be inappropriate thereby giving rise to an abuse of process.[24] Therefore, any application for pre-action discovery will be carefully scrutinised by the court to ensure that the arbitration process is not being circumvented or otherwise undermined.[25]

[2.011] The question of whether the courts may grant pre-arbitral discovery has not been definitively settled.[26] There is some authority which suggests that the court has no jurisdiction to grant pre-arbitral discovery in relation to both international and domestic arbitration, on the basis that there are "*specific legislative provisions dealing with the types of court-ordered measures that can be granted in aid of arbitration*", and that it would be "*more consistent with Parliament's intention for the court not to be granting pre-arbitral discovery*".[27] There is also some academic support for the proposition that pre-arbitral discovery is not available under the Rules of Court,[28] which has been described in dicta of the Court of Appeal as "*persuasive*" and "*most appropriate*".[29] Notwithstanding, there remains scope for arguing that the court does retain residual discretion under its inherent jurisdiction to grant pre-arbitral discovery in limited circumstances, such as where a potential claimant in arbitration is unable to identify the causes of action he may have and would otherwise have no recourse under the relevant arbitral rules or the Rules of Court.[30]

3. STAYING LOCAL COURT PROCEEDINGS AND ARBITRATIONS

[2.012] An arbitration agreement arises where parties agree to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether amounting to a contract or not.[31] Despite such an agreement, however, a party may decide instead to commence court proceedings to resolve such disputes. In response, the other party may elect to apply to stay the court proceedings in favour of arbitration.

24 *Woh Hup* at [34].
25 *Navigator* at [56].
26 *Ibid* at [64].
27 *Equinox Offshore* at [22].
28 See Jeffrey Pinsler, "Is Discovery Available Prior to the Commencement of Arbitration Proceedings" [2005] SJLS 64.
29 *Navigator* at [64].
30 Paul Tan, "Discovery before Arbitration—When and Why? Equinox Offshore Accommodation Ltd v Richshore Marine Supplies Pte Ltd" [2011] 1 SJLS 270.
31 Section 2A(1) IAA; s 4 AA.

(a) Dispute

[2.013] The court must first determine whether there is in fact a dispute which can be properly referred to arbitration. This is done adopting a "*holistic and commonsense approach*", such that only a *prima facie* case of a dispute need be established; the court should not examine the validity of the dispute as though it were an application for summary judgment.[32] Hence, it has been held that, in general, a dispute exists unless the claim is undisputed[33] or indisputable.[34]

(b) Agreement which provides for alternatives

[2.014] The agreement may provide for two or more alternative dispute resolution mechanisms. In such a case, one issue that arises is whether the agreement constitutes an arbitration agreement for the purposes of the IAA or AA.

[2.015] This issue arose for determination in "*The 'Dai Yun Shan'*".[35] The relevant dispute resolution clause read as follows:

> Jurisdiction: All disputes arising under or in connection with this bill of lading shall be determined by Chinese law in the courts of, or by arbitration in, the People's Republic of Singapore [*sic*].

[2.016] The plaintiff had commenced court proceedings in respect of payment for certain cargo. The defendant then sought a stay of court proceedings in favour of arbitration, arguing that the clause required settlement of the dispute by arbitration. The High Court disagreed and held that because the clause granted the parties the choice of either proceeding to arbitration in China or prosecuting their claim in court, the

32 *Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd* [1992] 3 SLR(R) 595; [1992] SGHC 293 ("*Uni-Navigation*"). See also *Kwan Im Tong Chinese Temple & Anor v Fong Choon Hung Construction Pte Ltd* [1998] 1 SLR(R) 401; [1998] SGCA 7, *Multiplex Construction Pty Ltd v Sintal Enterprise Pte Ltd* [2005] 2 SLR(R) 530; [2005] SGCA 10 and *Tjong Very Sumito*. In *Mancon (BVI) Investment Holding Co Ltd v Heng Holdings SEA (Pte) Ltd & Ors* [1999] 3 SLR(R) 1145; [1999] SGHC 234, the court observed that the applicable test was lower than that used for an application for summary judgment.
33 *The 'Dai Yun Shan'* [1992] 1 SLR(R) 461; [1992] SGHC 51 ("*The 'Dai Yun Shan'*").
34 *JDC Corp & Anor v Lightweight Concrete Pte Ltd* [1999] 1 SLR(R) 96; [1999] SGCA 3. See also *Kwan Im Tong* at [9], defining an "indisputable" claim as one which "simply cannot be resisted on either the facts or the law", and *Uni-Navigation* at [15], where it was stated that "in a case where the defendant in the action has made a clear and unqualified admission of the claim the court cannot stay the action".
35 [1992] 1 SLR(R) 461; [1992] SGHC 51.

clause did not "require" the dispute to be referred to arbitration; hence, a stay of court proceedings in favour of arbitration was not mandated.[36]

[2.017] This decision may be contrasted with the observations made in a subsequent High Court decision, *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* ("*WSG Nimbus*").[37] There, the relevant dispute resolution clause in the agreement provided (amongst other things) that in the event that a dispute arose between the parties relating to the agreement, "*either party may elect to submit such matter to arbitration*". The defendants argued that the words "*may elect*" conferred on the parties a wide discretion in that either party could elect between arbitration or litigation, and the word "*may*" should not be given a mandatory meaning.[38]

[2.018] The Court disagreed with the defendants' argument and construed the relevant clause to mean that upon the election of either party to submit the dispute to arbitration, both parties would be bound to submit to arbitration in accordance with the terms of the clause.[39] On this basis, the Court held that "*an agreement in which the parties have the option to elect for arbitration which, if made, binds the other parties to submit to arbitration is an arbitration agreement within the meaning of the Act*".[40]

[2.019] In the High Court decision of *Sembawang Engineers and Constructors Pte Ltd v Covec (Singapore) Pte Ltd* ("*Sembawang Engineers*"),[41] the dispute resolution clause in question stated that either party could refer any dispute arising under the relevant contract to arbitration, "*[p]rovided [a]lways that the [Plaintiff] shall have the sole discretion to commence proceedings in the courts of Singapore and/or any other jurisdiction if the [Plaintiff] deems fit*". In that case, the plaintiff commenced litigation in respect of liquidated damages arising from a delay in construction works. The defendant then counterclaimed for monies which it claimed were owed to it by the plaintiff. The plaintiff applied for a stay of the

36 This is similar to the decision of the Hong Kong High Court in *William Co v Chu Kong Agency Co Ltd* [1993] 2 HKC 377. There, the dispute resolution clause provided for both litigation and arbitration as alternatives. The Court held that the clause evinced parties' clear intention to arbitrate the matter, and hence that the clause would operate as an arbitration agreement upon the election by any one party to proceed to arbitration. Once that election was made, the other party would have no further say in the choice of dispute resolution method.

37 [2002] 1 SLR(R) 1088; [2002] SGHC 104.

38 *WSG Nimbus at* [20].

39 *Ibid* at [21].

