Published on 4 September 2023

Case Comment

BETWEEN DEFERENCE AND DISTANCE

An Enforcement Court's Approach to Rulings and Proceedings in the Seat Court

CZD v CZE [2023] SGHC 86

[2023] SAL Prac 13

Melvin **SEE** Hsien Huei[1]
PBM; LLB (National University of Singapore); FCIArb;
Advocate and Solicitor (Singapore);
Solicitor (Non-practising) (England and Wales);
Senior Partner, Dentons Rodyk & Davidson LLP.

Alexander Kamsany **LEE**[1]
LLB (Singapore Management University);
Advocate and Solicitor (Singapore);
Senior Associate, Dentons Rodyk & Davidson LLP.

I. Introduction

1 The proper and effective enforcement of an arbitral award across jurisdictions is not only a key reason favouring the use of arbitration generally; in the Singaporean context, the applicable regime to arbitral awards has been observed to form a major part of Singapore's "world-class infrastructure … to support dispute resolution".[2] That said, the cross-border enforcement of awards has the potential to raise thorny issues over the interaction between multiple applicable laws and *fora* (not least, between the tribunal, court of the seat of the arbitration and court of enforcement).

1 The authors were counsel for the claimant in *CZD v CZE* [2023] SGHC 86. The views expressed herein are the authors' own and are not representative of the views of their firm.

2 See Singapore Parl Debates; Vol 95, Sitting No 18 [16 February 2021].

2 In *CZD v CZE*[3] ("*CZD*"), the High Court ("the Court") grappled with numerous issues relating to foreign law, the impact of proceedings in the seat and the effect of findings of the seat court.

3 In this article, the authors seek to analyse the Court's views on the extent to which concurrent or concluded proceedings in a foreign seat court can and should affect enforcement proceedings in Singapore. By and large, while the Court has acknowledged that proceedings in the seat court are relevant and must be disclosed, the Court also took a conservative approach on the applicability of transnational issue estoppel arising from challenges before the seat court and in Singapore enforcement proceedings. The authors consider how these observations in *CZD* enrich the existing jurisprudence and offer some suggestions for how these issues may be developed further in an appropriate case.

II. Background facts

A. The arrangement between parties

4 Various agreements were entered into with some combination of the claimant, the defendant, a People's Republic of China ("PRC") company (referred to in the judgment as "TargetCo") and various other parties. The existence of these various agreements was of some import to the defendant's case in the Singapore proceedings. To summarise:

(a) The claimant, defendant and TargetCo had entered into a loan agreement ("Loan Agreement") pursuant to which the claimant would lend the defendant certain sums for a particular purpose.[4]

(b) The claimant, defendant and TargetCo also subsequently entered into another agreement ("Cooperation Agreement") under which the claimant would provide a convertible loan to the defendant for the

3 [2023] SGHC 86.
4 *CZD v CZE* [2023] SGHC 86 at [3].

identical purpose as in the Loan Agreement and assist in introducing investors to become shareholders of TargetCo.[5]

(c) The defendant, TargetCo, and yet another company (referred to in the judgment simply as "[X]") entered into an investment agreement ("Investment Agreement") in which [X] was to provide convertible loans to TargetCo.[6] The claimant was not party to the Investment Agreement.

(d) As a supplement to the Cooperation Agreement and the Investment Agreement, the claimant, defendant, TargetCo, [X] and four other parties signed a memorandum ("Memorandum") which purported to "clarify the investment rights and capital relationship between [the claimant] and [the defendant]".[7]

B. The arbitration and proceedings thereafter

5 The claimant commenced arbitration in 2020, claiming that the defendant had failed to repay loans due under the Loan Agreement.[8] Pursuant to the Loan Agreement, the arbitration was administered by the Beijing Arbitration Commission,[9] and was seated in Beijing, the PRC.[10] An award was issued in favour of the claimant in 2021 ("the Award").

6 The defendant sought to challenge the Award in numerous ways in the PRC:[11]

(a) First, the defendant applied unsuccessfully to the Fourth Intermediate People's Court of Beijing Municipality to set aside the award.

5 *CZD v CZE* [2023] SGHC 86 at [4].
6 *CZD v CZE* [2023] SGHC 86 at [5].
7 *CZD v CZE* [2023] SGHC 86 at [6].
8 *CZD v CZE* [2023] SGHC 86 at [7].
9 *CZD v CZE* [2023] SGHC 86 at [7].
10 *CZD v CZE* [2023] SGHC 86 at [1].
11 *CZD v CZE* [2023] SGHC 86 at [9].

