plaintiffs' Reply Submissions at [26].

to prescribe the *exclusive* and *mandatory* method by which *all* foreign process had be served in Indonesia, and it merely provided a mechanism through which a foreign party *may* arrange to have a writ served through an Indonesian court bailiff (at [65]). The second was that the MOU was not law, but at best a guideline which allowed foreign parties to validly engage the services of the Indonesian court bailiff to effect service within the jurisdiction of Indonesia; it only governed the relationship between the Indonesian MFA and the Indonesian Supreme Court *inter se*, and neither affected the legal rights of third parties (at [66]).

(b) As to the HIR, the court observed that it did not "pertain to the service of foreign process", given the Indonesian law experts' agreement that there were no express statutory provisions which governed the service of foreign process in Indonesia (at [70]).

141 In *Cosmetic Care*, the defendant's expert referred to the VCCR and deposed that the MOU and HIR prescribed the sole and mandatory method for serving foreign process in Indonesia. The expert further deposed that (a) the MOU would be rendered otiose if other methods of service were permitted; and (b) the rules governing the service of foreign process could not be different from those governing the service of domestic process (under the HIR). The court considered the conflicting expert testimony on the significance of the MOU and the HIR (as it did in *Humpuss*), as well as Chong J's discussion in *Humpuss* (specifically, the learned judge's observations at [65]–[66] and [70] therein), and agreed "with all of Chong J's observations and conclusions in *Humpuss* regarding Indonesian law on service of foreign process" (*Cosmetic Care* at [166]).

142 The MOD submitted that *Humpuss* and *Cosmetic Care* were both concerned with provisions in the ROC 2014 to the effect that service cannot be validly effected abroad by means contrary to the law of the foreign country. This case, it was submitted, concerns service under the SIA. Specifically, the MOD submitted that Indonesian law is relevant because Article 5(j) of the VCCR applies and requires service in a manner compatible with Indonesian laws and regulations.[148] We do not see why that should detract from the relevance of *Humpuss* and *Cosmetic Care* in deciding whether Bayu's opinion is correct.

143 The MOD also pointed to two Indonesian cases in which the Indonesian courts referred to the method prescribed by the MOU, although Bayu did not mention them in his expert opinion. The MOD submitted (and we accept) that those cases had not been brought to the attention of the court in *Humpuss* and *Cosmetic Care*:[149]

(a) In one case, the Denpasar Court of First Instance referred to the MOU in affirming that service of Indonesian process had to be "submitted through the Supreme Court to be forwarded to the country of destination through the Ministry of Foreign Affairs", which the court observed was the reverse of the process for service of foreign process in Indonesia.

(b) In the other case, the Batam Court of Religion noted that the defendant had been summoned according to the provisions of the MOU and "must be declared absent", which implied that the service on the defendant was valid.

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148 Defendant's Reply Submissions ("DRS") at [9].

149 DWS at [34].

144 We do not think those cases take the matter further. That the process of the MOU is used – and in the aforementioned Indonesian cases, was used for service of Indonesian process outside Indonesia – does not mean that it is more than a guideline and that it in fact prescribes the exclusive and mandatory method for service of foreign process in Indonesia (and in this case, for service of Singapore process in Indonesia).

145 Notwithstanding that Bayu's opinion is not countered by an opposing expert opinion, we respectfully do not accept it. That there was a legal vacuum in the laws and regulations of Indonesia governing the handing of requests for judicial assistance in civil matters and which prompted the conception of the MOU does not mean that the MOU is anything more than what it purports to be, *ie*, a memorandum of understanding between two Indonesian state entities providing for a process which parties requesting judicial assistance may adopt. As was said in *Humpuss*, the MOU does not purport to lay down exclusive and mandatory rules and although it may be regarded as setting out the *preferred* method of service within Indonesia, we do not agree that that method is the *only permissible* one under Indonesian law. In *Humpuss*, it was observed that Article 2(1) of the MOU then in force stated that the MOU was a "joint coordination guideline" and was "intended to be used as the guidelines for coordination in handling the requests for judicial assistance in civil matters". In concluding that the MOU was not a statutory instrument creating law of general applicability, Chong J had regard to the fact that under Articles 15(2) and 15(4), the MOU was described as being valid for five years but may be extended by written agreement of the parties, and may be terminated by either party on six months' notice. We too agree that the MOU is not a binding law.

146 Bayu referred to Article 390(1) of the HIR not as an independent, exclusive, and mandatory requirement for service of foreign process in

Indonesia, but as the method used to fulfil step (d) in the process he described (at [132] above).[150] We note that his translation of that provision is different from that reproduced in *Humpuss*. In any event, the suggestion that Article 390(1) of the HIR merely operates as the method in step (d) of the MOU process does not advance Bayu's opinion that the MOU created a law of general application. Article 390(1) cannot be itself an Indonesian law governing the service of foreign process because it was the very existence of a legal lacuna on the service of foreign process that occasioned the creation of the MOU (as was observed in *Humpuss*).

147 Having considered Bayu's expert opinion against the weight of the authorities, we also do not accept the second limb of MOD's argument (*ie*, that under Indonesian law, valid service of foreign process requires *actual* service on the final recipient).

148 We note that in its written reply submissions, the MOD submitted that:

(a) The binding nature of the MOU process was confirmed by a letter issued by the Supreme Court of Indonesia (the "Supreme Court") under Article 34(4) of Law No 3 of 2009 (which authorises the Supreme Court to issue instructions to all courts);[151] and

(b) Furthermore, the Supreme Court had the power to effectively create law out of the MOU's terms because under Article 79 of Law No 14 of 1985, the Supreme Court was empowered to regulate matters not sufficiently regulated in that law.[152]

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150 BSH at pp 19–20, para 16(d).

151 DRS at [13(a)].

152 DRS at [13(b)].

It was not Bayu's evidence that the MOU had the force of law for either of these reasons; Bayu did not even refer to either of the aforementioned provisions of Indonesian law in his affidavit. Neither argument is, therefore, supported by proof of Indonesian law and we do not think any weight can be placed on them.

149 In any event, we do not think these arguments should be accepted. Article 32(4) of Law No 3 of 2009 provides that the Supreme Court "has the authority to provide guidelines, reprimand, or warning to all subordinate courts";[153] it is concerned with how subordinate courts shall administer their affairs. In any event, the letter is simply an announcement of the launch of a new procedure for submitting court documents abroad (that is, the method set out in the MOU) and is not an instruction to follow the MOU procedure.

150 Article 79 of Law No 14 of 1985 is part of a "law regarding Supreme Court" and says that the Supreme Court may further regulate "the matters which are needed for the continuous implementation of judiciary":[154] the scope of that provision is obscure and not elucidated by Bayu's evidence, but the MOU is an understanding between the Indonesian MFA and the Supreme Court and neither purports to be nor is a regulatory decree by the Supreme Court; and, it may be noted, neither Law No 14 of 1985 nor Article 79 therein is referred to in the recital in the MOU of a number of laws "observing" which the MOU was entered into.

151 We therefore conclude that pursuant to s 14 SIA, service of the Enforcement Order was effected upon receipt of the same by the Indonesian

153 Defendant's Supplemental Bundle of Authorities ("DSBA") at p 49.

154 DSBA at p 23.

MFA on 26 April 2022. It follows that SUM 589 was filed out of time by a little under eight months.

SUM 11 for a retrospective extension of time to file SUM 589 is dismissed

The approach to applications for extensions of time

152 In their submissions, the parties identified O 3 r 4(1) of the ROC 2014 as the source of the court's power to grant an extension of time. That rule provides that:

> The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules or by any judgment, order or direction, to do any act in any proceedings.

153 In *Bloomberry Resorts and Hotels Inc and another v Global Gaming Phillipines LLC and another* [2021] 3 SLR 725 ("*Bloomberry (HC)*"), Belinda Ang Saw Ean J (as she then was) said of this rule (at [49]) that:

> The words "such terms as it thinks just" gives the court discretion to grant time extension in order to achieve justice in the circumstances of the case. Generally, the factors the court takes into consideration in deciding whether to grant an extension of time are: (a) the length of delay; (b) the reasons for delay; (c) the chances of the defaulting party succeeding on appeal if the time for appealing were extended; and (d) the degree of prejudice to the would-be respondent if the extension of time were granted: see *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2011] 2 SLR 196 at [29]; *AD v AE* [2004] 2 SLR(R) 505 at [10]) with the courts generally focusing on the first two: *Falmac Ltd v Cheng Ji Lai Charlie and another matter* [2014] 4 SLR 202 at [14].

154 As appears from the reference to factor (c) (*ie*, the chances of the defaulting party succeeding on appeal if the time for appealing were extended), the general regard to the four factors came from cases concerned with applications for extensions of the time to appeal. In *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2011] 2 SLR 196 ("*Sun Jin*") to which Ang J referred, it was

noted that the courts took a stricter view in such cases than in cases of extension of time for other purposes (at [28]). The court, however, also noted that these factors had been applied in some cases which did not concern applications for leave to file an appeal out of time – the instance given was a case in relation to late filing of a proof of debt (at [29]). In *Bloomberry (HC)*, Ang J had regard to the four factors in considering whether to grant an extension of time to set aside an order giving leave to enforce an award as a judgment, as did the court in *CNX* (at [57]), citing *Bloomberry (HC)*.

155 The Plaintiffs' submissions also approached the extension of time in this case having regard to the four factors mentioned above. Mr Mahesh Rai, counsel for the Plaintiffs, submitted that the stricter view was equally applicable in cases where an extension of time was sought in respect of an application to set aside an order granting leave to enforce an arbitral award. In the decided cases concerning extensions of time to appeal, significant weight was given to considerations of finality and the successful party's entitlement to assume (and act on the assumption) that the judgment entered into is final. The Plaintiffs submitted that the same considerations apply with equal force where leave has been granted to enforce an arbitral award and the award debtor's application to set aside that decision was made out of time.