40 At [30]. The Court cited with authority the cases of (*inter alia*) *Lobb Partnership Ltd v Aintree Racecourse Co Ltd* [1999] All ER (D) 1300 and *Manningham City Council v Dura (Australia) Constructions Pty Ltd* [1999] 3 VR 13.

41 [2008] SGHC 229.

defendant's counterclaim in favour of arbitration on the basis that the dispute resolution clause contained in the contract constituted an arbitration clause. In response, the defendant argued *inter alia* that since the plaintiff had commenced court proceedings first, the defendant should be entitled to raise all defences as well as any counterclaims in those court proceedings.

[2.020] The Court applied *WSG Nimbus* and observed that "*[t]he fact that the latter part of cl 40.1 affords the Plaintiff with an option to choose court proceedings over arbitration will not detract from the characteristic of the arbitration agreement in cl 40.1 as being an arbitration agreement for the purposes of both the Arbitration Act and the International Arbitration Act*".[42]

[2.021] The Court went on to hold that the plaintiff's choice to commence court proceedings would not act as a general waiver of the right to have disputes falling under the ambit of the arbitration agreement arbitrated. Rather, it would only act as a waiver *vis-à-vis* the disputes that the plaintiff chose to proceed with in court and any defences raised in response, but would not extend to claims that were not instituted as part of the defences, such as counterclaims.[43] The Court therefore ordered a stay of the defendant's counterclaim.

[2.022] A similar arbitration clause was considered in *Russkaya Telefonnaya Kompaniya v Sony Ericsson Mobile Communications Rus*, a 2012 decision of the Russian Federation Supreme Arbitrazh Court. There, the dispute resolution clause provided for arbitration which could be triggered by either party, as well as a unilateral option in favour of only one party to litigate any dispute. The Russian court held that a clause which provides for only one of the parties with an option to initiate litigation while restricting the other party to arbitration would violate the basic principle of Russian law that there must be equal access to justice, and would therefore be invalid.

[2.023] On the other hand, as evidenced by the High Court's decision in *Sembawang Engineers* and more recently in *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd*,[44] the Singapore court will readily uphold asymmetrical dispute resolution clauses. In the latter case, the High Court held that a contractual dispute resolution agreement which conferred on one party but not the other an asymmetrical right to elect

42 *Sembawang Engineers* at [12].

43 *Ibid* at [54].

44 [2017] SGHC 238; [2017] 3 SLR 267 ("*Dyna-Jet (HC)*"). *Dyna-Jet* went on further appeal to the Court of Appeal but the parties did not contest the High Court's findings on the validity of the arbitration agreement: *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2017] SGCA 32 ("*Dyna-Jet (CA)*") at [13].

whether to arbitrate a future dispute is a valid and enforceable arbitration agreement.

(c) Time for applying for a stay

[2.024] A party may only apply for a stay (both under the IAA and the AA) after appearance has been entered and before delivering any pleading or taking any other step in the court proceedings.[45]

[2.025] A party is required to enter appearance before applying for a stay because the law requires a substantive claim to first be crystallised; it is only then that the defendant can be cognisant of a clear claim being brought against it, and thus elect to apply for a stay of that claim.[46]

[2.026] The phrase "taking any other step in the court proceedings" refers to one which "*impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with a determination by the Courts of law instead of arbitration*".[47] Examples of such steps include:

(1) Filing a defence on the merits;[48]

(2) Filing an affidavit opposing an application for interim payment;[49]

(3) Applying for security for costs, unless such application is made as an alternative prayer to the application for a stay;[50]

(4) Appearing at and attending a hearing of Summons for Directions without objection or qualification;[51]

45 Section 6(1) IAA; s 6(1) AA.
46 *Navigator* at [53]–[54].
47 *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357, cited with approval in *Australian Timber Products Pte Ltd v Koh Brothers Building and Civil Engineering Contractor (Pte) Ltd* [2005] 1 SLR(R) 168 ("*Australian Timber*") at [19].
48 *Samsung Corp v Chinese Chamber Realty Pte Ltd & Ors* [2004] 1 SLR(R) 382; [2003] SGCA 50 which held that an O 14 application for summary judgment could not be made while a stay application was pending. However, see also *Australian Timber* which held that a pending stay application in itself did not stop time running for the service of the defence. These cases were reconciled in *Carona Holdings Pte Ltd & Ors v Go Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460; [2008] SGCA 34 ("*Carona Holdings*"), which held that a party would ordinarily not be compelled to file his defence while the stay application is pending (at [33]).
49 *Lian Teck Construction Pte Ltd v Woh Hup (Pte) Ltd & Ors* [2006] 4 SLR(R) 1; [2006] SGHC 118.
50 *Fasi Paul Frank v Specialty Laboratories Asia Pte Ltd* [1999] 1 SLR(R) 1138; [1999] SGHC 89 ("*Fasi*") at [32]. See also *The 'Dai Yun Shan'*.
51 *Sim Hiang Kiaw & Ors v Lee Hoi Kim Construction Co* [1986] 1 MLJ 347; *Carona Holdings* at [55].

(5) Including in a stay application a prayer to strike out the plaintiff's writ;[52]

(6) Seeking leave to defend;[53]

(7) Seeking leave to strike out;[54] and

(8) Seeking discovery,[55] though this does not include pre-action discovery.[56]

[2.027] However, a party may be allowed to take certain "prohibited" steps and nevertheless preserve its right to apply for a stay of court proceedings, if it makes an express reservation to that effect.[57]

[2.028] Examples of permissible steps (not amounting to a step in the proceedings) include:

(1) Request to the plaintiff for an extension of time to file a defence;[58]

(2) Application for an extension of time to file a defence;[59]

(3) Request for further and better particulars;[60]

(4) Application for notice to produce documents to ascertain the nature of the claim and whether arbitration was an option;[61]

(5) Application for default judgment to be set aside;[62]

52 *PP Persero Sdn Bhd v Bimacom Property & Development Sdn Bhd* [1999] 6 MLJ 1.
53 *Carona Holdings* at [55].
54 *Ibid.* In *L Capital Jones Ltd & Anor v Maniach Pte Ltd* ("*L Capital Jones (SGCA)*") [2017] 1 SLR 312; [2017] SGCA 3 at [77]–[84], the Court of Appeal held that the very act of *filing* an application to strike out a suit on its merits constituted a step in the proceedings. Once such step was taken, it would generally be irrevocable. In so determining, the Court of Appeal had overturned the decision of the High Court below on this issue in *Maniach Pte Ltd v L Capital Jones Ltd & Anor* [2016] 3 SLR 801; [2016] 3 SLR 901 ("*L Capital Jones (SGHC)*").
55 *Ibid.*
56 *Woh Hup*; *Navigator*.
57 *Chong Long Hak Kee Construction Trading Co v IEC Global Pte Ltd* [2003] 4 SLR(R) 499; [2009] SGHC 234. See also *Australian Timber* at [22].
58 *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625.
59 *Carona Holdings* at [94]. This must be contrasted with *Duncan, Cameron Lindsay & Anor v Diablo Fortune Inc & Anor Matter* [2017] SGHC 172 at [24] where it was held that an application to extend time to register a lien under s 137 of the Companies Act (Cap 50, 2006 Rev Ed) ("CA") was a step in the proceedings.
60 *S P Chua Pte Ltd v Lee Kim Tah (Pte) Ltd* [1993] 1 SLR(R) 793; [1993] SGHC 104.
61 *Amoe Pte Ltd v Otto Marine Ltd* [2014] 1 SLR 724; [2013] SGHC 240.
62 *Australian Timber*.