(b) Second, the defendant applied unsuccessfully to the Second Intermediate People's Court of Beijing Municipality for an order that the Award not be enforced.

(c) Third, the defendant applied to the Fourth Branch of the Beijing Municipal People's Procuratorate for a procuratorial order for civil supervision of the decision refusing the defendant's setting aside application ("PRC Procuratorial Application"). This application eventually failed (though, crucially, it was dismissed at a time after the claimant's Singapore application for enforcement of the Award).

(d) The defendant also claimed that he intended to apply to the People's Procuratorate of Beijing Municipality to review the PRC Procuratorial Application ("the defendant's Intended Application"). However, at the time *CZD* was heard, no such application had been made.[12]

7 The claimant applied without notice for permission to enforce the Award in Singapore and obtained an order to that effect. The defendant subsequently applied to set aside the order ("Refusal of Enforcement Application") on numerous grounds:[13]

(a) that the Award had been "fully and/or effectively satisfied" through enforcement proceedings in the PRC ("Satisfaction Argument");

(b) that the Award dealt with a difference not contemplated by, or not falling within the terms of, the submission to arbitration or contained a decision on the matter beyond the scope of the submission to arbitration ("Excess of Jurisdiction Argument");

(c) that the claimant had breached its duty of full and frank disclosure ("Disclosure Argument"); and

(d) that enforcement of the Award would be contrary to public policy on the ground of fraud ("Fraud Argument").

12 *CZD v CZE* [2023] SGHC 86 at [10].
13 *CZD v CZE* [2023] SGHC 86 at [12].

III. The Court's decision

8 The Honourable Judge of the High Court Chua Lee Ming ("Judge") ultimately dismissed the defendant's Refusal of Enforcement Application, thereby permitting enforcement of the Award.

9 In arriving at this decision, the Judge grappled with a number of novel issues, engaging questions of the extent to which the enforcement court should be cognisant of developments in the court of the seat and consequent issues of civil procedure under the Rules of Court 2021 ("ROC 2021") which had not hitherto been answered.

10 These issues are the focus of the next sections of this article.

A. Was this a "special case" for the defendant to belatedly adduce evidence of foreign law?

11 Curiously, in the Refusal of Enforcement Application, the defendant had "included an expert opinion from a PRC lawyer in his affidavit".[14] However, he did not obtain an opinion dealing with, among other things, whether the Award had been "fully and/or effectively satisfied" due to certain proceedings in the PRC[15] and whether the defendant's Intended Application "would lead to suspension or termination of enforcement of the Award or to the Award being set aside/revoked" and the merits of such an application.[16] The claimant, on the other hand, had filed, among other responsive affidavits, one "by a PRC lawyer whose legal opinion on PRC law included" evidence on the aforementioned issues.[17]

12 After having had sight of the claimant's responsive affidavits, the defendant applied for permission to file a further expert affidavit. This application was dismissed at first instance.

14 *CZD v CZE* [2023] SGHC 86 at [22].
15 See para 29 below.
16 *CZD v CZE* [2023] SGHC 86 at [16] and [22].
17 *CZD v CZE* [2023] SGHC 86 at [15].

The defendant then filed a Registrar's Appeal against this decision. This Registrar's Appeal was similarly dismissed by the Judge.

13 It is apposite to note that the proceedings in *CZD* were governed by the ROC 2021. Crucially, under the ROC 2021:

(a) under O 3 r 5(7), affidavits filed in applications "must contain all necessary evidence in support of or in opposition (as the case may be) to the application"; and

(b) under O 3 r 5(6), beyond the initial supporting affidavit for an application and a responsive affidavit contesting an application, "the Court will not allow further affidavits to be filed", except in a "special case".

14 In other words, the permission of the court must be sought for all additional affidavits; this permission will only be granted in a "special case". The concept of a "special case" features heavily in the ROC 2021.[18] This appears to be intentional, in order to give greater latitude for the exercise of judicial discretion in civil procedure. Thus, in the Public Consultation on Civil Justice Reforms,[19] it was noted (albeit in the context of document production provisions) that "'[s]pecial case' *is deliberately left undefined to allow for flexibility and good sense should a rare case emerge*".[20]

18 See, *eg*, O 2 r 9(10) (for when applications may be taken out during the period of 14 days before the commencement of trial); O 6 r 3(4) (for when the court will extend the validity of an originating process more than twice or for periods of longer than three months at a time); and O 6 r 5(4) (for when a general endorsement is permitted outside of situations where the limitation period for a cause of action will expire within 14 days of the issue of the originating claim).