156 In its written submissions, the MOD accepted that the court takes into account the four factors in exercising its discretion but submitted that the court generally focuses on the first two factors, citing *Bloomberry (HC)* and *CNX*.[155] The written submissions went on to say that "the subsequent discovery of new evidence of fraud post-award is a factor which militates strongly in favour of

[155] DWS at [46].

the grant of an extension of time".[156] In oral submissions, the MOD argued that a different approach had to be taken where fraud was the basis for resisting enforcement of the Award. This culminated in the forthright assertion that the general approach to applications for extensions of time to appeal should not apply to the present case.

157 For the suggested different approach, we go to the cases to which the MOD referred. The first is *Bloomberry (HC)* itself. Ang J said (at [52]) that the main focus was on the reason for the extension of time, which in that case was the allegation of new evidence of alleged fraudulent and corrupt conduct discovered post-award, the significance of which could only be fully appreciated after the relevant timeline had expired. She then said (at [54]):

> The plaintiffs' reasons for the delay and allegations of fraud are closely connected in that the allegations of fraud are bound up with the merits of the application to challenge enforcement of the Partial Award. As I see it, it is within the court's discretion to extend time and defer matters that are bound up with the merits to the substantive hearing proper. Put another way, given the circumstances of the present case, the plaintiffs ought to be allowed to assert the allegations of fraud as put forward in the application for time extension without reference to the further point of whether they are likely to succeed or not at the substantive hearing. This approach is in the overall interest of justice having regard also to the minimal prejudice caused to the defendants.

158 The second case is *Ching Chew Weng Paul, deceased and others v Ching Pui Sim and others* [2011] 3 SLR 869 ("*Ching Chew Weng Paul*"), which was concerned with an application to set aside a judgment entered after trial in the defendants' absence on the ground that the judgment was procured by fraud. The application was dismissed. The MOD relied on the following observations (at [26]–[27]):

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156 DWS at [47].

> 26 Although I have found the purported reasons for the fifth to ninth defendants' absence from trial and the late application to be wholly unconvincing, and some even to be disingenuous, it would still be necessary to examine the allegations of fraud raised by the fifth to ninth defendants. The statement of law propounded in [*Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR(R) 673] ([11] supra) that the predominant consideration in deciding whether to set aside a judgment under O 35 r 2 is the reason for the defendant's absence was intended to be of general application. The situation is quite different when the application is founded on actual fraud. In this regard, the authorities are clear that a judgment obtained by fraud cannot be allowed to stand, as Denning LJ observed in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712:
>
> > No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. *Fraud unravels everything.* The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments …
>
> 27 Indeed, the Court of Appeal in *Su Sh-Hsyu* at [65] endorsed Denning LJ's observations and set aside the judgment even though the reasons furnished by the applicant to explain her absence were found to be unconvincing. Here, Mr Hri Kumar, counsel for the plaintiff, sensibly accepted that if there is clear and egregious fraud, delay would not be an obstacle. As such, there was a need to examine the specific allegations of fraud made by the fifth to ninth defendants in relation to the first defendant's evidence in respect of each of the trust assets.

159 The third case is *PT First Media TBK v Astro Nusantara International BV & Ors* [2018] 3 HKC 458 ("*PT First Media*"), which is a decision of the Hong Kong Court of Final Appeal. In that case, orders had been made in Hong Kong giving leave to enforce an arbitral award. It was then held, in an application to enforce the award in Singapore, that the tribunal lacked jurisdiction to make the award in favour of some of the claimants. An application was then made in Hong Kong for an extension of time to set aside the leave orders. The application was dismissed at first instance and in the Court of Appeal, but in the Court of Final Appeal it was held that the courts below had erred in principle in refusing to exercise their discretion to extend time and the

application was granted. It is impractical to set out the lengthy passages from the decision on which the MOD relied for its disapproval of what was described as an "elaborately structured approach to discretion" taken in the English case of *Terna Bahrain Holding Company WLL v Al Shamsi* [2013] 1 Lloyd's Rep 86 involving a list of relevant factors (*PT First Media* at [59]), in favour of what was described as a "broad, unrestricted approach" in cases like the Hong Kong case of *The Decurion; sub nom Chimbusco Pan Nation Petroleum - Chemical Co Ltd v The Owners and/or demise charterers of the ship or vessel Decurion* [2012] 1 HKLRD 1063 (*PT First Media* at [59]). Their Lordships endorsed (at [55]) a statement that the applicable principle in deciding whether the time should be extended is to look at all relevant matters and consider the overall justice of the case, and that a rigid and mechanistic approach is not appropriate.

160 Returning to the present case, the different approach urged by the MOD was not framed with clarity, but its thrust was that an application to set aside an order on the ground of fraud brought special considerations and justified a more liberal approach to setting aside the Enforcement Order. As we understand it:

(a) The MOD was relying on *Bloomberry (HC)* and *Ching Chew Weng Paul* in arguing that where fraud is the basis of a challenge to an arbitral award, less emphasis should be placed on the extent of the delay and the applicant's chances of success in the substantive challenge; and

(b) Although *PT First Media* was not a fraud case, the MOD further argued that it supports the proposition that a rigid and mechanistic approach in applying the four factors should be eschewed in favour of a more liberal approach to an application based on fraud.

161 In the same vein, the MOD relied on *The Federal Republic of Nigeria v Process & Industrial Development Ltd* [2020] EWHC 2379 ("*FRN (2020)*"), which involved an application for an extension of time to challenge an Enforcement Order, for the following propositions:

(a) That there can be no prejudice to the award creditor in being subject to a full inquiry into the alleged fraud because an award that is liable to be set aside as having been procured by fraud is, in legal terms, worthless (at [267]);

(b) That an important factor in assessing the overall justice of the case is the injustice to the award creditor seeking an extension of time if it could not challenge an award on the ground that it was obtained by fraud (at [275]); and

(c) That allowing an investigation into allegations touching the integrity of the dispute resolution system over which the court has supervisory jurisdiction is important (at [273]).

162 We are unable to agree with the argument that it is inappropriate to have regard to all four factors simply because fraud is the basis of the challenge to the Enforcement Order. *Ching Chew Weng Paul* does not say so – that was not a case with the additional elements brought in by the public policy ground, and in the observations on which the MOD relied, it is *proved fraud* that unravels everything and *clear and egregious fraud* that would have removed delay as an obstacle in the exercise of the discretion (which the four factors are intended to structure). In *Bloomberry (HC)*, the court's decision to grant an extension of time was plainly a decision that was made in light of the particular circumstances of the case and *having regard to the four factors*. An important feature of that case was the fact that the substantive challenge against

enforcement of the award was premised on fresh evidence of fraud, the significance of which was belatedly appreciated only after time to challenge the court's decision to grant leave to enforce had expired. Although the substantive challenge was eventually dismissed, that challenge was considered alongside the award debtor's application for an extension of time; this gave rise to practical considerations that were material to the course taken.

163 We respectfully do not think there is a gulf between the approach in *Bloomberry (HC)* (which considers the four factors) and the approach endorsed in *PT First Media. Sun Jin* recognised the four factors as the factors "which our courts have regard to in determining whether an extension of time to file a notice of appeal should be granted" (at [29]) and also that the factors had been applied in other cases, but went on to say (at [30]):

> In our view, what the aforesaid authorities show is that in each case, the court, in deciding whether to extend the prescribed timeline for an act to be done, has to balance the competing interests of the parties concerned. As the statement of Millett LJ in *Mortgage Corporation* (quoted above at [27]) shows, the factual matrix of the particular case at hand will be paramount. In balancing the parties' competing interests, the court inevitably needs to consider the question of prejudice. Copious citation of case law will not be necessary (and also will not be helpful) as previous decisions will be no more than guides. *In determining how the balance of interests should be struck and in applying the four factors mentioned at [29] above, it is the overall picture that emerges to the court as to where the justice of the case lies which will ultimately be decisive.*
>
> [emphasis added]

164 The court has a wide discretion under O 3 r 4(1) of the ROC 2014, the exercise of which must be guided by the justice of the particular case. The identification in the cases of the four factors to which the court has regard is an aid to the exercise of the discretion, but as *Sun Jin* makes clear, the court ought not consider the four factors to the exclusion of all the other circumstances of

the case. The "overall picture" – which *includes* the four factors – must be considered in balancing the competing interests of the parties and landing at a just outcome. In relation to an extension of time to apply to set aside an order granting leave to enforce an arbitral award, relevant circumstances may include allegations of fraud having been made – or more specifically, the award debtor being able to make out a strong case of fraud in the obtaining of the award. This consideration may weigh heavily in the balancing of interests, as it did in a different context in *Ching Chew Weng Paul*. On the other hand, in considering that the basis of the application is alleged fraud and assessing the strength of the case to set the Enforcement Order aside, it must be borne in mind that – in the words of Denning LJ (see [158] above) – fraud must be distinctly proved.

165 In deciding whether an extension of time should be allowed, we will approach the question by considering the four factors, but this does not mean to the exclusion of all the circumstances of the case. Nor does it mean that we will not balance the respective interests of the parties in order to arrive at a just outcome. If proof of fraud is relevant to the ultimate question of whether enforcement of the Award would be contrary to Singapore's public policy, then such proof may assist in persuading this court to grant an extension of time. However, it is clear to us that the MOD cannot succeed on the strength of a *mere assertion* that fraud tainted some aspect of the arbitral proceedings. More would be required in order to persuade the court to exercise its discretion.

Factor (a): The length of the delay

166 For reasons set out at [77]–[151] above, we have come to the conclusion that SUM 589 was filed out of time by a little under eight months.

Factor (b): The reasons for the delay

167 Turning to the reasons for the MOD's delay, the MOD submitted that the evidence of fraud on which its application in SUM 589 is based was not known to it at the time of the Arbitration and could not reasonably have been uncovered sooner. For present purposes, however, the question is why the MOD did not file SUM 589 and its associated applications until March 2023.