[13.013] Indeed, in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*,[5] the Singapore Court of Appeal held that a negative jurisdictional ruling was not an "award" such that it could be set aside under the provisions of the IAA that stipulate grounds for setting aside an award.

[13.014] Similarly, in *AQZ v ARA*,[6] the Singapore High Court found that relief under s 10(3) of the IAA and/or Art 16(3) of the Model law is not available when a party seeks to set aside a ruling which is "predominantly on jurisdiction but also marginally deals with the merits because that is simply not the purpose that the drafters intended Art 16(3) to serve. In such a situation, the dissatisfied party can seek to set aside the award pursuant to s 3(1) of the IAA read with the relevant limbs of Art 34(2) of the Model Law".

[13.015] Where a party has not elected to challenge the tribunal's preliminary ruling on jurisdiction under Art 16(3) of the Model Law, this may have implications on the recourse available to that party to subsequently challenge an award made by the same tribunal. The Singapore Court of Appeal in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV & Ors*[7] held that parties who elect not to challenge the tribunal's preliminary ruling on its jurisdiction under Art 16(3) of the Model Law are not thereby precluded from relying on its passive remedy to resist recognition and enforcement on the grounds set out in Art 36(1) of the Model Law. The Court also found *obiter* that the position might not be the same in relation to whether such a party may raise such a ground to initiate setting aside proceedings under Art 34 of the Model Law.[8]

(b) Distinguished from procedural orders, directions and interim measures

[13.016] Procedural orders, directions and interim measures, not being decisions on the "substance of the dispute", are not "awards" within the definition of s 2(1) of the AA and the IAA. This is regardless of whether they are labelled as 'awards' by the tribunal.

[13.017] Further, under s 2(1) of both the AA and the IAA, orders and directions made under s 28 of the AA and s 12 of the IAA respectively are expressly excluded from the definition of an "award". Such orders and directions include interim measures.

5 [2007] 1 SLR(R) 597 at [66].
6 [2015] 2 SLR 972 at [69].
7 [2014] 1 SLR 372 at [132].
8 *Ibid.*

[13.018] Section 12(1) of the IAA provides:

> 'Without prejudice to the powers set out in any other provision of this Act and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for –
>
> (a) security for costs;
>
> (b) discovery of documents and interrogatories;
>
> (c) giving of evidence by affidavit;
>
> (d) the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute;
>
> (e) samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute;
>
> (f) the preservation and interim custody of any evidence for the purposes of the proceedings;
>
> (g) securing the amount in dispute;
>
> (h) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and
>
> (i) an interim injunction or any other interim measure.'

[13.019] The equivalent provision in the AA is s 28(2) which confers similar powers on the tribunal, save that it does not contain the powers referred to in sub-sections (g) to (i) of s 12(1) of the IAA.[9]

[13.020] In *PT Pukuafu Indah v Newmont Indonesia Ltd*,[10] the Singapore High Court held that the interim order issued by the tribunal restraining the plaintiffs from prosecuting Indonesian Court proceedings was an interim injunction made under s 12(1)(i) of the IAA and specifically excluded under the definition of an "award" under s 2 of the IAA. The Court thus found that it did not have the jurisdiction to consider an application for setting aside the tribunal's order under s 24 of the IAA and Art 34 of the Model Law, "as those powers only extend to an 'award'".[11]

9 Under s 28(2)(d) of the AA, the tribunal has the power to order a witness to be examined. There is no equivalent power conferred to the tribunal under the IAA.
10 [2012] 4 SLR 1157 at [16]–[19].
11 [2012] 4 SLR 1157 at [19].

The Court also observed that the enforcement mechanism under s 12(6) of the IAA to enforce an order made under s 12 of the IAA required the leave of Court, and that the possibility of refusing leave provided "some measure of residual protection for the rights of both parties".[12]

[13.021] It should be noted that s 12(5) of the IAA includes references to the power of the tribunal to "award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court." As these relate to final decisions which amount to awards, they should be distinguished from s 12(1) and other parts of s 12 which relate to procedural orders, directions and interim measures. Section 34 of the AA, the local equivalent of s 12(5) of the IAA, is more appropriately located in the section titled 'Award' in Pt VIII of the AA.[13]

3. TYPES OF AWARD

[13.022] Under s 2(1) of both the AA and the IAA, an "award" is defined to mean a decision of the arbitral tribunal on the substance of the dispute and "includes any interim, interlocutory or partial award".

[13.023] Section 33 of the AA and s 19A of the IAA further provide that "the arbitral tribunal may make more than one award at different points in time during the (arbitral) proceedings on different aspects of the matters to be determined".[14]

[13.024] A tribunal may therefore issue a single final award dealing with all the issues in dispute at the conclusion of the hearing or, if it finds it necessary or more expedient to do so, render more than one award at different points in time during the arbitral proceedings on different aspects of the dispute.

(a) Interim, interlocutory and partial awards

[13.025] The IAA and the AA refer to "interim, interlocutory or partial awards". However, the terms interim, interlocutory and partial

12 [2012] 4 SLR 1157 at [27].

13 See also Chan Leng Sun SC, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011), p 24, para 2.39 and p 62, para 3.79.

14 See r 32.5 of the Arbitration Rules of the Singapore International Arbitration Centre, 6th Ed, 1 August 2016 ("SIAC Rules 2016") which similarly provides that "[u]nless otherwise agreed by the parties, the Tribunal may make separate Awards on different issues at different times".

have not been expressly defined in the legislation and are often used interchangeably.

[13.026] Examples of such awards include decisions on single issues of law or fact (such as determinations of the applicable proper law and adjudication of time-bar defences); decisions on liability only, with quantum to be decided separately; and decisions on all the issues in the arbitration, save for the question of costs.