19 Civil Justice Review Committee and Civil Justice Commission, *Public Consultation on Civil Justice Reforms: Recommendations of the Civil Justice Review Committee and Civil Justice Commission* (26 October 2018) <https://www.mlaw.gov.sg/files/news/press-releases/2018/10/Annex%20A%20Public%20consultation%20paper%20on%20civil%20justice%20reforms.pdf> (accessed 19 June 2023).

20 Civil Justice Review Committee and Civil Justice Commission, *Public Consultation on Civil Justice Reforms: Recommendations of the Civil Justice Review Committee and Civil Justice Commission* (26 October 2018) at para 83 <https://www.mlaw.gov.sg/files/news/press-releases/2018/10/Annex%20A%20Public%20consultation%20paper%20on%20civil%20justice%20reforms.pdf> (accessed 19 June 2023).

15 The Judge was of the view that *CZD* did not present a "special case". The premises relied on by the Judge were as follows:

(a) The Judge relied on the fact that the "intent [of the inclusion of O 3 r 5(6) of the ROC 2021] is clear", *ie*, that "there is to be only one round of affidavits from each party, except in a 'special case'".[21]

(b) The Judge also ascribed great weight to the fact that "special case" should be interpreted consistently with the Ideals set out in O 3 r 1 of the ROC 2021; in particular, the fact that the dispute concerned the enforcement of an arbitral award meant the Ideal of expeditious proceedings[22] was particularly important.[23]

(c) "The fact that new issues are raised in affidavits" could, in the Judge's view, amount to a "special case" if "these issues could not reasonably have been within the applicant's contemplation" at the time of the filing of initial affidavits.[24] However, here, the issues on which the defendant sought leave to respond to were, in the Judge's view, "clearly not new issues"; "[i]n fact, they dealt with two of the very grounds that the defendant relied on in his [Refusal of Enforcement Application]".[25]

(d) Further, the Judge found that the effect of O 3 rr 5(6) and 5(7) was that it would be "incumbent on the applicant to ensure that his affidavits filed in support of his application deal with all matters that are relevant to his application. An applicant cannot adopt a wait-and-see approach".[26] Here, the defendant "had to adduce the relevant expert opinion on PRC law to make good the grounds that he relied on".[27]

21 *CZD v CZE* [2023] SGHC 86 at [19].
22 As under O 3 r 1(2)(*b*) of the Rules of Court 2021.
23 *CZD v CZE* [2023] SGHC 86 at [19].
24 *CZD v CZE* [2023] SGHC 86 at [22].
25 *CZD v CZE* [2023] SGHC 86 at [22].
26 *CZD v CZE* [2023] SGHC 86 at [21].
27 *CZD v CZE* [2023] SGHC 86 at [22].

(e) Lastly, the Judge did not accept the defendant's contention that the claimant had "impermissibly jump[ed] the gun" by adducing expert evidence as it had not sought the Court's approval as required under O 12 r 2(1) of the ROC 2021.[28] In the Judge's view, it "did not lie in [the defendant's] mouth to raise this objection" since, as alluded to above, the defendant had himself adduced expert evidence in his affidavit. The Judge did, however, caution that practitioners should "take note of" O 12 r 2(1).[29] In particular, the Judge noted that "approval to file expert evidence is likely to be given" in applications relating to arbitral awards which involve questions of foreign law. Further, the Judge suggested that "if it not practicable to obtain approval before filing the expert evidence" (*eg*, in order to meet the filing deadline imposed by O 3 r 5 of the ROC 2021), then "approval may be obtained retrospectively".[30]

16 The Judge's observations provide much-welcomed clarity on the meaning of a "special case". Where permission to file further affidavits is concerned, it now appears clear that one way for an applicant to prove a special case is to demonstrate that further evidence is required to address an issue which could not have been contemplated at the time of the applicant's initial affidavit(s). The authors pause here to note that even in proceedings under the predecessor Rules of Court (2014 Rev Ed) (which contained no analogue to the "special case" rule for further affidavits), the Singapore courts have routinely used the absence of satisfactory reasons for why new evidence could not have been adduced at the outset as one of the factors for denying leave to adduce further evidence.[31]

28 *CZD v CZE* [2023] SGHC 86 at [23].
29 *CZD v CZE* [2023] SGHC 86 at [23].
30 *CZD v CZE* [2023] SGHC 86 at [23].
31 See, *eg*, *CPU v CPX* [2022] 4 SLR 314 at [80], where the court observed that the absence of a "satisfactory reason as to why such application could not have been filed earlier" was one of the reasons for dismissing an application to adduce a further affidavit which, in the court's view, "should have been filed at the outset"; and *Ong Dan Tze Magdalene v Chee Yoh Chuang* [2021] SGHC 129 at [10] and [11], where the court noted: "No coherent explanation was provided by the Applicant as to why the further evidence she wanted to