168 The MOD's answer was twofold:

(a) First, although OS 94 (as it then was) was served on the Indonesian MFA on 26 April 2022, the MOD did not know of it. As earlier described at [86] above, the MOD was verbally informed sometime in June 2022 by the Minister of Political, Legal and Security Affairs that an application had been taken out to enforce the Award in Singapore, but it was also told that the relevant court documents would go through the prescribed process of service in Indonesia and would therefore take some time.[157] It did not have sight of the relevant court papers until 19 December 2022.[158]

(b) Second, time was required to investigate the procurement, execution, and performance of the Navayo Agreement and the conduct of the MOD's defence in the Arbitration. The investigation was complex and ongoing even at the time SUM 589 was taken out. The MOD reasonably and responsibly did not bring SUM 589 and the other applications until it was sufficiently equipped with evidence to support the allegations of fraud and corruption in the dealings between Navayo

157 MI-3 at [15].

158 MI-3 at [15].

and the MOD, albeit that there remained investigations ongoing (which explains why SUM 606 had to be taken out for leave to file the Further Affidavits).[159]

169 The MOD led evidence on the course the investigations took, principally through Kiki. Kiki deposed that:

(a) In September 2021, the Coordinating Ministry of Politics, Legal and Security Affairs directed the Indonesian government's internal auditor ("BPKP") to carry out an audit of the SatKomHan Programme.[160] No explanation was given as to why this audit was commissioned so long after the termination of the SatKomHan Programme in October 2018.

(b) The audit was completed at the end of December 2021 and a report of the BPKP's findings was prepared (the "BPKP Audit Report"). According to the BPKP Audit Report, the BPKP purportedly discovered what were described as significant irregularities, including irregularities in the MOD's procurement of the Orbital Slot and the procurement and performance of the Navayo Agreement.[161]

(c) In January 2022, the Indonesian Attorney General's Office directed that its Special Criminal Forces (the Jaksa Agung Muda Pidana Khusus, or "PIDSUS") investigate the satellite procurement.[162]

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159 DWS at [62].

160 Kiki Yonata's 3rd Affidavit dated 10 May 2023 ("KY-3") at [30(a)].

161 KY-3 at [30(b)].

162 KY-3 at [30(d)].

(d) In February 2022, the investigation was handed over to the Deputy Attorney General of the Military and Civilian Connectivity in Criminal Affairs within the Attorney General's Office (the Jaksa Agung Muda Bidang Pidana Militer, or "PIDMIL") because the PIDSUS saw that it would involve both civilian and military elements and thus, the investigation should proceed as a "connectivity" investigation. The PIDMIL commenced its investigations pursuant to an investigation order of 14 March 2022.[163]

170 Kiki held a senior position in the PIDMIL and was part of the investigation team.[164] The PIDMIL first focused its investigations on the circumstances of the Artemis Lease. At the end of June 2022, the Attorney General's Office announced that it was expanding the investigation and was now focusing on "the alleged corruption in the contract made with Navayo". By an investigation order of 28 November 2022, the PIDMIL was directed to investigate the Navayo Agreement.[165]

171 The investigation into the circumstances of the Artemis Lease was completed on 16 February 2023.[166] In June 2022, three persons had been named as suspects for their roles in alleged corruption and/or fraud underlying the Artemis Lease, namely Agus (who had retired in 2016); Surya; and Arifin Wiluna ("Arifin"), who succeeded Surya as President Director of PT DNK. On 23 February 2023, the PIDMIL registered corruption charges against them. In November 2022, Thomas had been named as a suspect for his role in the same

163 KY-3 at [30(e)]–[30(f)].

164 KY-3 at [1].

165 KY-3 at [31(d)].

166 KY-3 at [31(e)].

alleged corruption and/or fraud, and on 23 February 2023 the PIDMIL registered a corruption charge against him.[167] The charges were brought under a law relating to the eradication of corruption; the thrust of those charges was that they had unlawfully enriched themselves and abused their positions to the detriment of state finances or the state economy.[168] Witnesses in the prosecutions of the four persons were examined from March through May 2023,[169] but whether those proceedings were concluded – and if they were, their outcomes – was not disclosed to us in the evidence.

172 SUM 606 was brought on the ground that a further 16 weeks was required for the PIDMIL "to complete the Navayo Investigation and file the necessary further affidavits".[170] This, according to Kiki, was a reasonable time.[171]

173 The MOD's evidence on the investigations that were carried out was not particularly informative insofar as it disclosed very little as to what was discovered in respect of the fraud/and or corruption allegations *vis-à-vis* the Navayo Agreement. We do not think it necessary to enter an inquiry into whether the investigations were tardy or unduly leisurely because it is clear that *by 31 January 2022 at the very latest*, the MOD was in possession of sufficient evidence to apply to challenge the Enforcement Order on the ground of fraud in the procurement and performance of the Navayo Agreement and the conduct of

167 KY-3 at [31(f)(i)].

168 Kiki Yonata's 2nd Affidavit dated 6 March 2023 ("KY-2") at [7].

169 KY-3 at [31(g)].

170 KY-2 at [12]–[13].

171 KY-2 at [19].

the Arbitration. That much is clear from the MOD's defence in the proceedings brought by the Plaintiffs in Indonesia to enforce the Award.

174 As mentioned at [52] above, the Exequatur Award was issued by the Central Jakarta District Court on 30 December 2021. On 31 January 2022, the MOD filed its Challenge against the Exequatur Award.[172] The Challenge was brought on *inter alia* the ground that the Award could not be enforced within Indonesia because it would otherwise be contrary to public policy. A number of assertions were made to establish this ground of the challenge.

175 One was that the Award was "based upon the concealment of that fact that there exist unperformed obligation of Navayo [*sic*]".[173] In this connection, the MOD identified a number of work items in the Invoices and referred to the four COPs, as well as an extract from the BKPK's Audit Report. Based on this, it was said that "there appears to be an irregularity in the issuance of the certificates of performance, thus there is a clear concealment of fact that Challenged Party 1 [*ie*, Navayo] has not fully performed its obligation in accordance with the Agreement".[174] The gravamen of the complaint was fraudulent concealment, as it was then said that:[175]

> Based on the details above, it is clear that a series of actions were undertaken to conceal the actual facts, causing the panel of arbitrators to view that the Challenging Party has any obligation towards Challenged Party 1 and Challenged Party II. In that regard, the international arbitral award in question is in conflict with public policy, as it is in contravention with the fundamental principles of justice and morality.

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172 GK at p 265.

173 GK at p 280, para 9.1.

174 GK at p 283, para 9.1.5.

175 GK at p 284, para 9.1.6.

176 It was also asserted that the Award was "based upon a fraudulent act committed through the preparation of the certificates of performance".[176] The COPs and their signatories were identified.[177] Part of a statement by Ginting was also set out, in which he said that he signed the certificates in good faith to assist Navayo in obtaining a loan from MEHIB and that he did not know the COPs would be used in an arbitration against the MOD.[178] It was said that the COPs were used by Navayo to convince the arbitrators "that the items delivered by it have undergone verification and testing",[179] and that the use of a document which did not reflect the actual facts or situation "should be deemed as a fraudulent document". The MOD also added that as a matter of Indonesian law, any person who knowingly uses a document with fraudulent content is deemed to commit a criminal offence.[180] This was a forthright assertion that the COPs were fraudulently procured and fraudulently deployed in the Arbitration.

177 All these matters were at the heart of the MOD's application in SUM 589. The Challenge also quoted an extract from the BPKP Audit Report detailing various alleged "[inconsistencies] between the invoice issued by Navayo and the realized items of the work", which include "among others":[181]

> (a) That in relation to stated items in the invoices, "[n]o hardware development [had] been performed with the partner appointed by the [MOD], namely [PT Len Industri]";

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176 GK at p 284, para 9.2.

177 GK at p 284, para 9.2.1.

178 GK at p 284–285, para 9.2.2.

179 GK at p 285, para 9.2.3.

180 GK at p 285–286, para 9.2.4.

181 GK at p 282, para 9.1.5.

(b) That "[n]o test had been conducted on the hardware items, including laboratory test, field testing the available satellite network, and stability test under extreme conditions";

(c) That "[t]he 3200 pcs of Secfone Platinum" and "3200 pcs of Satkomhan-enabled communication devices/user terminal" has "not been delivered and stored"; and

(d) That "[a]lgorithm/encryption had not been developed jointly with the State Cryptographic Agency (Badan Sandi Negara)", "[n]o algorithm [had] been developed for the SatKomHan", and "[n]o testing had been conducted".

These allegations also form part of the MOD's grounds in SUM 589.

178 The investigations since January 2022 may have added to the MOD's armoury and we accept that, in general, a challenge to an award creditor's attempts to enforce an arbitral award should not be brought half-cocked, and that it may be reasonable for an award debtor to hold back until satisfied that there are proper grounds for challenging the award. However, the MOD considered itself to be in a position to challenge the Exequatur Award by the end of January 2022. It was also in a position – and possibly a *better* position since the investigations had since advanced – to apply to set aside the Enforcement Order by 12 July 2022 (*ie*, 2 months and 14 days after service of the Enforcement Order on 26 April 2022), even if it was appropriate or necessary for it to apply (as it did in SUM 606) for leave to rely on further evidence because its investigations were continuing.

179 For the foregoing reasons, we find that the MOD was in a position to apply to set aside the Enforcement Order by the end of January 2022. As such,

the operative reason for the delay was that although it knew of the enforcement proceedings in Singapore in around June 2022 (see [86] and [168(a)] above), it did not then act because the MOD *itself* had not received the Enforcement Order, and the actual receipt of it took nearly eight months from the transmission of the Enforcement Order by the Singapore MFA to the Indonesian MFA (or seven months from it being conveyed by the Indonesian MFA to the Indonesian Supreme Court).