[13.027] Under the IAA, emergency arbitrators are accorded the same legal status and powers as any other arbitral tribunal and orders made by emergency arbitrators are enforceable under the IAA.[15] It follows that an emergency award issued by emergency arbitrators is included in the definition of an "award" under s 2 of the IAA.[16]

[13.028] In this connection, para 8 of Sch 1 of the Arbitration Rules of the Singapore International Arbitration Centre, 6th Ed, 2016 ('SIAC Rules 2016") empower an emergency arbitrator to "order or award any interim relief that he deems necessary." This provision was introduced in 2010 in the Arbitration Rules of the Singapore International Arbitration Centre, 4th Ed. It has been invoked several times since its introduction, and emergency awards have been included in the definition of an "award" under the SIAC Rules 2016.[17] This of course does not change the fact that such orders are different from other awards in that they are temporary, are made before the tribunal is constituted, do not dispose of the substance of the dispute, expire after 90 days from the date of their issuance and may be modified or vacated by the tribunal.[18]

(b) Final awards

[13.029] A final award refers to an award which the tribunal issues at the conclusion of the arbitral proceedings and which deals with all the remaining issues in dispute.

15 The definition of "arbitral tribunal" includes "an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties": see s 2 of the IAA.

16 Section 2 of the IAA states defines "award" as "a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award but excludes any orders or directions made under section 12".

17 Rule 1.3 of the SIAC Rules 2016 defines an award of an Emergency Arbitrator as an "Award".

18 Lye Kah Cheong, Yeo Chuan Tat and William Miller, "Legal Status of the Emergency Arbitrator under the SIAC 2010 Rules – Neither Fish nor Fowl?" (2011) 23 SAcLJ 93. See also para 10 of Sch 1 to the SIAC Rules 2016.

[13.030] If it is the tribunal's only award, it will deal comprehensively with all the substantive issues in dispute and costs. If partial awards had been rendered earlier in the course of the proceedings, the final award will address all remaining issues, including costs.

[13.031] After issuing the final award, the tribunal's mandate comes to an end and arbitral proceedings are terminated.

(c) Consent awards

[13.032] If, during arbitral proceedings, the parties settle their dispute, the tribunal shall terminate proceedings and, if required by the parties and not objected to by the tribunal, record the settlement in the form of an arbitral award on agreed terms, stating explicitly that it is being made by consent.[19] Such an award has the same status and effect as any other award on the merits of the case.[20]

[13.033] When faced with a request to record a settlement, the tribunal shall not consider the merits of the settlement, but shall consider whether the matters settled fall within the tribunal's terms of reference. If the tribunal is satisfied that they do not, it should seek confirmation from the parties that they consent to the requisite extension of the tribunal's jurisdiction.[21] Once such consent to enlarged jurisdiction is confirmed by all parties, the tribunal may issue a consent award in the terms of the settlement.

(d) Default awards

[13.034] Section 29(3) of the AA provides that if the tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim, the tribunal may make an award dismissing the claim if the delay:

(a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim; or

(b) has caused, or is likely to cause, serious prejudice to the respondent.

19 See SIAC Rules 2016, r 32.10, which provides that the tribunal may make a consent Award recording a settlement.

20 For the requirements on the form and contents of a consent award, see s 18 of the IAA read with Art 31 of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration ("Model Law"). The equivalent provisions in the AA are ss 37 and 38.

21 Timothy Hill and Mark Lin, *Arbitration in Hong Kong: A Practical Guide*, 2nd Ed (Sweet & Maxwell, 2011), p 480, para 15.019.

[13.035] If the tribunal makes an award dismissing the claim under s 29(3) of the AA, it should set out clearly the circumstances and reasons which have compelled it to exercise its statutory power.

[13.036] Save for the above scenario envisaged in s 29(3) of the AA (to which there is no equivalent in the IAA or Model Law), unless parties have otherwise agreed, it appears that the tribunal does not have the power to make a default award.

[13.037] If the claimant fails to communicate his statement of claim, the tribunal shall terminate the proceedings.[22]

[13.038] If the respondent fails to communicate his statement of defence, the tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations. Further, if any party fails to appear at a hearing or to produce documentary evidence, the tribunal may continue the proceedings and make the award on the evidence before it.[23] In other words, the tribunal will issue an award on the merits.

[13.039] It is worth noting that default awards are not the norm, and not usually sought, because where a party subsequently seeks to enforce the award, whether in the same or different jurisdiction, its chances of success may decrease and/or otherwise be affected if the award was not one that had been decided on the merits.[24] Arbitrators and counsel should bear this practical consequence in mind when considering any default award.

4. FINALITY OF AN AWARD

[13.040] An award that is made by the tribunal is 'final' in the sense that it is final and binding on the parties and any persons claiming through or under them, as regards the matters decided. Save for limited statutory exceptions, namely, the "slip rule" and cases of remission, an award may not be varied, amended, corrected, reviewed, added to or revoked. An award is made when it has been signed and delivered, as required.[25]

22 Article 25(a) of the Model Law; and s 29(2)(a) of the AA.

23 Article 25(b) and (c) of the Model Law; and s 29(1) and s 29(2)(b) to (c) of the AA.

24 Timothy Hill and Mark Lin, *Arbitration in Hong Kong: A Practical Guide*, 2nd Ed (Sweet & Maxwell, 2011), p 482, para 15.029.

25 See s 44 of the AA and s 19B of the IAA. In *Econ Piling Pte Ltd v Shanghai Tunnel Engineering Co Ltd* [2011] 1 SLR 246, Justice Prakash recognised the doctrine of finality in arbitrations and added that the doctrine of *res judicata* applied to arbitral proceedings.

[13.041] As regards finality of an award, there is no distinction between a final award and an interim, interlocutory or partial award.[26]

[13.042] There are nonetheless limited exceptions to the doctrine of finality and they are discussed below.

(a) Correction, interpretation or addition

[13.043] Both s 43(1)(a) of the AA and Art 33(1)(a) of the Model Law (for arbitrations under the IAA) allow the tribunal to correct "any error in computation, any clerical or typographical error, or other error of similar nature" at the request of a party, or at its own initiative.[27] Unless otherwise agreed by the parties, the request has to be made within 30 days of the receipt of the award. Thereafter, the tribunal shall make the correction, which shall form part of the award, within 30 days of the date of the request or within 30 days of the date of the award if the correction is made at its own initiative.[28]

[13.044] These provisions allow clerical rectifications to be made in cases of accidental slips or omissions. This is commonly referred to as the "slip rule". Pursuant to the slip rule, it is possible to remedy a failure to award interest,[29] transpose the parties' names,[30] and make changes to a costs order as a result of corrections made to the demurrage payable to the ship-owner.[31] In Singapore, the High Court has held in *Tay Eng Chuan v United Overseas Insurance Ltd*[32] that s 43(1) of the AA refers to "obvious errors in calculation or phraseology or reference" and does not extend to mistakes in findings whether they are "mistakes of fact or mistakes of law".