(cont'd on the next page)

17 Further, the Judge's observations on approval for expert evidence also provide critical guidance.

(a) O 12 r 2(1) of the ROC 2021 states: "No expert evidence may be used in Court unless the Court approves." In more long-form proceedings, the parties are expected to "inform the Court during the case conference [held pursuant to O 9 r 1(1) of the ROC] if they intend to rely on expert evidence".[32]

(b) In proceedings concerning the refusal of enforcement of an arbitral award (which in most cases would take the form of a summons), the time for filing evidence may come before the holding of any case conference. Thus, the Judge's suggestion that parties may seek *retrospective* leave for expert evidence while first filing said evidence to comply with statutory deadlines goes a long way toward resolving the problem.

(c) The authors also note that after the publication of *CZD*, the Registrar of the Supreme Court also issued Registrar's Circular No 1 of 2023 (Guide for the Conduct of Arbitration Originating Applications) ("RC 1"). RC 1 largely codifies the Judge's observations at para 10(vi):

> Expert(s)
>
> Expert evidence may be required on certain matters relevant to the arbitration [Originating Application], such as various aspects of foreign law. Approval will ordinarily be granted under Order 12, Rule 2(1) of the ROC 2021 for the filing of such expert affidavit(s). The expert affidavit(s) may be filed at the same time as the affidavit in support or reply affidavit for the arbitration [Originating Application], with permission for the filing of the expert affidavit(s) to be sought at the 1st [Registrar Case Conference] and to have retrospective effect. [emphasis in original omitted]

adduce could not have been furnished earlier. … In the circumstances, I was of the view that the alleged 'further evidence' could and should have been adduced in the Applicant's earlier affidavits, and that no coherent reason has been provided by the Applicant for the omission to do so."

32 Rules of Court 2021 O 9 r 21(1).

B. Do the findings of the seat court attract issue estoppel in the enforcement court?

18 The defendant's Excess of Jurisdiction Argument and Fraud Argument can be summarised as follows:

(a) In the Excess of Jurisdiction Argument, the defendant contended that the tribunal had acted in excess of jurisdiction (as under s 31(2)(*d*) of the International Arbitration Act 1994[33] ("IAA 1994")) "because the Tribunal found the defendant liable for a total of RMB 140m not for a breach of the Loan Agreement, but under the Cooperation Agreement, Investment Agreement and Memorandum".[34] It bears mentioning that the claimant's claim was for the defendant's non-payment of the loans under the Loan Agreement and that the claimant had commenced arbitration pursuant to an arbitration agreement within the Loan Agreement.[35]

(b) For the Fraud Argument, the defendant alleged that enforcement of the Award would be contrary to Singapore's public policy as under s 31(4)(*b*) of the IAA 1994.[36] Specifically, the defendant argued that the claimant allegedly "maintained inconsistent evidential positions before the Tribunal and in subsequent PRC court proceedings"[37] because the claimant had rejected the authenticity of a certain letter issued by [X] ("Letter of Undertaking") (regarding whether [X] furnished the loan under the Investment Agreement from its own funds), but allegedly later admitted to the authenticity of [X]'s seal on the letter in proceedings before the PRC courts.[38] According to the defendant, this amounted to procedural fraud.

33 2020 Rev Ed.
34 *CZD v CZE* [2023] SGHC 86 at [27].
35 *CZD v CZE* [2023] SGHC 86 at [7] and [27].
36 *CZD v CZE* [2023] SGHC 86 at [37]–[39].
37 *CZD v CZE* [2023] SGHC 86 at [39].
38 *CZD v CZE* [2023] SGHC 86 at [40].

19 The Judge rejected both the Excess of Jurisdiction Argument and the Fraud Argument:

> (a) For the Excess of Jurisdiction argument, the Judge found that on an analysis of the Award, it was not impermissible for the tribunal to have dealt extensively with the Cooperation Agreement, Investment Agreement and Memorandum since the claimant's case in the arbitration was that payments made under those agreements were disbursements of the loan under the Loan Agreement.[39] Further, the Judge noted that the tribunal ultimately awarded liquidated damages based on a term of the Loan Agreement – this, in the Judge's view, fortified the fact that liability was ultimately found under the Loan Agreement.[40]
>
> (b) As for the Fraud Argument, the Judge found that the claimant had never accepted the contents of the Letter of Undertaking and, in any event, the letter was "just one piece of evidence which was before the Tribunal"; thus, in the Judge's view, the defendant had not discharged his burden of showing that the Award had been procured through fraud.[41]

20 Perhaps of note is the fact that the claimant had attempted to argue that the defendant should be estopped from raising both the Excess of Jurisdiction Argument and the Fraud Argument since materially identical arguments had been raised and rejected in the setting aside proceedings before the seat court in the PRC.[42] As the Judge had found that these grounds had not been made out, there was no need to venture further to definitively decide the issue of estoppel.[43] However, the Judge did offer certain comments in *obiter*.