180 In our judgment, this is not a sufficient justification for the MOD's delay in filing SUM 589; indeed, no adequate explanation for the delay has been given. The Plaintiffs had commenced proceedings *in Singapore* to enforce the Award. As a matter of *Singapore law*, service of the Enforcement Order was effected upon its receipt by the Indonesian MFA – that is what s 14 SIA provides and what we have held (see [96]–[151] above). It appears that the departments of the Indonesian government involved in the transmission of the Enforcement Order were not sensitive to this point of Singapore law and its implications for the MOD:

(a) First, the transmission of the documents to the Indonesian MFA on 26 April 2022 had been conveyed or notified to the Minister of Political, Legal and Security Affairs[182] even though that Ministry was not part of the service chain described by Bayu, so it must have been regarded as a matter of some significance. Thus, both the Minister and the MOD knew *by June 2022 at the very latest* of the existence of the documents and that they related to enforcement of the Award. Yet, it seems that no one in the Ministry of Political, Legal and Security Affairs

182 MI-3 at [15].

or the MOD was troubled to enquire into when action on the MOD's part might be required (as the MOD must have enquired later on).

(b) Second, the MOD quite clearly became aware of s 14 SIA at some stage, since it took the benefit of the two months from the date the documents were received (*ie*, 19 December 2022) when filing SUM 589 and SUM 606. Upon becoming so aware – and we were not told when exactly the MOD became aware of s 14 SIA – it should have realised that under Singapore law, service had been effected on 26 April 2022 (or at the least, that the Plaintiffs would contend as much). The MOD should therefore have applied then for an extension of time. This, it did not do.

(c) Third, while the MOD itself might not be responsible for the time taken for the transmission of the Enforcement Order within Indonesia after it had been received by the Indonesian MFA, the culpable delay by the MOD in filing SUM 589 was, in our view, a consequence of the lack of appreciation of the position under Singapore law *and* its failure to make the necessary enquiries promptly.

181 In the premises, we are not persuaded that the delay was justified.

Factor (c): The MOD's chances of success in SUM 589

182 The MOD put forward a great many matters in support of what it described as "an overarching conspiracy perpetuated by Navayo acting in concert with errant officers of the MOD and PT DNK to defraud the MOD and to conceal such fraud from the MOD and Indonesian government".[183]

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183 DWS at [55].

The alleged fraud relating to the Navayo Agreement

183 We first address the MOD's arguments on the alleged fraud in the entry into and performance of the Navayo Agreement (and this includes the MOD's allegations surrounding the obtaining of the COPs, which were subsequently deployed in the Arbitration). Prominent in the arguments were the allegations that:

(a) The COPs had been fraudulently procured. Specifically, it was alleged that the COPs confirmed acceptance of Navayo's invoices for payment despite checks *not* having been conducted on the Deliverables that were the subject of those invoices;[184] and

(b) The equipment and services supplied (so far as they were), or to be supplied, under the Navayo Agreement were not suitable for and/or irrelevant to the SatKomHan Programme.[185]

We address those matters first since they underlay the alleged fraud in the Arbitration.

(1) The allegedly fraudulent procurement of the COPs

184 In his affidavit, Ginting explained how he came to sign both COP 1 and COP 4. As to COP 1, Ginting's account was as follows:

(a) Ginting said that in mid- to late-October 2016, he attended a routine meeting at Hartawan's office to discuss the progress and

184 DWS at [56(a)].

185 DWS at [56(c)(iii)].

development of the procurement for the SatKomHan Programme.[186] The meeting was attended by Thomas, Surya, and several MOD officials.

(b) Thomas and Surya said that Navayo required COPs to be signed and issued by the MOD to show their funder, MEHIB, that work had been performed in relation to the Navayo Agreement.[187]

(c) Hartawan asked what Ginting thought. Ginting told Hartawan that (i) the COPs were not referred to in the Navayo Agreement, and there was no requirement for the MOD to sign any COPs acknowledging the delivery of goods or services, or to acknowledge any payment obligation of any invoices; and (ii) he (*ie*, Ginting) thought they were of no legal effect even if they were signed by the MOD; but (iii) it was up to Hartawan to decide.[188]

(d) Hartawan queried Thomas and Surya on the impact of signing the COPs, and Thomas said that signing them would not cause any impact to the MOD, as they were only documents required for the sole purpose of enabling Navayo to obtain funding from MEHIB and not for the purpose of acknowledging delivery of any goods or services by Navayo under the Navayo Agreement, or to confirm the acceptance of any invoices issued by Navayo for payment.[189]

(e) Accordingly, Hartawan ordered Ginting to sign the COPs in order to help Navayo, as a gesture of goodwill.[190]

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186 Jon Keneddy Ginting's Affidavit dated 9 May 2023 ("JKG") at [19].

187 JKG at [20].

188 JKG at [22].

189 JKG at [23].

190 JKG at [24].

(f) When Ginting was later presented with COP 1, he did not inspect its contents carefully, although from his "cursory review" it had a different format from the usual form of certificates used by the MOD in procurement contracts; specifically, the letterhead did not appear to be a typical MOD letterhead.[191] He in fact had no knowledge of the delivery and/or acceptance of any goods or services under the Navayo Agreement; nor was he a "SatKomHan Program Authorized Signatory".[192] He nevertheless signed COP 1 in obeyance of Hartawan's orders.[193]

185 As to COP 4, Ginting's evidence is that sometime in July 2017, Thomas and Surya came to his office and presented it to him. They requested that he sign it.[194] Ginting took it to Leonardi and asked for his instructions. He explained the earlier exchanges in Hartawan's office and Hartawan's instructions (see [184] above), and told Leonardi that three COPs had previously been issued.[195] Leonardi told him to follow the earlier instruction given by Hartawan.[196] In light of Leonardi's instructions, Ginting signed off on COP 4. Ginting had by then been appointed as the MOD's Authorised Representative in relation to the SatKomHan Programme and was responsible for inspecting and accepting goods in compliance with the "MOD's Directive dated 2 February 2017".[197] Plainly, however, he did not inspect any of the equipment supplied by Navayo.

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191 JKG at [25].

192 JKG at [26].

193 JKG at [27].

194 JKG at [28].

195 JKG at [29]–[30].

196 JKG at [31].

197 JKG at [32].

186 In his affidavit, Masri (now retired as a Major General) said that sometime in April 2017, he was approached by Thomas, Surya, and Kuti in a hallway of the MOD's premises. They presented him with Invoices 2 and 3 and the accompanying COPs (*ie*, COP 2 and COP 3).[198] Masri asked what the documents were, and Surya "responded to tell [Masri] to sign and initial the documents, as they were to serve as 'proof' that the 'bill of lading has been received' by the MOD".[199] Masri then reported to Hartawan (who was his superior) and "after hearing [Masri] out", Hartawan "ordered [Masri] to just sign off on the documents 'because it's just a receipt'".[200]

187 Masri further deposed that:

(a) Prior to signing off on COP 2 and COP 3, he had never been informed that he "was required to, and was in any event not in a position to, check that the goods or services under the 2nd and 3rd Invoices had been received by the MOD";[201]

(b) He was "never appointed as an authorised representative / signatory of the MOD in relation to the SatKomHan Program at any time", and therefore he was never in a position to sign off on any documents confirming the MOD's receipt of goods and services delivered by Navayo;[202]

198 Masri Adenan Senos' Affidavit dated 11 May 2023 ("MAS") at [8].

199 MAS at [9].

200 MAS at [11].

201 MAS at [13].

202 MAS at [14].

(c) He "did not fully understand the contents of the four documents, as [he is] not well-versed in English";[203] and

(d) He only signed off on those document because Hartawan ordered him to do so, and in light of the reassurances given by Kuti, Thomas, and Surya that the documents were mere "receipts".[204]

188 From the evidence as a whole, it seems clear to us that in fact no checks had been made by the MOD on any of the Deliverables supplied by Navayo. In addition to the evidence from Ginting and Masri, Idris deposed in his second affidavit that no such office as the "SatKomHan Program Office" existed, and there was no such thing as a "SatKomHan Program Office Authorized Signatory".[205]

189 One curious aspect of this case is that Kiki averred in his third affidavit – after referring to the charges brought against Agus, Surya, Arifin, and Thomas in relation to the Artemis Lease (see [171] above) – that "it is the PIDMIL's view that Surya, Arifin, Thomas, *Masri* and *Ginting* are also involved in fraud and / or corruption in procurement, execution and performance of the Navayo Agreement".[206] As can be seen from our discussion and analysis of the evidence above, both Masri and Ginting provided affidavits in these proceedings in support of the MOD's case. However, no evidence was put before us as to whether, and if so, what action had (or has since) been taken against either individual.

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203 MAS at [15].

204 MAS at [15].

205 MI-2 at [29(b)]–[29(c)].

206 KY-3 at [25(c)].

(2) The alleged unsuitability of the equipment and/or services supplied under the Navayo Agreement for the SatKomHan Programme

190 We turn next to the suitability of the equipment and services that were in fact provided by Navayo. The MOD's evidence on this was extensive. An appreciation of that evidence is necessary for present purposes, and so we will traverse it in summary.

191 There was evidence adduced in relation to a specific "Deliverable" mentioned in the invoices issued by Navayo. There was a line item in Invoice 2 referring to completion of "500 Secfone Pack Delivery".[207] From Kiki's first affidavit, Navayo in fact delivered not Secfones (an abbreviation for "secure phones") but 500 "Festal" (in Kiki's sixth affidavit, corrected to "Vestel") handsets.[208] From the first affidavit of Praceko – who is an equipment testing expert with the Indonesian Ministry of Information and Communication Technology experienced in the field of communications testing, especially in handphone user devices[209] – the Festal/Vestal handsets were in fact merely generic Android smartphones used as regular mobile communication devices and not for satellite communications; in particular, they did not contain the "Secphone Cryptocard" which enabled secure satellite communications to take place.[210]

192 Kiki, in his first affidavit, asserted further discrepancies in the invoiced "Deliverables". It was said that a number of items in the invoices provided for

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207 KY-1 at p 420.