[13.045] These provisions however do not allow the tribunal to reopen the award generally nor to correct substantive decisions of fact or law. *ASG v ASH*[33] is illustrative. In *ASG v ASH*, the Singapore High Court held that s 43 and s 44 of the AA did not permit an arbitrator to withdraw the costs orders he had made in his principal award (as he had done in his correction award), or to issue a fresh costs order (as he had done in

26 See *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV & Ors* [2014] 1 SLR 372 at [140].
27 Section 43(1)(a), (2) and (3) of the AA and Art 33(1)(a) and (2) of the Model Law.
28 Section 43(1)(a), (2) and (3) of the AA and Art 33(1)(a) and (2) of the Model Law.
29 *Pancommerce SA v Veecheema BV* [1983] 2 Lloyd's Rep 304.
30 *Mutual Shipping Corporation v Bayshore Shipping Co ("The Montan")* [1985] 1 Lloyd's Rep 189.
31 *Gannet Shipping Ltd v Eastrade Commodities Inc* [2002] 1 Lloyd's Rep 713.
32 [2009] 4 SLR(R) 1043 at [16].
33 [2016] 5 SLR 54 at [110].

his costs award). The Court held that once the arbitrator had rendered a decision on all matters relating to the costs of the arbitration and legal fees and costs in the principal award, he became *functus officio* on the issue of costs and could not revisit the issue of costs because he no longer had the jurisdiction to do so.[34]

[13.046] Apart from corrections, the tribunal may also give an interpretation of a specific point or part of an award, if one party makes a request which is also agreed to by the other parties. This is provided for under s 43(1)(b) of the AA and Art 33(1)(b) of the Model Law. Under the AA, the tribunal has the power to give an interpretation at its own initiative as well. There is however, no equivalent provision in the Model Law.[35] The time frames which apply to corrections apply equally to interpretations.

[13.047] Finally, under s 43(4) of the AA and Art 33(3) of the Model Law, unless otherwise agreed by the parties, a party may, within 30 days of receipt of the award and upon notice to the other party, request the tribunal to make an additional award on claims presented during the proceedings but omitted from the award.[36] The tribunal shall make the additional award within 60 days of receiving the request. It has been suggested that a tribunal may hold additional hearings or take further evidence for this purpose.[37]

[13.048] If necessary, the tribunal may extend the time period within which to make the correction, interpretation or additional award, as the case may be.[38]

[13.049] The rules of natural justice apply to the issuance of an additional award. In *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd*,[39] the Singapore Court of Appeal held that parties have a right to be heard on the applicability of s 43(4) of the AA before a tribunal made its decision on whether it could make an additional award, notwithstanding the absence of the words "giving the parties a reasonable opportunity to

34 *Ibid* at [111].
35 See s 43(3) of the AA, compared with Art 33(2) of the Model Law.
36 In *BLB v BLC* [2014] 4 SLR 79, the Court found (at [107]) that Art 33(3) of the Model Law can only be invoked if the arbitrator omitted to make a determination on a claim which had been presented to it.
37 Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 3rd Ed (Sweet & Maxwell, 2010), p 373; and Chan Leng Sun SC, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011), p 75, para 4.30.
38 See s 43(6) of the AA and Art 33(4) of the Model Law. It will be noted that under Art 33(4), the power to extend time does not apply to corrections made at the tribunal's own initiative.
39 [2013] 1 SLR 125 at [68] and [74].

be heard" in s 43(4) of the AA. The same reasoning applies to Art 33(3) of the Model Law.

[13.050] It is not mandatory for parties to avail themselves of Art 33(3) of the Model Law. In *BLB v BLC*,[40] the Singapore Court of Appeal found *obiter* that Art 33(3) of the Model Law was a non-mandatory provision in the sense that parties can agree that Art 33(3) does not apply to their arbitration. However, while a party is not obliged to invoke Art 33(3), that party takes the risk that the Court would not, in a setting-aside application, exercise its discretion to set aside any part of the award or exercise the powers of remission under Art 34(4) of the Model Law.[41]

(b) Remission

[13.051] Under the AA, the court may remit the award when an appeal[42] has been lodged under s 49. Section 49(8) expressly provides that on an appeal, the court may by order "remit the award to the arbitral tribunal, in whole or in part, for reconsideration in the light of the court's determination". In addition, s 49(9) provides that the court "shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the arbitral tribunal for reconsideration". The tribunal shall make a fresh award in respect of the matters remitted within three months of the date of the order for remission or such longer or shorter period as the court may direct.[43]

[13.052] Further, s 48(3) of the AA provides that upon an application to set aside an award, the court may "where appropriate and so requested by a party, suspend the proceedings for setting aside an award, for such period of time as it may determine, to allow the arbitral tribunal

40 *BLB v BLC* [2014] 4 SLR 79 at [106].

41 *BLB v BLC* [2014] 4 SLR 79 at [116]. Section 70(2) of the English Arbitration Act states that an application to set aside an award under s 68 may not be brought if the applicant has not first exhausted the recourse under s 57 (similar to Art 33(3) of Model Law).

42 Section 49(1) provides that a party to arbitral proceedings may appeal to the court on a question of law arising out of an award.

43 Section 51(3) of the AA.

to resume the arbitral proceedings or take such other action as may eliminate the grounds for setting aside an award".[44]

[13.053] Section 48(3) of the AA is mirrored in Art 34(4) of the Model Law. It has been observed that although the word "remission" is not used in Art 34(4) of the Model Law, the *travaux preparatoires* of the UNCITRAL Working Group indicate that it was intended to preserve a national court's option to remit an award where it deems appropriate.[45]

[13.054] The Court's power to remit matters to the tribunal is found in Art 34(4) of the Model Law. The Singapore Court of Appeal in *AKN v ALC*[46] held that the power to remit under Art 34(4) is "a curative option that is available to the court in certain circumstances where it considers that it may be possible to avoid setting aside the award" and that the Court had no power under Art 34(4) of the Model Law to remit an award after it has been set aside. In other words, remission operates as an *alternative* to setting aside.[47]

[13.055] However, the Court of Appeal did not elaborate on when remission would be considered to be appropriate. The Court appears to have a broad discretion to decide when to remit an award. In similar vein, the English High Court in *The Secretary of State for the Home Department v Raytheon Systems Ltd*[48] found that the correct approach in deciding whether to remit or set aside under the s 68(3) of the English Arbitration Act[49] is "to consider all the circumstances and background facts relating

44 In *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80, Andrew Ang J ordered part of the dispute to be re-tried before a new arbitrator. In *AKN v ALC* [2016] 1 SLR 966, the Singapore Court of Appeal noted (at [35]) that *Front Row* was not so much an order to remit to a new arbitrator as it was a consequential order to the parties to commence fresh arbitration. The Court added that in *Front Row*, it was clear that the arbitrator had wholly failed to consider an issue because he thought it had been abandoned. Therefore, part of the dispute had not in fact been determined on the merits. Moreover, the matter was not being referred back to the same tribunal and hence it was not an issue of remitting the award at all.

45 See Chan Leng Sun SC, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011), p 77, paras 4.36 and 4.39; *Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session*, General Assembly Official Records: 40th Session, Supplement No. 17 (A/40/17) (1985), para 306; and Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, 3rd Ed (Sweet & Maxwell, 2010), p 385.

46 [2016] 1 SLR 966 at [22] and [34].

47 *Ibid* at [39].

48 [2015] EWHC 311 (TCC) at [4].