39 *CZD v CZE* [2023] SGHC 86 at [29].
40 *CZD v CZE* [2023] SGHC 86 at [30].
41 *CZD v CZE* [2023] SGHC 86 at [41].
42 *CZD v CZE* [2023] SGHC 86 at [28(b)] and [42].
43 *CZD v CZE* [2023] SGHC 86 at [36] and [42].

21 First, the Judge noted (quoting *BAZ v BBA*[44] at [33]) that the application of transnational issue estoppel to the "re-litigation of identical issues in different fora in the context of arbitration" is "less than clear".[45] The Judge recognised, however, that while *BAZ v BBA* had observed that issue estoppel should generally not apply to jurisdictional challenges between a foreign enforcement court and a Singapore seat court, the situation in *CZD* was the reverse, *ie*, whether issue estoppel could arise from a decision of a *foreign seat court* in Singapore enforcement proceedings. Despite noting various authorities which suggested that issue estoppel might arise in this latter scenario, the Judge expressed no decided view.

22 Second, as regards the Fraud Argument, the Judge noted that as procedural fraud "fell within the public policy ground", it was relevant to consider the observation in *BAZ v BBA* that issue estoppel "would not arise with regard to the grounds of arbitrability and public policy … because the public policy and the test for arbitrability are unique to each state",[46] and therefore "there would be no identity of subject matter" even if the public policy ground had been ventilated before another court previously.[47] While *BAZ v BBA* concerned the public policy ground in the context of a setting aside application and not in a refusal of enforcement application, the Judge stated there was "no reason in principle why the position should be any different".[48]

23 It will certainly be of great interest to see how case law will develop on these points in future cases. The authors respectfully suggest that there are sound reasons for the application of issue estoppel even to challenges of jurisdiction and those based on fraud.

24 A central feature of the New York Convention, as the court noted in *BAZ v BBA* is the "supervisory powers of the seat

44 [2020] 5 SLR 266.
45 *CZD v CZE* [2023] SGHC 86 at [32].
46 *BAZ v BBA* [2020] 5 SLR 266 at [50].
47 *CZD v CZE* [2023] SGHC 86 at [42].
48 *CZD v CZE* [2023] SGHC 86 at [42].

court and the seat court's *primacy* in reviewing an award"[49] [emphasis added]. Thus, in an oft-cited English authority, *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan*[50], it was observed (in the context of whether a failure to challenge an award in setting aside proceedings affected the right of the party in enforcement proceedings):[51]

> The fact that it has not been challenged or that a challenge has failed in the supervisory court does not affect that principle [of right of a party to challenge enforcement], *although a decision of the supervisory court may finally determine such questions and thereby itself create an estoppel by record*. [emphasis added]

25 The authors pause to note that more recent English authority has also affirmed that issue estoppel can arise from the findings of a seat court in an enforcement court. In *Carpatsky Petroleum Corp v PJSC Ukrnafta*[52] ("*Carpatsky*"), the English High Court dealt with an application to resist enforcement of a Swedish arbitral award in England. The applicant there alleged that the Swedish-seated tribunal's rulings on calculations of certain damages had:[53]

> … amounted to (a) a denial to [the applicant] of the opportunity to present its case on the combined effect of the varied assumptions; (b) the tribunal's exceeding its mandate by, in effect, applying a model which was not that proposed by the parties' experts; and (c) the tribunal's adoption of an approach which was not in accordance with the agreed procedure.

The critical context in *Carpatsky* was that the applicant had previously brought (and failed in) a jurisdictional challenge before the seat court in Sweden, *ie*, the Svea Court of Appeal. The English High Court found that the basis of the applicant's application to refuse enforcement of the award was materially

49 *BAZ v BBA* [2020] 5 SLR 266 at [45].
50 [2011] 1 AC 763. This case has been cited both by the Court in *BAZ v BBA* and the court in *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372.
51 *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at [56].
52 [2020] EWHC 769 (Comm).
53 *Carpatsky Petroleum Corp v PJSC Ukrnafta* [2020] EWHC 769 (Comm) at [141].