208 KY-1 at [67(b)(i)].

209 Arif Budi Praceko's 1st Affidavit dated 9 May 2023 ("ABP-1") at [7].

210 ABP-1 at [21]–[22].

the delivery of a report detailing the completion of the works thereunder, and that in fact, no such reports were ever delivered to the MOD.[211]

193 Meiditomo's evidence was considerably wider. He is well-qualified to give expert evidence on satellite communications technology, and his credentials were not questioned. For the purpose of considering the strength of the MOD's case on fraud, it is enough for us to consider Meiditomo's conclusions.

194 The "main conclusions" in Meiditomo's first affidavit were:[212]

> a. The Navayo Contract would not have resulted in any L-Band user terminals suitable for communication with satellites, in particular for communication with the satellite under the Airbus Contract, and the Artemis satellite by Avanti.
>
> b. None of the deliverables provided by would have been suitable for the development of user terminals. From the list of physical goods that were delivered, only two items appeared to have some relevance to satellite communications, being listed as L-Band Modules and Antennae. For the L-Band Modules and the Antennae to be suitable for use as component parts of the user terminals which Navayo was to supply to MOD under the Navayo Contract, these items must have been manufactured according to precise technical specifications customised for satellite communication and must be compatible with the remaining items supplied. In any event, based on the remaining items supplied as described in the list of items delivered by Navayo, these were insufficient and would not have resulted in any user terminal system suitable for use in the User Segment of the SatKomHan Programme.

195 Meiditomo's second affidavit more specifically addressed whether Navayo had performed the services which were the subject of Invoices 1 to 4, and whether the Navayo Agreement would have resulted in any functional user terminals suitable for satellite communication. In his opinion (which is

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211 KY-1 at [67].

212 MS-1 at p 14, para 11.

explained at some length), the services allegedly provided by Navayo under Milestones 1 to 4 "were manifestly inadequate, and plainly did not comply with the requirements and/or specifications of the Navayo Contract",[213] and:[214]

> … even if Navayo had properly performed all of its obligations under the Navayo Contract … it could not have resulted in the development of a complete and a functional user terminal system for satellite communications suitable for use with the Artemis and SatKomHan satellites in the MOD's SatKomHan Program.

196 Muhammad is an experienced satellite communications engineer.[215] In his affidavit, he expressed "complete agreement" with Meiditomo's opinions[216] and added that Navayo had failed to provide a testing programme or evidence of testing in relation to the work it claimed to have done, which he said were "commonplace and required in the satellite engineering industry". In the absence of comprehensive tests, he said, no functional user terminals will be produced.[217]

197 Sigit has worked extensively in the satellite communications industry.[218] He inspected equipment delivered by Navayo and what were called "Milestone Submissions" or "Milestone Documents" that appeared to have been submitted by Navayo in support of the Milestones in the invoices.[219] In summary, his opinion was that the equipment (at least, those in respect of certain line items)

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213 Dr Meiditomo Sutyarjoko's 2nd Affidavit dated 27 June 2023 ("MS-2") at p 10, para 11(a).

214 MS-2 at p 10, para 11(b).

215 MSQ at pp 6–8.

216 MSQ at p 14, para 13.

217 MSQ at pp 14–16, paras 14–16.

218 SJ at pp 7–9.

219 SJ at p 17, para 8(a).

did not meet the requirements or specifications under the Navayo Agreement. For example, with regard to the Secfones, he agreed with Praceko's opinion (referred to at [191] above);[220] with regard to certain laptops, they lacked the necessary applications and/or software;[221] and certain antennae supplied could only receive but could not transmit signals.[222] Sigit also agreed with Meiditomo that Navayo "did not provide any services under Milestones #1 to #4",[223] and further specified other failings in delivery.[224] Moreover, in his opinion:[225]

> Even if Navayo had properly provided the deliverables stipulated in the Navayo Agreement, these could not have been utilised to develop and produce a functional user terminal system to be utilised in connection with both the Artemis and SatKomHan satellites. In particular, the user terminal system envisaged in the Navayo Agreement, which relied on Secfones to transmit signals, will not be able to communicate with the Artemis satellite at all.

198 These matters formed the core of the MOD's case on fraud in the entry into and performance of the SatKomHan Agreement. Without being exhaustive, other matters put forward by the MOD in support of that fraud were that:

(a) Navayo lacked the financial ability, credentials, necessary premises, equipment, and technical expertise to supply the user terminals and related services under the Agreement;[226]

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220 SJ at p 18, para 10(a)(i).

221 SJ at pp 18–19, para 10(a)(ii).

222 SJ at p 19, para 10(a)(iii).

223 SJ at p 23, para 16.

224 SJ at pp 23–25, paras 17–19.

225 SJ at p 26, para 20.

226 DWS at [56(b)(iii)].

(b) The COPs were fraudulently procured in circumstances where "no checks had been conducted on the status and adequacy of the goods and services allegedly provided by Navayo";[227]

(c) The Navayo Agreement was not reviewed by the Indonesian Legal Bureau, as required for any contract over IDR 1 billion;[228]

(d) Navayo was appointed without compliance with the auction process required for contracts over IDR 100 million;[229]

(e) The Navayo Agreement was entered into when there was no budget for the SatKomHan Programme, contrary to Indonesian government regulations (although it must be said that this was clear from the Navayo Agreement itself);[230]

(f) Navayo had not provided an advance payment bond or performance bond as required under the Navayo Agreement;[231] and

(g) Navayo had not involved PT Len Industri, the state-owned enterprise involved in defence communications, in a joint development programme as required by the Navayo Agreement.[232]

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227 DWS at [56(a)].

228 KY-1 at [60]–[61].

229 DNS at [33].

230 DNS at [26(a)].

231 DNS at [35(a)].

232 DNS at [41(a)(ii)].

The alleged fraud in the conduct of the Arbitration

199 We turn then to the alleged fraud in the conduct of the MOD's defence in the Arbitration.

200 The assertion in Kiki's first affidavit was that "the entire conduct of the MOD's defence in the Arbitration was plagued by significant irregularities, which prevented the MOD from properly defending itself".[233] The irregularities were that:

(a) The MOD did not submit any request for document production, nor did it file any objection to Navayo's document request(s);[234]

(b) When ordered by the Tribunal to produce the documents sought by Navayo in its document requests, the MOD failed to do so within the deadline directed by the Tribunal;[235]

(c) The "affidavit" submitted to explain the non-availability of certain documents was defective because it was not a signed and sworn statement but merely a letter with the MOD's letterhead;[236] and

(d) In particular, the MOD did not call any witnesses – a matter on which the Tribunal commented at a number of places in the Award.[237]

201 We observe that these were rather general assertions. Further evidence was given by Nindya in her first affidavit.

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233 KY-1 at [70].

234 KY-1 at [71(a)]–[71(b)].

235 KY-1 at [71(c)].

236 KY-1 at [71(d)].

237 KY-1 at [73].

202 Nindya is a State Attorney with the division of the Indonesian Attorney General's Office responsible for the conduct of civil and administrative affairs of the Indonesian government (the Jaksa Agung Muda Bidang Perdata dan Tata Usaha Negara, or "DATUN").[238] She was one of the members of a team from the DATUN that had the conduct of the Arbitration on behalf of the MOD, together with Schinder Law Firm and Sippel Law (see [36] above). Nindya named the "primary" members of the DATUN team, which comprised eight members (including herself).[239] The role of the team from the DATUN was to advise the MOD and act jointly with Schinder Law Firm.[240]

203 According to Nindya's evidence, decisions on, and instructions for, the conduct of the Arbitration would ultimately be issued by the members of the MOD team (the "MOD Instructing Team") set up for that purpose. The MOD Instructing Team "comprised several officials from the MOD who had been specifically appointed by the senior management of the MOD to take responsibility over the carriage of the Arbitration for the MOD", and instructions would be issued "by one or more members of the MOD Instructing Team".[241] The members of the MOD Instructing Team were not identified in Nindya's affidavits nor any of the other affidavit evidence led by the MOD in these proceedings.

204 Nindya's evidence was that the DATUN had recommended to the MOD that factual witnesses be called in the Arbitration and that expert witnesses be

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238 Nindya Asih Martha Utami, SH. MH.'s 1st Affidavit dated 27 June 2023 ("NAMU-1") at [1].

239 NAMU-1 at [6]–[7].

240 NAMU-1 at [8].

241 NAMU-1 at [9].

engaged "to put forth helpful expert testimony to support the MOD's defence in the Arbitration".[242]

205 On 1 October 2019, a meeting was held between Schinder Law Firm, the MOD, and PT DNK. This was prior to the filing of the MOD's Statement of Defence, which was to be accompanied by witness statements. At that meeting, the DATUN said that there was a need to immediately collect all relevant factual evidence and witness testimony in relation to the issues arising in the Arbitration.[243] On 10 October 2019, the DATUN wrote to the Secretary-General of the MOD informing the MOD that it had to submit witness statements together with its Statement of Defence, and "highlighted and sought the MOD's permission to speak to" eight persons (namely Agus, Hartawan, one Rear Admiral Bambang Eko, Ginting, Masri, Pardede, and one Colonel Wajariman).[244] This was affirmed in a memo from the Acting Attorney General to the Secretary-General.[245] It was Nindya's evidence that:[246]

> Despite the above recommendations, no instructions were received from the MOD Instructing Team for the potential factual witnesses to be interviewed and their testimony secured for the hearing in the Arbitration. *I am not aware of the reasons why members of the MOD Instructing Team had decided not to adhere to the recommendations of the DATUN.*
>
> [emphasis added]

206 Nindya also detailed the occasions on which the DATUN recommended engaging expert witnesses in the fields of English contract law, government procurement, satellite telecommunications, and damages. This recommendation

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242 NAMU-1 at [13].