49 Unlike Art 34(4) of the Model Law, remission under the English Arbitration Act is the default option and the English Court cannot set aside unless it would *not be* appropriate to remit. Section 68(3) of the English Arbitration Act states that "[t]he court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration".

THE SINGAPORE ARB-MED-ARB CLAUSE
(As of 1 September 2015)

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration administered by the Singapore International Arbitration Centre ("SIAC") in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause.

The seat of the arbitration shall be [Singapore].*

The Tribunal shall consist of _____ ** arbitrator(s).

The language of the arbitration shall be _____ .

The parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the Dispute through mediation at the Singapore International Mediation Centre ("SIMC"), in accordance with the SIAC-SIMC Arb-Med-Arb Protocol for the time being in force. Any settlement reached in the course of the mediation shall be referred to the arbitral tribunal appointed by SIAC and may be made a consent award on agreed terms.

* *Parties should specify the seat of arbitration of their choice. If the parties wish to select an alternative seat to Singapore, please replace "[Singapore]" with the city and country of choice (e.g., "[City, Country]").*

** *State an odd number. Either state one, or state three.*

PAYMENT INFORMATION

1. Payments may be made by a local cheque payable to "***Singapore International Arbitration Centre***". All cheques should be sent directly to:

   Singapore International Arbitration Centre
   32 Maxwell Road
   #02-01
   Singapore 069115
   Attn: Accounts Department

2. Payments may also be made by bank transfer to our bank account (**please absorb bank charges**). Details are as follows:

Name of Beneficiary	: Singapore International Arbitration Centre
Name of Bank	: United Overseas Bank Limited
Bank Branch	: Coleman Branch
Bank address	: 1 Coleman Street, #01-14 & B1-19, The Adelphi, Singapore 179803
Bank a/c	: 302-313-540-8
Swift code	: UOVBSGSG

   For easy identification of the remittance, parties are requested to include in their remittance details "Case Reference Number - Claimant / Respondent". To help us with tracking the deposits, we request that you send us a copy of the remittance record as soon as the funds are transferred. Please note that SIAC's policy is to accept payments from the party or its authorised representative (e.g. the party's counsel).

   Parties are advised to check with SIAC for the latest bank account details before making any bank transfer. For payments in currencies other than Singapore Dollars, parties are also advised to check with SIAC.

'General Rules' mean the institutional, ad hoc or other rules that apply to the conduct of the arbitration;

'IBA Rules of Evidence' or *'Rules'* means these IBA Rules on the Taking of Evidence in International Arbitration, as they may be revised or amended from time to time;

'Party' means a party to the arbitration;

'Party-Appointed Expert' means a person or organisation appointed by a Party in order to report on specific issues determined by the Party;

'Request to Produce' means a written request by a Party that another Party produce Documents;

'Respondent' means the Party or Parties against whom the Claimant made its claim, and any Party who, through joinder or otherwise, becomes aligned with such Party or Parties, and includes a Respondent making a counterclaim;

'Tribunal-Appointed Expert' means a person or organisation appointed by the Arbitral Tribunal in order to report to it on specific issues determined by the Arbitral Tribunal; and

'Witness Statement' means a written statement of testimony by a witness of fact.

Article 1

Scope of Application

1. Whenever the Parties have agreed or the Arbitral Tribunal has determined to apply the IBA Rules of Evidence, the Rules shall govern the taking of evidence, except to the extent that any specific provision of them may be found to be in conflict with any mandatory provision of law determined to be applicable to the case by the Parties or by the Arbitral Tribunal.
2. Where the Parties have agreed to apply the IBA Rules of Evidence, they shall be deemed to have agreed, in the absence of a contrary indication, to the version as current on the date of such agreement.
3. In case of conflict between any provisions of the IBA Rules of Evidence and the General Rules, the Arbitral Tribunal shall apply the IBA Rules of Evidence in the manner that it determines best in order to accomplish the purposes of both the General Rules and the IBA Rules of Evidence, unless the Parties agree to the contrary.
4. In the event of any dispute regarding the meaning of the IBA Rules of Evidence, the Arbitral Tribunal shall interpret them according to their purpose and in the manner most appropriate for the particular arbitration.
5. Insofar as the IBA Rules of Evidence and the General Rules are silent on any matter concerning the taking of evidence and the Parties have not agreed otherwise, the Arbitral Tribunal shall conduct the taking of evidence as it deems appropriate, in accordance with the general principles of the IBA Rules of Evidence.

Article 2

Consultation on Evidentiary Issues

1. The Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence.
2. The consultation on evidentiary issues may address the scope, timing and manner of the taking of evidence, including:
   (*a*) the preparation and submission of Witness Statements and Expert Reports;
   (*b*) the taking of oral testimony at any Evidentiary Hearing;
   (*c*) the requirements, procedure and format applicable to the production of Documents;
   (*d*) the level of confidentiality protection to be afforded to evidence in the arbitration; and
   (*e*) the promotion of efficiency, economy and conservation of resources in connection with the taking of evidence.
3. The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues:
   (*a*) that the Arbitral Tribunal may regard as relevant to the case and material to its outcome; and/or
   (*b*) for which a preliminary determination may be appropriate.

Article 3

Documents

1. Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all Documents available to it on which it relies, including public Documents and those in the public domain, except for any Documents that have already been submitted by another Party.
2. Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal and to the other Parties a Request to Produce.
3. A Request to Produce shall contain:
   (*a*) (*i*) a description of each requested Document sufficient to identify it, or

(ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;

(*b*) a statement as to how the Documents requested are relevant to the case and material to its outcome; and

(*c*) *(i)* a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and

(ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.

4. Within the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the other Parties and, if the Arbitral Tribunal so orders, to it, all the Documents requested in its possession, custody or control as to which it makes no objection.

5. If the Party to whom the Request to Produce is addressed has an objection to some or all of the Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. The reasons for such objection shall be any of those set forth in Article 9.2 or a failure to satisfy any of the requirements of Article 3.3.

6. Upon receipt of any such objection, the Arbitral Tribunal may invite the relevant Parties to consult with each other with a view to resolving the objection.

7. Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in consultation with the Parties and in timely fashion, consider the Request to Produce and the objection. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that *(i)* the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; *(ii)* none of the reasons for objection set forth in Article 9.2 applies; and *(iii)* the requirements of Article 3.3 have been satisfied. Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it.

8. In exceptional circumstances, if the propriety of an objection can be determined only by review of the Document, the Arbitral Tribunal may determine that it should not review the Document. In that event, the Arbitral Tribunal may, after consultation with the Parties, appoint an independent and impartial expert, bound to confidentiality, to review any such Document and to report on the objection. To the extent that the objection is upheld by the Arbitral Tribunal, the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the Document reviewed.