"the same complaint … made to and rejected by the Svea Court of Appeal"[54]; thus, the English High Court observed "that created an issue estoppel which precludes [the applicant] from arguing the same point again now".[55] The English High Court went further to observe that:[56]

> The arbitration agreement was governed by Swedish law and [the court] would in any event, even without an issue estoppel, have seen no reason not to accept the conclusion of the Swedish courts that there was no breach of mandate, which [the court saw] as addressing this issue.

26 The discussion in *Carpatsky* adds an interesting dimension to the discussion. Should an enforcement court be more willing to accept the findings of a seat court on issues of the seat court's application of its own law? In *CZD*, the seat court was of course the PRC courts. Assuming that the issue of interpretation and scope of the arbitration agreement fell to be determined by PRC law, would this be another reason for the Singapore courts to defer to the findings of the PRC courts? This will certainly be a point of interest for future cases.

27 On the specific issue of the application of issue estoppel to a public policy challenge, it is respectfully suggested that not all public policy challenges ought to be seen in the same light. Challenges on enforcement of arbitral awards based on fraud are made under s 31(4)(*b*) of the IAA 1994, *ie*, that enforcement of the award "would be contrary to the public policy of Singapore".[57] Notwithstanding this, there is a developed corpus of law dealing with challenges based on fraud specifically – there must first be factual circumstances of fraud (in the context of procedural fraud, when a party "commits perjury, conceals material information

54 *Carpatsky Petroleum Corp v PJSC Ukrnafta* [2020] EWHC 769 (Comm) at [146].
55 *Carpatsky Petroleum Corp v PJSC Ukrnafta* [2020] EWHC 769 (Comm) at [146].
56 *Carpatsky Petroleum Corp v PJSC Ukrnafta* [2020] EWHC 769 (Comm) at [148].
57 By contrast, the setting aside regime has an express provision for fraud, *ie*, s 24(a) of the IAA 1994, where "the making of the award was induced or affected by fraud or corruption". The recent decision of the Court of Appeal in *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC* [2021] 1 SLR 1045 observed, on an analysis of its drafting history, that "the s 24 grounds would in fact be a *subset* of the public policy ground in Art 34(2)(*b*)(ii) [of the UNCITRAL Model Law]" [emphasis in original].

and/or suppresses evidence that would have substantial effect on making of the award"[58]) and, secondly, there must be "a causative link between any concealment aimed at deceiving the arbitral tribunal and the decision in favour of the concealing party"[59].

28 Thus, while it is clear why the Court is apprehensive about applying issue estoppel to public policy challenges (*ie*, because of the "*unique*" public policy of each state), the authors respectfully suggest that there can be a limited application of issue estoppel where the factual substratum of an allegation has already been decided by the seat court. In the case of fraud, for example, if a seat court arrives at a finding that there was no fraud *per se* (*ie*, that there was no falsity in one party's position), a counterparty should not liberally be permitted to re-litigate that finding in the enforcement court. There is:[60]

> … a public interest to be accorded to sustaining the finality of decisions of the supervisory courts on properly referred procedural issues arising from the arbitration … reflected in [legislation] that the [court] may adjourn questions of enforcement pending a decision of the curial courts on an application to set aside or suspend an award.

C. Is "full and/or effective satisfaction" of an arbitral award a reason to refuse enforcement of an arbitral award?

29 In 2021, the PRC courts issued a Notice of Enforcement Assistance to the China Securities Depository and Clearing Co Ltd Shenzhen Branch.[61] The purpose of this Notice was to freeze the defendant's bank accounts and certain shares he held in a public listed company for a duration of time.[62] In the Satisfaction

58 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC* [2021] 1 SLR 1045 at [41].
59 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC* [2021] 1 SLR 1045 at [41].
60 *Carpatsky Petroleum Corp v PJSC Ukrnafta* [2020] EWHC 769 (Comm) at [121]. See also s 31(5)(*a*) of the International Arbitration Act 1994 (2020 Rev Ed): "Where … the court is satisfied that an application for the setting aside or for the suspension of the award has been made … the court may … adjourn the proceedings or (as the case may be) so much of the [enforcement] proceedings as relates to the award."
61 *CZD v CZE* [2023] SGHC 86 at [8].
62 *CZD v CZE* [2023] SGHC 86 at [8].