243 NAMU-1 at [14(a)].

244 NAMU-1 at [14(b)].

245 NAMU-1 at pp 24–31.

246 NAMU-1 at [15].

was also affirmed in a memo from the Attorney General to the Minister for Defence.[247] In particular, the DATUN recommended the engagement of one Matthew Glynn as an expert on English law and satellite telecommunication; members of the DATUN had met him in Singapore and his views were supportive.[248] Nindya confirmed that no experts were engaged on behalf of the MOD, and that the DATUN did not receive any explanation for this from the MOD Instructing Team.[249]

207 Nindya ended her first affidavit by stating that:[250]

> In addition, I would point out that in practically all meetings conducted as between the MOD, DATUN, and Schinder, Surya Cipta Witoelar of PT Dini Nusa Kusuma ("**PT DNK**") would also be in attendance. I now understand that he has been implicated in the investigation into the transactions between Navayo and the MOD. As such, his presence at these meetings could have compromised the MOD's conduct of its defence in the matter.
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> [emphasis in original]

Our conclusion

208 The MOD has very little prospects of succeeding in SUM 589. In referring to the MOD's chances of success, it must be remembered that it is not success in resisting the Plaintiffs' claims in the Arbitration that is relevant – instead, the focus is on the MOD's chances of succeeding in SUM 589 (that is, in setting the Enforcement Order aside). In the present circumstances, it means that the court must consider the likelihood of the MOD successfully satisfying

247 NAMU-1 at [16(a)]–[16(b)].

248 NAMU-1 at [16(c)]–[16(d)].

249 NAMU-1 at [17].

250 NAMU-1 at [18].

the court that enforcement of the Award would be contrary to the public policy of Singapore.

209 Going first to the procurement, execution, and performance of the Navayo Agreement, we accept that on the face of the materials presented to us, the MOD has shown a well arguable case of fraud in those respects; when we refer to performance of the Navayo Agreement, we include the obtaining of the COPs. That would be a matter going to the MOD's defence against Navayo's claims in the Arbitration. The ambit of the conspiracy alleged by the MOD in that regard was described by Kiki in his third affidavit. We see no need to identify all the alleged participants named by Kiki beyond those already evidently implicated – namely Kuti, Thomas, Surya, Ginting, and Masri – but the case would appear to be one involving a wide conspiracy.

210 However, and as we have emphasised above at [208], that is *not* the present question. The present question is one pertaining to the prospects of setting aside the Enforcement Order on the ground that enforcement of the Award would be contrary to the public policy of Singapore. It is well-established that the "public policy" ground is a narrow one or, to put the matter in another way, that the threshold to be met is a high one. As was noted in *Bloomberry (HC)* (at [96]):

> While the term "public policy" appears open-ended and is undefined in either the Model Law or the IAA, case law on the scope of the public policy of Singapore is that it should be construed narrowly and consequently, the threshold for resisting enforcement of an award is a high one. The Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*") held that the public policy ground is invoked when the upholding of the award would "shock the conscience" or is "clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public" or "where it violates the forum's most basic notion of morality and justice" (at [59]). While *PT Asuransi* concerns a setting-aside application under Art 34 of

> the Model Law, the definition and principles therein also apply to the present case of resisting enforcement under Art 36 of the Model Law. A similar observation has been made by the Court of Appeal in *AJU v AJT* [2011] 4 SLR 739 ("*AJU v AJT*") where it was stated that the question of public policy under both the setting aside regime and the enforcement regime for foreign arbitral awards is the same (at [34]). Likewise, there should be no difference in the enforcement regime for domestic international arbitral awards under Art 36(1)(b)(ii) of the Model Law.

211 In *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*") (which was cited in the preceding passage in *Bloomberry (HC)*), it was recognised that fraud and corruption will generally fall within the rubric of matters contrary to public policy (at [59]). But in order that the conscience be shocked by the attempted enforcement of an arbitral award, there must be a connection between the fraud or corruption and the making of the award. In *Bloomberry Resorts and Hotels Inc and another v Global Gaming Phillipines LLC and another* [2021] 1 SLR 1045 ("*Bloomberry (CA)*"), which was the appeal from *Bloomberry (HC)*, the Court of Appeal affirmed the holding in *Bloomberry (HC)* that in relation to setting aside an arbitral award on the ground provided in s 24(a) IAA, the making of the award must have been causatively induced or affected by fraud or corruption. The Court of Appeal said (at [42]) that it is not enough:

> … if the challenging party can merely show some peripheral fraud in the circumstances relating to a case or the parties notwithstanding that that fraud played no part in the conduct of the arbitration or the making of the award. *The party challenging the award on grounds of fraud must show a connection between the alleged fraud and the making of the arbitral award. Absent such a connection, s 24 of the IAA would not be satisfied.*
>
> [emphasis added]

212 In *Bloomberry (CA)* (at [73]), the Court of Appeal not only concluded that there was no basis to set aside the award in that case, but *also* that there was

no basis to *refuse enforcement* of the award, which was the appellant's alternative ground of challenge in *Bloomberry (CA)* (at [20] and [23]). The premise of the alternative ground was that allowing the award to be enforced would be contrary to the public policy of Singapore.

213 In our view, that must be the correct approach: there must be such a connection between the fraud or corruption and the making of the arbitral award that, should the successful party seek to enforce that award in Singapore, the Singaporean conscience would be shocked if its enforcement were permitted. Whether the connection is sufficient or insufficient will depend on the particular facts of each case, but more to the point, it is in our view not enough for the MOD to show an arguable case of fraud in the procurement, execution, and performance of the Navayo Agreement. That was – or should have been – a matter for the Arbitration (and specifically, raised as a defence of the claims advanced in the Arbitration). But plainly, it was not.

214 That then takes the enquiry to the fraud alleged in the conduct of the Arbitration. Is there, as the MOD contended, also an arguable case of fraud in the MOD's conduct of its own defence in the Arbitration – and more specifically, a sufficient explanation as to why a case of fraud in the procurement, execution, and performance of the Navayo Agreement was not mounted successfully (or at all) by the MOD? It is here that we think the MOD's case stumbles and falls.

215 From the Award, the Schinder Law Firm team comprised initially a team of five and later six members. The DATUN team comprised eight

members. When the hearing of the Arbitration opened *via* a virtual hearing, counsel for the MOD announced that:[251]

> … some high-ranking officials from the Government of Indonesia also attend the hearing from this room and this is actually a reflection of how serious [*sic*] the Government of Indonesia in general, and Ministry of Defence in particular, in facing [*sic*] this case, even in the situation of lockdown in Jakarta.

It is plain that there was an abundance of legal representation for and governmental oversight of the MOD's defence to the claims against it in the Arbitration.

216 From Nindya's evidence (see [204]–[206] above), specific recommendations were made by the DATUN for the conduct of the MOD's defence, but those recommendations were not adopted. There was no evidence before us as to why that was the case. Instead, Nindya's evidence only spoke to these crucial matters in general terms (*eg*, that no instructions were received from the MOD Instructing Team). There was no evidence as to what exactly happened at the meetings which were held between the DATUN, the MOD Instructing Team and Schinder Law Firm – there must have been discussions on interviewing witnesses and engaging experts. With the possible exception of the reference to Surya,[252] the members of the MOD Instructing Team were not identified by Nindya, or at all, and it is not even shown that Surya was at the meetings as a member of the MOD Instructing Team rather than as the PT DNK "expert". Significantly, with the same possible exception of Surya, there was also no evidence (or assertion) that any of the alleged participants in the fraud named by Kiki were members of the MOD Instructing Team – the inference

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251 GK at p 242, ln 24 to p 243, ln 6.

252 NAMU-1 at [18].

therefore is that none were. There is also no evidence at all from Schinder Law Firm (or Sippel Law) to explain (beyond Nindya's bland account that the MOD Instructing Team did not give instructions) their role(s), if any, in advising the MOD on advancing a proper defence in the Arbitration by procuring witnesses and expert evidence.

217 Nindya's suggestion that Surya's presence at the abovementioned meetings "could have compromised" the MOD's defence[253] is of little probative value in the absence of evidence of what actually happened at those meetings where Surya may have influenced the conduct of the defence. In light of the fact that there were no specific accusations levelled by the MOD against Schinder Law Firm or Sippel Law, we have considered whether, if there was a conspiracy of the scale described by Kiki, it can properly be inferred that the conspiracy extended to somehow compromising the defence in the Arbitration. We do not think that that suffices, especially when fraud must be distinctly particularised and proved. Here, there was a dearth of any better evidence other than the veiled suggestion that Surya "could" have compromised the MOD's defence in the Arbitration; that assertion was a bare one, and speculative at best. It was open to the MOD to (a) adduce evidence of what exactly occurred during the decision-making processes between the lawyers, the DATUN team, and the MOD Instructing Team; and (b) explain the failure to mount a proper defence in the Arbitration with a view to attributing it to the furtherance of the alleged fraudulent conspiracy. However, no such evidence was forthcoming.

218 In our view, in addressing the MOD's chances of success (and we come later to a more definite view), it is highly unlikely that in a hearing of SUM 589, it will be found that the failure to give instructions for the interviewing of

253 NAMU-1 at [18].

witnesses and engagement of experts was a furtherance of the fraudulent conspiracy (insofar as a fraudulent conspiracy can be demonstrated to begin with). Too many persons would need to be fraudulently delinquent, and there is insufficient evidence to sheet home the absence of instructions to the hint of baleful influence by Surya. Therefore, the conduct of the MOD's defence in the Arbitration was deficient for *some other reason* which was not forthcoming in the mass of evidence put forth by the MOD in these proceedings; it is not for us to speculate what that reason might be. Suffice to say, we are not satisfied that the conduct of the Arbitration was tainted or compromised by the alleged fraud as complained of by the MOD.

219 In the case before us, had the defence been properly conducted, the materials for a case of fraud in the entry into and performance of the Navayo Agreement, including fraudulent COPs, may well have sufficed. We cannot say for sure, and we do not need to. What we *can* say is that the defence as conducted went some way, and any diligent following through would have led to the presentation of a case of fraud in the nature of that which the MOD now puts forward for SUM 589. These are our reasons.