9. If a Party wishes to obtain the production of Documents from a person or organisation who is not a Party to the arbitration and from whom the Party cannot obtain the Documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the requested Documents, or seek leave from the Arbitral Tribunal to take such steps itself. The Party shall submit such request to the Arbitral Tribunal and to the other Parties in writing, and the request shall contain the particulars set forth in Article 3.3, as applicable. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take, or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that *(i)* the Documents would be relevant to the case and material to its outcome, *(ii)* the requirements of Article 3.3, as applicable, have been satisfied and *(iii)* none of the reasons for objection set forth in Article 9.2 applies.

10. At any time before the arbitration is concluded, the Arbitral Tribunal may *(i)* request any Party to produce Documents, *(ii)* request any Party to use its best efforts to take or *(iii)* itself take, any step that it considers appropriate to obtain Documents from any person or organisation. A Party to whom such a request for Documents is addressed may object to the request for any of the reasons set forth in Article 9.2. In such cases, Article 3.4 to Article 3.8 shall apply correspondingly.

11. Within the time ordered by the Arbitral Tribunal, the Parties may submit to the Arbitral Tribunal and to the other Parties any additional Documents on which they intend to rely or which they believe have become relevant to the case and material to its outcome as a consequence of the issues raised in Documents, Witness Statements or Expert Reports submitted or produced, or in other submissions of the Parties.

12. With respect to the form of submission or production of Documents:
    (*a*) copies of Documents shall conform to the originals and, at the request of the Arbitral Tribunal, any original shall be presented for inspection;
    (*b*) Documents that a Party maintains in electronic form shall be submitted or produced in the form most convenient or economical to it that is reasonably usable by the recipients, unless the Parties agree otherwise or, in the absence of such agreement, the Arbitral Tribunal decides otherwise;
    (*c*) a Party is not obligated to produce multiple copies of Documents which are essentially identical unless the Arbitral Tribunal decides otherwise; and
    (*d*) translations of Documents shall be submitted together with the originals and marked as translations with the original language identified.
13. Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.
14. If the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal may, after consultation with the Parties, schedule the submission of Documents and Requests to Produce separately for each issue or phase.

Article 4

Witnesses of Fact

1. Within the time ordered by the Arbitral Tribunal, each Party shall identify the witnesses on whose testimony it intends to rely and the subject matter of that testimony.
2. Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative.
3. It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them.

4. The Arbitral Tribunal may order each Party to submit within a specified time to the Arbitral Tribunal and to the other Parties Witness Statements by each witness on whose testimony it intends to rely, except for those witnesses whose testimony is sought pursuant to Articles 4.9 or 4.10. If Evidentiary Hearings are organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal or the Parties by agreement may schedule the submission of Witness Statements separately for each issue or phase.
5. Each Witness Statement shall contain:
    (*a*) the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant to the dispute or to the contents of the statement;
    (*b*) a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute. Documents on which the witness relies that have not already been submitted shall be provided;
    (*c*) a statement as to the language in which the Witness Statement was originally prepared and the language in which the witness anticipates giving testimony at the Evidentiary Hearing;
    (*d*) an affirmation of the truth of the Witness Statement; and
    (*e*) the signature of the witness and its date and place.
6. If Witness Statements are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Witness Statements, including statements from persons not previously named as witnesses, so long as any such revisions or additions respond only to matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.
7. If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.

12. With respect to the form of submission or production of Documents:
    (*a*) copies of Documents shall conform to the originals and, at the request of the Arbitral Tribunal, any original shall be presented for inspection;
    (*b*) Documents that a Party maintains in electronic form shall be submitted or produced in the form most convenient or economical to it that is reasonably usable by the recipients, unless the Parties agree otherwise or, in the absence of such agreement, the Arbitral Tribunal decides otherwise;
    (*c*) a Party is not obligated to produce multiple copies of Documents which are essentially identical unless the Arbitral Tribunal decides otherwise; and
    (*d*) translations of Documents shall be submitted together with the originals and marked as translations with the original language identified.
13. Any Document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.
14. If the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal may, after consultation with the Parties, schedule the submission of Documents and Requests to Produce separately for each issue or phase.

Article 4

Witnesses of Fact

1. Within the time ordered by the Arbitral Tribunal, each Party shall identify the witnesses on whose testimony it intends to rely and the subject matter of that testimony.
2. Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative.
3. It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them.

4. The Arbitral Tribunal may order each Party to submit within a specified time to the Arbitral Tribunal and to the other Parties Witness Statements by each witness on whose testimony it intends to rely, except for those witnesses whose testimony is sought pursuant to Articles 4.9 or 4.10. If Evidentiary Hearings are organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability or damages), the Arbitral Tribunal or the Parties by agreement may schedule the submission of Witness Statements separately for each issue or phase.
5. Each Witness Statement shall contain:
    (*a*) the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant to the dispute or to the contents of the statement;
    (*b*) a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute. Documents on which the witness relies that have not already been submitted shall be provided;
    (*c*) a statement as to the language in which the Witness Statement was originally prepared and the language in which the witness anticipates giving testimony at the Evidentiary Hearing;
    (*d*) an affirmation of the truth of the Witness Statement; and
    (*e*) the signature of the witness and its date and place.
6. If Witness Statements are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Witness Statements, including statements from persons not previously named as witnesses, so long as any such revisions or additions respond only to matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.
7. If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.

8. If the appearance of a witness has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Witness Statement.

9. If a Party wishes to present evidence from a person who will not appear voluntarily at its request, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the testimony of that person, or seek leave from the Arbitral Tribunal to take such steps itself. In the case of a request to the Arbitral Tribunal, the Party shall identify the intended witness, shall describe the subjects on which the witness's testimony is sought and shall state why such subjects are relevant to the case and material to its outcome. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if, in its discretion, it determines that the testimony of that witness would be relevant to the case and material to its outcome.

10. At any time before the arbitration is concluded, the Arbitral Tribunal may order any Party to provide for, or to use its best efforts to provide for, the appearance for testimony at an Evidentiary Hearing of any person, including one whose testimony has not yet been offered. A Party to whom such a request is addressed may object for any of the reasons set forth in Article 9.2.

Article 5

Party-Appointed Experts

1. A Party may rely on a Party-Appointed Expert as a means of evidence on specific issues. Within the time ordered by the Arbitral Tribunal, (i) each Party shall identify any Party-Appointed Expert on whose testimony it intends to rely and the subject-matter of such testimony; and (ii) the Party-Appointed Expert shall submit an Expert Report.

2. The Expert Report shall contain:
   (*a*) the full name and address of the Party-Appointed Expert, a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal, and a description of his or her background, qualifications, training and experience;
   (*b*) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;
   (*c*) a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal;

   (*d*) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
   (*e*) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;
   (*f*) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Party-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;
   (*g*) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;
   (*h*) the signature of the Party-Appointed Expert and its date and place; and
   (*i*) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.

3. If Expert Reports are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Expert Reports, including reports or statements from persons not previously identified as Party-Appointed Experts, so long as any such revisions or additions respond only to matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.