Argument, the defendant contended that the freezing of his shares meant that the Award was thus "fully and/or effectively satisfied".[63]

30 The defendant ultimately withdrew reliance on this ground at the oral hearing of the Refusal of Enforcement Application.[64] The Judge nonetheless observed that:

(a) It appeared the Satisfaction Argument was "a non-starter" since the suggestion that the freezing of the defendant's assets pursuant to enforcement proceedings in the PRC equated to a satisfaction of the Award was, to the Judge, "unarguable".[65]

(b) Additionally, the Judge also observed that the satisfaction of an award is "not a recognised ground of challenge under s 31 of the IAA 1994, which provides an exhaustive list of grounds for refusal of enforcement".[66] For this, the Judge relied on, among other things, the observations of Judith Prakash J (as she then was) in *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd*.[67]

31 Although the issue was not fully ventilated before the Judge (owing to the defendant's withdrawal of reliance on the ground), it is respectfully suggested that the Judge's *obiter* remarks are of great significance. This, to the authors' knowledge, represents the first occasion where it has been expressly suggested in the Singapore courts that the satisfaction of an arbitral award is not a ground to refuse its enforcement. The issue appears to be one for which there is a real paucity of case law on, even across New York Convention jurisdictions. The authors are aware

63 *CZD v CZE* [2023] SGHC 86 at [43].
64 *CZD v CZE* [2023] SGHC 86 at [43].
65 *CZD v CZE* [2023] SGHC 86 at [44].
66 *CZD v CZE* [2023] SGHC 86 at [45].
67 [2006] 3 SLR(R) 174. At [46], the court observed that the "language" in s 31(1) of the then International Arbitration Act (Cap 143A, 2002 Rev Ed) which provided that "enforcement in any of the cases mentioned in subsections (2) and (4) may be refused but not otherwise" indicated "that the grounds stated in s 31(2) of the Act are meant to be exhaustive and that the court has no residual discretion to refuse enforcement if one of those grounds is not established".

of at least one decision of the Piraeus Court of Appeal,[68] where materially similar reasoning was used to deny an application to refuse enforcement of an arbitral award on the basis of the sums thereunder being fully paid.

32 While the outcome may appear unintuitive at first blush, it is respectfully suggested that it is sound in principle. A party may wish to have the foreign award recognised as binding on the other party for all purposes in Singapore and thus have to apply for its enforcement regardless of its satisfaction.[69]

33 It is also unclear how (or on what basis) the terms of an arbitral award can be altered at the enforcement stage to take into account, for example, part-satisfaction of an award. The obligation of the enforcement court is to enforce a compliant arbitral award "in terms of the award".[70] There is at least some suggestion in Singapore case law that the use of this phrase in s 19 of the IAA 1994 (in the context of enforcing Singapore-seated awards) attracts a "mechanical approach",[71] *ie*, to "mirror, precisely and mechanically, the dispositive terms of the award",[72] save for minor exceptions (though an appeal on this decision has left the question somewhat unresolved[73]).

---

68 Piraeus Court of Appeal judgment 30/2012 (Admiralty Division) (Greece).

69 See s 29(2) of the International Arbitration Act 1994 (2020 Rev Ed): "Any foreign award which is enforceable under subsection (1) must be recognised as binding for all purposes upon the persons between whom it was made and may accordingly be relied upon by any of those parties by way of defence, set-off or otherwise in any legal proceedings in Singapore."

70 See s 29(1) of the International Arbitration Act 1994 (2020 Rev Ed), read with s 19: "Subject to this Part, a foreign award may be enforced in a court either by action or in the same manner as an award of an arbitrator made in Singapore is enforceable under section 19" and "[a]n award on an arbitration agreement may, by *permission of the General Division* of the High Court, be enforced in the same manner as a judgment or an order to the same effect and, where permission is so given, *judgment may be entered in terms of the award*" [emphasis added].

71 *National Oilwell Varco Norway AS v Keppel FELS Ltd* [2021] SGHC 124 at [40]–[46].

72 *National Oilwell Varco Norway AS v Keppel FELS Ltd* [2021] SGHC 124 at [42].

73 *National Oilwell Varco Norway AS v Keppel FELS Ltd* [2021] SGHC 124 was reversed on appeal in *National Oilwell Varco Norway AS v Keppel FELS Ltd* [2022] 2 SLR 115 ("*National Oilwell (CA)*"). In *National Oilwell (CA)* at [79], the Court of Appeal observed that "[s]ome of the [High Court judge's] observations may have gone further than was necessary to dispose of the present case and to that extent, we reserve our views, including on the precise ambit of the

(cont'd on the next page)

34 If the concern is with double recovery, then it is respectfully suggested that this is dealt with best at the stage where enforcement is sought against the assets of an award debtor. For example, if an award creditor is successful in the enforcement of an arbitral award and obtains judgment in terms of the award, the mechanism through which the award creditor enforces this judgment is an enforcement order under O 22 r 2 of the ROC 2021. As part of this process, O 22 r 2(4)(*g*) requires the award creditor to state on affidavit:

> … if the Court order requires the enforcement respondent to pay money, the amount due to the enforcement applicant, the amount recovered from any security held by the enforcement applicant, the amount that has been paid by the enforcement respondent and the amount that remains owing; …

35 The application for an enforcement order is one which is made by summons without notice.[74] Thus, the award creditor will be obliged to state on affidavit any sums recovered from the award debtor; the failure to do so could result in a breach of the obligation of full and frank disclosure, which makes any enforcement order liable to be set aside.