220 First, the COPs. The MOD's Statement of Defence in the Arbitration included the following:[254]

> 48. In its Statement of Claim the 1st Claimant argued that it has the rights over payment in accordance with invoice 1–4 based on its deliverable and the signing of Certificate of Performance by 2 (two) officers from the Respondent, namely Lt. Col. Ginting and Lt. Col. Masri.
>
> 49. The 2 (two) officers were asked to receive the deliverable and to sign certificate of performance due to the fact that the deliverables has already arrived in Indonesia and the Customs

254 GK at p 174.

> Office have repeatedly asked the Respondent to take the Deliverables at the warehouse.
>
> 50. The 2 (two) officers have no special knowledge on the deliverable and they were not specifically authorised to conduct testing or inspection as required by the Agreement. So, when they signed the document they were informed that it only to show the receipt of the delivery without specific knowledge that it is certificate of performance which at the later stage were manipulated by the 1st Claimant to claim for full payment.
>
> 51. The Certificates of Performance were issued as goodwill by Respondent when the First Claimant requested such documents to obtain facilities from Exim Bank. Respondent therefore contends that its goodwill has been taken for granted by the Claimant, now tendered as evidence against the Respondent in this arbitration.
>
> 51. Since the signatories of the Certificates of Performance have no official authorisation, experience and expertise to evaluate the value or the quality of the Deliverables. Therefore, the Certificates of Performance cannot be interpreted as Respondent's acknowledgement on the value or the quality of the Deliverables.

221 Details were pleaded of Ginting and Masri's accounts of how they came to sign the COPs, particularly the reference to the "EXIM Bank" (*ie*, MEHIB). This strongly suggests to us that both individuals must have been interviewed, despite what Nindya has said – or at the very least their input was obtained on what transpired with regard to the signing of the COPs. Whether or not their accounts were completely the same or as fulsome as those in these proceedings, the *essence* was that the COPs were obtained by misrepresentation and the Plaintiffs were acting improperly (and abusing the MOD's gesture of goodwill) in relying on them in the Arbitration. That was asserted in the pleadings, but neither Ginting nor Masri were called to give evidence. The Tribunal said that:[255]

> The Respondent's further contention that the officers who signed the CoPs were mislead (sic) to believe that their signatures were required only to show proof of receipt (versus adequacy) of the Deliverables is unsupported by any evidence,

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255 The Award at para 13.72.

> conspicuously by the absence of witness statements from the concerned officers. Nor can the Tribunal find any support in the record for the contention that the Respondent issued the CoPs as a goodwill gesture to assist Navayo in obtaining facilities from EXIM.

222 Second, the Deliverables. In the Award, the Tribunal noted that the MOD, by its Statement of Defence in the Arbitration, had pleaded that:[256]

> … Navayo's Deliverables failed to satisfy the requirements of Article 9.2 of the Agreement:
>
> "a) The 1st Claimant failed to submit the required documentations of (a) result of testing; (b) the conduct of inspection and testing; and (c) acceptance testing plan developed and agreed by the parties.
>
> b) The validity of the 1st Invoice is denied because there was no joint development of hardware between the First Claimant and the Indonesian counterpart;
>
> c) The 2nd Invoice is denied because the First Claimant failed to store 500 Secfones in suitable warehouse with temperature control pursuant to the Annex of the Agreement;
>
> d) The 3rd and 4th Invoices are denied because the implementation milestones were never been verified and did not involve Indonesian counterpart.
>
> e) The Claimant failed to meet the Good Industry Practices and applicable legal requirements.
>
> f) The Claimant failed to fulfil procedures for acceptance and to furnish advance payment guarantee as required by Presidential Regulation No. 16 of 2018."

223 This is well short of the matters referred to in the MOD's evidence for SUM 589. But it demonstrates that the MOD's legal teams were conscious of defaults in the delivery of the Deliverables as a defence to the claims in the

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256 The Award at para 13.17.

Arbitration. They picked up, for example, the failure to provide testing documentation and the failure to involve PT Len Industri.[257] They also alleged the failure to store the Secfones properly, which means someone must have looked into their storage.[258] The point is that if the MOD's legal team had looked further – for example, into the Secfones which were in fact Festal/Vestal Android handsets – a train of enquiry would likely have been started; or if they had checked whether the deliveries of the Deliverables as stated in the invoices had in fact occurred and were in accordance with the Navayo Agreement, from the evidence before us, they would likely have found that the invoices were not sound. The MOD could have conducted its defence accordingly.

224 Third, many of the other matters put forward as evidence by the MOD for SUM 589 were already there to be put forward as part of a defence of fraud in the entry into and performance of the Navayo Agreement (*eg*, lack of budget approval; lack of due diligence; and lack of review by the Indonesian Legal Bureau).

225 Fourth, had the DATUN's recommendation that witnesses be interviewed been followed, there is a reasonable likelihood of the default(s) in the delivery of the Deliverables being uncovered. Had the expert in satellite communications been engaged, it is reasonable to expect that the MOD would have been alerted to the matters spoken of by Meiditomo, Muhammad, and Sigit (see [190]–[197] above). Ginting and Masri could obviously have been called as witnesses, and we must assume that their evidence in the Arbitration would have been to a similar effect as that contained in their affidavits in these

257 DNS- at [41(a)(ii)].

258 GK at p 173, [45(c)].

proceedings. Had they been called, the Tribunal might not have placed as much weight on the COPs as it did.

226 Yet, there is no explanation before us (beyond Nindya's limited evidence) on why the defence in the Arbitration did not support the pleaded allegations so far as they went. There was also no evidence from anyone in the MOD Instructing Team, Schinder Law Firm, or Sippel Law. A stark example of this is the absence of any evidence from Ginting or Masri in support of the contention, as recorded by the Tribunal, that the officers were misled to believe that their signatures were required only to show proof of receipt (and not the adequacy) of the Deliverables. None of these matters were illuminated by any of the evidence placed before us by the MOD, and there is accordingly no proper basis for us to infer that the MOD's defence in the Arbitration was perfunctorily run in consequence of the alleged conspiracy.

227 In our view, if we had to put it in terms of chances of success, the MOD's case in SUM 589 for setting aside the Enforcement Order has very little chance of succeeding. The MOD suffered the Award because of the plainly inadequate conduct of its defence in the Arbitration but *more importantly*, there was woefully inadequate evidence before us to attribute the inadequacy of the conduct of its defence in the Arbitration to a *fraudulent conspiracy* in the conduct thereof. In our judgment, enforcing an award obtained in such circumstances *would not* shock the conscience and be regarded as contrary to Singapore's public policy.

Factor (d): The likely prejudice to the Plaintiffs if the extension is allowed

228 The Plaintiffs submitted that they would suffer prejudice because the invoices had been unpaid since the latter part of 2017, nearly two years before

the Award was issued and nearly six years before the MOD's application in SUM 589, and that they should not be deprived of the fruits of the Award because of the MOD's dilatory conduct.[259] Navayo acknowledged that, as the MOD had asserted, it is funded by a third-party litigation funder, but said that that was irrelevant.[260] That Navayo is funded suggests that it may be short of funds, and the Tribunal referred to evidence that it faced cash flow problems due to the MOD's failure to pay the invoices.[261] However, apart from this reference, there was no other direct evidence of Navayo's financial state. Nor was there any evidence from Navayo that it had arranged its affairs on the basis that enforcement of the Award would not be challenged (which would have been difficult when the Exequatur Award in Indonesia was challenged) or in anticipation of prompt receipt of the fruits of the Award.

229 The MOD submitted that there was no prejudice to the Plaintiffs which could not be compensated for in interest and costs.[262]

230 In our view, if we did allow an extension of time, any prejudice to the Plaintiffs would not extend beyond possible exposure to having the Enforcement Order set aside, and if it is not set aside, costs and further delay in enforcing the Award and receiving the fruits of the Award. The former is not a relevant head of prejudice, while the latter would be compensable by an award of interest and costs. We do not, therefore, consider factor (d) to be particularly weighty in the circumstances of this case.

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259 PWS at [80]–[83].

260 GK at [57(c)].

261 The Award at para 15.7.

262 DWS at [58]–[60].

Conclusion: The extension of time to file SUM 589 should not be granted

231 The exigencies of litigation mean that applications for extensions of time (such as the one we are presently considering) are commonly made on less than complete evidence of the underlying proceedings and/or less than complete argument on the merits. It is to reflect that reality that factor (c) is expressed in terms of the applicant's *chances* of success.

232 In these proceedings, however, despite the parties' agreement for us to conduct a preliminary hearing to first deal with the questions we summarised above at [6], for the purposes of assessing the MOD's chances of success in SUM 589, we have had before us *all* the primary evidence on which the MOD seeks to rely on in SUM 589. We have also had extensive submissions on all of this evidence. This means, in our view, that we can come to a more robust view on the outcome of SUM 589 than one framed simply in terms of the MOD's chances of success. This reinforces our conclusion above at [227] that the MOD's chances of succeeding in SUM 589 are extremely slim. It also means that in considering factors (a) to (d), the general focus on factors (a) and (b) can be displaced and more weight placed on factor (c); our view on the MOD's prospects of success (which are more definite in light of all the material and arguments before us) assumes more importance in assessing the overall balance of the interests of the parties.

233 In our judgment, even if we were to grant the MOD the extension of time sought, we would have dismissed SUM 589 in any event, for the reasons set out at [208]–[227] above. In short (and to reiterate), where the MOD suffered the Award because of the inadequate conduct of its own defence in the Arbitration – and which was not shown to be attributable to a fraudulent

conspiracy – we do not think that enforcement of the Award would be contrary to Singapore's public policy.

234 As for the other factors, while they do not weigh as heavily in this case as factor (c), we would add that factors (a) and (b) also weigh against an extension being granted. The delay of nearly eight months is lengthy. While there is some explanation for the delay, the explanation given is neither adequate nor persuasive (as we have found above at [167]–[181]). On the other hand, factor (d), which relates to the prejudice the Plaintiffs are likely to suffer, is not a factor that favours the Plaintiffs in this case.