4. The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who will submit or who have submitted Expert Reports on the same or related issues meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on the issues within the scope of their Expert Reports, and they shall record in writing any such issues on which they reach agreement, any remaining areas of disagreement and the reasons therefore.

5. If a Party-Appointed Expert whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Expert Report by that Party-Appointed Expert related to that Evidentiary Hearing unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.

6. If the appearance of a Party-Appointed Expert has not been requested pursuant to Article 8.1, none of the other Parties shall

be deemed to have agreed to the correctness of the content of the Expert Report.

Article 6

Tribunal-Appointed Experts

1. The Arbitral Tribunal, after consulting with the Parties, may appoint one or more independent Tribunal-Appointed Experts to report to it on specific issues designated by the Arbitral Tribunal. The Arbitral Tribunal shall establish the terms of reference for any Tribunal-Appointed Expert Report after consulting with the Parties. A copy of the final terms of reference shall be sent by the Arbitral Tribunal to the Parties.

2. The Tribunal-Appointed Expert shall, before accepting appointment, submit to the Arbitral Tribunal and to the Parties a description of his or her qualifications and a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal. Within the time ordered by the Arbitral Tribunal, the Parties shall inform the Arbitral Tribunal whether they have any objections as to the Tribunal-Appointed Expert's qualifications and independence. The Arbitral Tribunal shall decide promptly whether to accept any such objection. After the appointment of a Tribunal-Appointed Expert, a Party may object to the expert's qualifications or independence only if the objection is for reasons of which the Party becomes aware after the appointment has been made. The Arbitral Tribunal shall decide promptly what, if any, action to take.

3. Subject to the provisions of Article 9.2, the Tribunal-Appointed Expert may request a Party to provide any information or to provide access to any Documents, goods, samples, property, machinery, systems, processes or site for inspection, to the extent relevant to the case and material to its outcome. The authority of a Tribunal-Appointed Expert to request such information or access shall be the same as the authority of the Arbitral Tribunal. The Parties and their representatives shall have the right to receive any such information and to attend any such inspection. Any disagreement between a Tribunal-Appointed Expert and a Party as to the relevance, materiality or appropriateness of such a request shall be decided by the Arbitral Tribunal, in the manner provided in Articles 3.5 through 3.8. The Tribunal-Appointed Expert shall record in the Expert Report any non-compliance by a Party with an appropriate request or decision by the Arbitral Tribunal and shall describe its effects on the determination of the specific issue.

4. The Tribunal-Appointed Expert shall report in writing to the Arbitral Tribunal in an Expert Report. The Expert Report shall contain:
   (*a*) the full name and address of the Tribunal-Appointed Expert, and a description of his or her background, qualifications, training and experience;
   (*b*) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
   (*c*) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Tribunal-Appointed Expert relies that have not already been submitted shall be provided;
   (*d*) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Tribunal-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;
   (*e*) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;
   (*f*) the signature of the Tribunal-Appointed Expert and its date and place; and
   (*g*) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.

5. The Arbitral Tribunal shall send a copy of such Expert Report to the Parties. The Parties may examine any information, Documents, goods, samples, property, machinery, systems, processes or site for inspection that the Tribunal-Appointed Expert has examined and any correspondence between the Arbitral Tribunal and the Tribunal-Appointed Expert. Within the time ordered by the Arbitral Tribunal, any Party shall have the opportunity to respond to the Expert Report in a submission by the Party or through a Witness Statement or an Expert Report by a Party-Appointed Expert. The Arbitral Tribunal shall send the submission, Witness Statement or Expert Report to the Tribunal-Appointed Expert and to the other Parties.

6. At the request of a Party or of the Arbitral Tribunal, the Tribunal-Appointed Expert shall be present at an Evidentiary Hearing. The Arbitral Tribunal may question the Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert on issues raised in his or her Expert Report, the Parties' submissions or Witness Statement or the Expert Reports made by the Party-Appointed Experts pursuant to Article 6.5.

7. Any Expert Report made by a Tribunal-Appointed Expert and its conclusions shall be assessed by the Arbitral Tribunal with due regard to all circumstances of the case.
8. The fees and expenses of a Tribunal-Appointed Expert, to be funded in a manner determined by the Arbitral Tribunal, shall form part of the costs of the arbitration.

Article 7

Inspection

Subject to the provisions of Article 9.2, the Arbitral Tribunal may, at the request of a Party or on its own motion, inspect or require the inspection by a TribunalAppointed Expert or a Party-Appointed Expert of any site, property, machinery or any other goods, samples, systems, processes or Documents, as it deems appropriate. The Arbitral Tribunal shall, in consultation with the Parties, determine the timing and arrangement for the inspection. The Parties and their representatives shall have the right to attend any such inspection.

Article 8

Evidentiary Hearing

1. Within the time ordered by the Arbitral Tribunal, each Party shall inform the Arbitral Tribunal and the other Parties of the witnesses whose appearance it requests. Each witness (which term includes, for the purposes of this Article, witnesses of fact and any experts) shall, subject to Article 8.2, appear for testimony at the Evidentiary Hearing if such person's appearance has been requested by any Party or by the Arbitral Tribunal. Each witness shall appear in person unless the Arbitral Tribunal allows the use of videoconference or similar technology with respect to a particular witness.
2. The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 9.2. Questions to a witness during direct and re-direct testimony may not be unreasonably leading.
3. With respect to oral testimony at an Evidentiary Hearing:
   (*a*) the Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent presenting the testimony of its witnesses;

   (*b*) following direct testimony, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning;
   (*c*) thereafter, the Claimant shall ordinarily first present the testimony of its Party-Appointed Experts, followed by the Respondent presenting the testimony of its Party-Appointed Experts. The Party who initially presented the Party-Appointed Expert shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning;
   (*d*) the Arbitral Tribunal may question a Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert, on issues raised in the Tribunal-Appointed Expert Report, in the Parties' submissions or in the Expert Reports made by the Party-Appointed Experts;
   (*e*) if the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability and damages), the Parties may agree or the Arbitral Tribunal may order the scheduling of testimony separately for each issue or phase;
   (*f*) the Arbitral Tribunal, upon request of a Party or on its own motion, may vary this order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses be questioned at the same time and in confrontation with each other (witness conferencing);
   (*g*) the Arbitral Tribunal may ask questions to a witness at any time.
4. A witness of fact providing testimony shall first affirm, in a manner determined appropriate by the Arbitral Tribunal, that he or she commits to tell the truth or, in the case of an expert witness, his or her genuine belief in the opinions to be expressed at the Evidentiary Hearing. If the witness has submitted a Witness Statement or an Expert Report, the witness shall confirm it. The Parties may agree or the Arbitral Tribunal may order that the Witness Statement or Expert Report shall serve as that witness's direct testimony.
5. Subject to the provisions of Article 9.2, the Arbitral Tribunal may request any person to give oral or written evidence on any issue that the Arbitral Tribunal considers to be relevant to the case and material to its outcome. Any witness called and questioned by the Arbitral Tribunal may also be questioned by the Parties.