D. The limits of disclosure of foreign proceedings

36 In the course of its application for permission to enforce the Award at the first stage of enforcement (*ie*, in its application without notice), the claimant did not disclose the existence of the PRC Procuratorial Application.[75] As stated above, the defendant's PRC Procuratorial Application eventually failed (by the time of the second contested stage).[76] The defendant contended that the failure to disclose the then-pending PRC Procuratorial Application was a breach of the duty of full and frank disclosure which should lead to the order granting permission for enforcement to be set aside.

---

exceptions to the mechanical approach to enforcement, to another occasion when it is necessary to consider these points".

74 Rules of Court 2021 O 22 r 2(3).

75 *CZD v CZE* [2023] SGHC 86 at [46].

76 *CZD v CZE* [2023] SGHC 86 at [9(c)].

37 The claimant argued that it was not obliged to disclose the PRC Procuratorial Application given that its existence was not a ground for refusal of enforcement and should not have to be disclosed at the first stage of enforcement (which is "formalistic and mechanistic").[77] The claimant also argued that the PRC Procuratorial Application was irrelevant to the Court's powers under s 31(5) of the IAA 1994 (which allowed the Court to adjourn enforcement proceedings if "an application for the setting aside or for the suspension of the award has been made to a competent authority of the country in which, or under which, the award was made").[78] The claimant contended this was because it was for the defendant to apply for an adjournment after the first stage of enforcement proceedings; in any event, the claimant argued the PRC Procuratorial Application was not "an application for the setting aside or for the suspension" of the Award.[79]

38 The Judge took a different view, finding that the claimant ought to have disclosed the existence of the PRC Procuratorial Application. The Judge found that the PRC Procuratorial Application, although not itself "an application to set aside or suspend the Award", could had it succeeded, possibly have required the PRC Court to "re-hear the defendant's application to set aside the Award".[80] Further, the Judge found that its existence amounted to a material fact which may have had an outcome on whether permission would be granted at the first stage of enforcement since the Court had the inherent power to direct that the application without notice be converted into a hearing with notice.[81]

39 Notwithstanding this, Judge did not think the failure to disclose the PRC Procuratorial Application was basis to refuse enforcement of the Award. The Judge observed that the Court retained a discretion not to set aside an order of court depending on the seriousness of the non-disclosure or where the breach

77 *CZD v CZE* [2023] SGHC 86 at [48(a)].
78 *CZD v CZE* [2023] SGHC 86 at [48(c)].
79 *CZD v CZE* [2023] SGHC 86 at [48(d)].
80 *CZD v CZE* [2023] SGHC 86 at [54].
81 *CZD v CZE* [2023] SGHC 86 at [52].

was "technical and inconsequential".[82] Given that the PRC Procuratorial Application had been dismissed by the second stage, the claimant's non-disclosure was inconsequential. Thus, the Judge did not set aside the order granting the claimant permission to enforce the Award.[83] This did, however, have an impact on costs; parties were ordered to each bear their own costs.

40 The Judge's observations on this ground provide some clarity on the extent of proceedings which must be disclosed at the first stage of enforcement. In particular, the Judge's endorsement of the position that the PRC Procuratorial Application ought to have been disclosed makes clear that it is not only proceedings which might *directly* result in a setting aside or suspension of an arbitral award which must be disclosed.

IV. Conclusion

41 *CZD* not only provides useful guidance on applications to enforce (and refuse enforcement) of arbitral awards generally and under the ROC 2021, it demonstrates the often-difficult position the enforcement court finds itself in when dealing with matters after various decisions and developments in the seat court.

42 The decision of the Judge to leave open questions of transnational issue estoppel creates a ripe opportunity for the development of law in future cases. The resolution of these questions will, in the authors' view, have a significant impact on the parties' post-award strategy as well as on costs implications when deciding the scale and manner of challenge in different fora.

82 *CZD v CZE* [2023] SGHC 86 at [57].
83 *CZD v CZE* [2023] SGHC 86 at [59].