235 In having regard to all the circumstances, we do not overlook that the MOD has shown a well arguable case of fraud in the entry into and performance of the Navayo Agreement, including in the obtaining of the COPs (which were significant to the Tribunal's decision). The propositions concerning fraud taken from *FRN (2020)* on which the MOD relied (see at [161] above) came from Sir Ross Cranston's considerations of prejudice and "fairness 'in the broadest sense'". However, those statements must be understood in their proper context. The learned judge had noted that the case was not one "where a party who has been unsuccessful in the arbitration alleges fraud in relation to the procurement of the underlying contract or in relation to the conduct of the arbitration, when that was not properly investigated at the time of the arbitration" (at [270]). That contextual statement is important: where the fraud was *not* properly investigated at the time (when it could have been), so that the defence of fraud was *not* properly run (when it could have been), investigations into the alleged fraud carried out after the event at the behest of the unsuccessful party in the arbitration loses much (if not all) of its force and the arbitral award would not, in those circumstances, be considered offensive to the integrity of the dispute resolution system over which the court has supervisory jurisdiction.

236 In balancing justice between the parties and considering the "overall picture" that emerged from the evidence, the fact that SUM 589 would in all likelihood be dismissed is the dominant consideration. To extend time so that the MOD can prosecute an application which has very little prospect of succeeding would, in our judgment, be a severe imposition on the Plaintiffs, on judicial time and resources, and would bring no corresponding legitimate advantage to the MOD. Thus, in the interests of justice, it is our decision that we should refuse the MOD an extension of time to file SUM 589.

SUM 606: The MOD's application for leave to file the Further Affidavits

237 Only the Further Affidavits were in question; the reference to "further grounds" was surplusage, unless it was intended to refer to whatever further support the evidence in the Further Affidavits would provide. As we explained above at [68]–[73], the Further Affidavits have been filed and we have had regard to them *de bene esse*.

238 Had we allowed SUM 11 and granted the extension of time for filing SUM 589, we would have given the MOD leave to rely on the Further Affidavits.

239 The Plaintiffs submitted, in summary, that from the proper service date of 26 April 2022, the additional 16 weeks would give the MOD nearly twelve months to resist enforcement of the Award (instead of the two months and 14 days pursuant to s 14 SIA). In addition, allowing the MOD the extra 16 weeks would be unjustified when the BPKP's audit (which was completed at the end of December 2021) had already found "irregularities" in the procurement and performance of the Navayo Agreement but the investigations had first focused

on the circumstances of the Artemis Lease. The delay in investigating the Navayo Agreement, the Plaintiffs argued, was of the MOD's own making.[263]

240 There is some force in this argument, when it is borne in mind that the MOD's resistance to the Exequatur Award in the Challenge filed on 31 January 2022 included the grounds of concealment and fraudulently procured COPs, as we have earlier described. But the affidavits have in fact been filed, and if an extension of time were granted, the hearing of SUM 589 would have been held sometime in the future with opportunity for the Plaintiffs to respond to the Further Affidavits. In our view, the balance of justice between the parties would come down in favour of the MOD.

241 On one view, since we have dismissed SUM 11 (which means that SUM 589 must also consequently be dismissed), there is no point in allowing the Further Affidavits to be filed and so SUM 606 should be dismissed. However, as the Further Affidavits have in fact been filed on 27 June 2023, and as we have had regard to them *de bene esse* for the purposes of determining if SUM 11 should be allowed, it is our view that the better course is to regularise the fact of the Further Affidavits having been filed. We accordingly do so by allowing SUM 606 and grant the MOD leave for the Further Affidavits to be filed for the purposes of SUM 589.

SUM 607: The MOD's application for sealing and redaction orders

242 In SUM 607, the MOD sought orders that:

(a) The proceedings in OS 94/OS 2 and all applications filed thereunder be heard otherwise than in open court;

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263 PWS at [86].

(b) OS 94/OS 2 and all its contents be sealed and no inspection be allowed by any member of the public;

(c) The case number of the Arbitration, the Award, and the names of the parties be redacted from all notices from the court; and

(d) Any judgment or order made in respect of OS 94/OS 2 (including any application filed thereunder):

> shall not reveal, nor enable any member of the public to deduce, the case number of the Arbitration, the identities of the parties in the Arbitration and these proceedings, and confidential information relating to investigations and other matters undertaken by bodies of the Government of the Republic of Indonesia.

243 The prayer for an *in camera* hearing was unnecessary, that being the default position under s 22(1) IAA. The Plaintiffs also did not oppose that position.

244 On 20 April 2023, the Assistant Registrar made, by consent, the orders as to sealing and redaction from notices until the final determination of SUM 607. Whether those orders were to be continued, and whether the order as to redaction of any judgment or order should be made, was left for our determination. The Plaintiffs opposed the making of any final orders.

245 In Idris' first affidavit filed in support of SUM 607, the reasons for the orders sought were that:[264]

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[264] Muhamad Idris' 1st Affidavit dated 6 March 2023 at [9].

(a) The court papers in OS 94/OS 2 contained information and matters relating to the Arbitration which the parties were obliged to treat as confidential;

(b) The dispute related to "sensitive matters concerning the Indonesian Government's procurement processes and governmental policies, including that relating to its national defence strategy", which were highly confidential and if disclosed to third parties and/or the general public were likely to cause prejudice to the Indonesian Government; and

(c) The court papers in OS 94/OS 2 also "concern and touch upon" matters presently the subject of ongoing investigations by Indonesia's Attorney General's Office and other government institutions, which ongoing investigations risked being compromised if the orders were not made.

246 A considerable body of material was filed by the Plaintiffs directed to showing that the fact of the Arbitration, the parties to it, the claims made under the Navayo Agreement, and the result were all already in the public domain, as was the fact of the investigations into alleged corruption in relation to the Artemis Lease and the Navayo Agreement, and the charging of Agus and others.

247 While this continued to be debated in the affidavits and the submissions, the MOD's reasons for seeking the orders were refined in its written submissions. Specifically, it was submitted that the court papers in OS 94/OS 2 touched upon matters that were the subject of ongoing investigations by Indonesia's Attorney General's Office and other government institutions which could be compromised. It was also submitted that they contained information

and materials relating to the Arbitration which the parties were obliged to treat as confidential.[265]

248 In the course of oral submissions, the MOD's position was further refined. Mr Xavier asked only that the contents of the Award not be revealed and for any judgment to be anonymised because disclosure might adversely affect the ongoing investigations.

249 As a matter of Singapore law, there is a public interest in maintaining the integrity of a police investigation: *Mustafa Ahunbay v Public Prosecutor* [2015] 2 SLR 903 at [80]. It could be argued that a like public interest can be seen in maintaining the integrity of the PIDMIL's investigations. However, it is important not to lose sight of the fact that the additional 16 weeks sought by the MOD in SUM 606 to file the Further Affidavits was the time the MOD said (by way of Kiki's affidavit) that it required to *complete* the investigations.[266] Kiki was senior in the PIDMIL and a member of the investigation team. Thus, when Kiki gave evidence on what was a reasonable time within which the investigations would be completed, he must have meant reasonable in the interests of the MOD.

250 The 16 weeks expired in July 2023, and on the evidence before us the investigations would have been completed well before the hearing before us in September 2023. At the hearing, Mr Xavier properly informed us that the charging of persons under investigation was imminent. In those circumstances, we do not think that in or by September 2023 (or now), there was or is any reason to depart from the important general principle of open justice. Once

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265 DWS at [64].

266 KY-2 at [13] and [19(e)].

protection of the integrity of the investigations is put aside, it might be thought that adherence to the principle of open justice is all the more important in a case such as this. The circumstances relate to the conduct by a state of a publicised programme on behalf of its people, and at stake is the fate of public funds. There is, in our view, a clear public interest, whatever be the result, in openness of our decision in these proceedings.

251 For these reasons, we do not agree to making the interim sealing and redaction orders permanent and dismiss SUM 607 accordingly.

Conclusion

252 For the reasons detailed above, this is our decision on the various applications that were before us:

(a) SUM 11, being the MOD's application for an extension of time to file SUM 589, is refused and the application is accordingly dismissed.

(b) Since SUM 589 was filed out of time and the extension of time has been refused, SUM 589 is also dismissed.

(c) SUM 606, being the MOD's application for leave to file the Further Affidavits, is allowed and the filing of the Further Affidavits on 27 June 2023 is regularised.

(d) SUM 607, being the MOD's application for sealing and redaction orders, is also dismissed. For good order, the interim orders for sealing and redaction are also set aside.

253 We do not think that our grant of leave in SUM 606 warrants a departure from the usual order that costs should follow the event and that the MOD should

therefore pay the Plaintiffs' costs of all four applications. Accordingly, we order that the costs of all the applications be paid by the MOD to the Plaintiffs. However, since we have not heard the parties on costs, we grant the parties liberty to apply to us, within 21 days of the date of this judgment, to seek a different or additional order as to costs; the liberty may be exercised by letter from their counsel to the Registry. In the absence of any such application, and if the parties are unable to reach an agreement on costs within 28 days from the date of this judgment, they should notify the Registry in writing and directions will thereafter be given by us for the parties to provide their written submissions on costs for our consideration and determination.

S Mohan
Judge of the High Court

Sir Jeremy Lionel Cooke
International Judge

Roger Giles
International Judge

Mahesh Rai s/o Vedprakash Rai, Yong Wei Jun Jonathan and Melissa Ng Li Ling (Drew & Napier LLC) for the first and second plaintiffs;
Francis Xavier SC, Hamidul Haq, Chee Fei Josephine, Tan Hua Chong Edwin, Kristin Ng Wei Ting, Liew Min Yi Glenna, Veltrice Tan Yin Rong and Bernice Tan Rui Lin (Rajah & Tann Singapore LLP) for the defendant.