Published on 16 October 2023

"ENFORCING" ARBITRAL AWARDS THROUGH WINDING-UP PROCEEDINGS: UNWINDING THE GORDIAN KNOT?

[2023] SAL Prac 18

Under the traditional approach, a debtor resisting winding-up proceedings must show that the debt is *bona fide* disputed on substantial grounds. However, an arbitral award is ostensibly "final and binding". If an award creditor serves a statutory demand while the award is being challenged in the curial court, how is an award debtor to establish the requisite *bona fide* dispute on substantial grounds since an award cannot be challenged on its merits? This article considers how these issues may be resolved and suggests a practical way forward for both the award creditor and the award debtor.

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1 The authors are grateful to Ms Cheyenne Low for her assistance. The views expressed in this article are the authors' personal views.

I. Introduction

1 An arbitral award[2] is final and binding upon its issuance and cannot be challenged on its merits in the curial courts. Generally, a debtor may only resist winding-up proceedings commenced against it if there is a *bona fide* dispute on substantial grounds in respect of the debt.[3] These are well-settled principles of arbitration law and insolvency law respectively.

2 However, the intersection of these principles where the award creditor commences, or has indicated the intention to commence, winding-up proceedings on the basis of an unpaid award debt throws up intriguing questions. What does "final and binding" mean in the arbitration context? What are the limits of the "final and binding"[4] nature of an arbitral award? May the award debtor seek injunctive relief from the curial court to restrain the award creditor from prosecuting winding-up proceedings, and if so, on what basis? What legal principles would, or should, apply to such an application? Where winding-up proceedings in respect of an unpaid award debt are sought to be enjoined or dismissed in circumstances where avenues of review and/or appeal have not been exhausted, the tension arising from the conjunction of arbitration law and insolvency law principles is brought to the fore.[5] It may be timely to revisit these principles

2 The subject matter of this article relates to international arbitration awards only. See n 79 below.

3 For the sake of completeness, the winding-up court retains a discretion not to wind up a company even if it is proved or deemed to be unable to pay its debts. Factors that the winding-up court would consider in the exercise of its discretion include the viability of the company, and the economic and social interests of the company's employees, suppliers, shareholders, non-petitioning creditors, customers and other companies in the group enterprise. Generally, the court's discretion would only be exercised in "exceptional circumstances": *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] 2 SLR 478 at [84]–[85], citing *BNP Paribas v Jurong Shipyard Pte Ltd* [2009] 2 SLR(R) 949 at [15]. See para 6 below.

4 International Arbitration Act 1994 (2020 Rev Ed) s 19B.

5 These issues have received little scholarly attention to date. But see, *eg*, Shaun Matos, "Arbitration Agreements and the Winding-Up Process: Reconciling Competing Values" (2023) 72(2) International & Comparative Law Quarterly 309 <https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/arbitration-agreements-and-the-windingup-process-reconciling-competing-values/25B7008761FCC67E2A4E119C77A8171B> (accessed 3 April 2023). The author suggests that the tension

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given the rapidly evolving commercial landscape in Singapore, which is not only an established pro-arbitration regime but also aims to be a regional (if not global) hub for restructuring and insolvency.

II. An inherent tension between arbitration and insolvency regimes

3 In *Larsen Oil and Gas Pte Ltd v Petroprod Ltd*[6] ("*Larsen Oil*"),[7] the court noted that arbitration and insolvency processes embody "contrasting legal policies":[8]

> Arbitration and insolvency processes embody, to an extent, contrasting legal policies. On the one hand, arbitration embodies the principles of party autonomy and the decentralisation of private dispute resolution. On the other hand, the insolvency process is a collective statutory proceeding that involves the public centralisation of disputes so as to achieve economic efficiency and optimal returns for creditors.

4 Such "contrasting legal policies" are not limited to issues of the arbitrability of certain types of disputes.[9] Almost

between arbitration law and insolvency law which manifests itself in the situation where a defendant in a winding-up process disputes the existence of a debt which is subject to an arbitration agreement is attributable to a "difference in view as to which of the parties' rights is most relevant to the dispute" (at p 3), and proffers a principled solution if the problem is viewed from the perspective of "competing values" (at pp 2 and 23).

6 [2011] 3 SLR 414.

7 In *Larsen Oil*, the court considered the non-arbitrability of certain types of disputes involving an insolvent company in liquidation. The respondent's liquidators commenced proceedings to, *inter alia*, have various transactions declared unfair preferences and/or transactions at an undervalue under the Bankruptcy Act (Cap 20, 2009 Rev Ed). The appellant applied for a stay of the court proceedings in favour of arbitration. The court held (at [47]) that different considerations applied in relation to disputes involving an insolvent company that stemmed from its pre-insolvency rights and obligations. The court was of the view that such disputes differ from those arising on the onset of insolvency because they did not necessarily involve public policy considerations such as the protection of creditors. The court stated at [51] that there would usually be no good reason not to observe the terms of the arbitration agreement where the agreement was only to resolve prior private *inter se* disputes between the company and another party.

8 *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414 at [1].

9 As regards the concept of arbitrability, the court in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 stated at [71]:

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a decade later in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)*[10] ("*AnAn*"), the Court of Appeal, expanding on the theme of contrasting legal policies, opined that the respective policies underpinning the arbitration and insolvency regimes are "not necessarily at odds" in an application to stay or dismiss a winding-up application on the ground that the dispute ought to be determined by arbitration. The court reasoned:[11]

> … when a dispute arises in relation to a debt that is subject to an arbitration agreement (as opposed to a claim which arises under the insolvency regime), the policy concerns of the insolvency regime are strictly not engaged. It is only when the debt is established to be due and owing to the creditor by way of arbitration, and that debt remains unsatisfied, that it can be said that the company is insolvent, such that the collective interest of the insolvent company's creditors becomes a relevant consideration. … There is thus strictly speaking no conflict of policy interests between the two regimes under such circumstances.

5 However, the situation where the award creditor seeks to "enforce" the award debt through the winding-up process, particularly where the available curial remedies of appeal or review have not been exhausted and the award creditor has not obtained leave to enforce the award is, arguably, distinct. In this situation, there is undeniably tension between arbitration law and insolvency law principles and this tension remains even after the debt has been established through arbitration.[12]

A. The jurisdiction of the winding-up court

6 Where a creditor serves a statutory demand on the debtor, and the debtor fails to make payment or otherwise secure or

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> The absence of arbitrability has come to be associated with that *class of disputes which are thought to be incapable of settlement by arbitration* … It covers matters which '*so pervasively involve "public" rights and concerns, or interests of third parties, which are the subjects of uniquely governmental authority* … [emphasis added]

10 [2020] 1 SLR 1158.

11 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [71].

12 In this respect, a presumption of insolvency arises from an unsatisfied statutory demand.

compound the debt, the debtor is deemed to be unable to pay its debts[13] and the creditor is *prima facie* entitled to a winding-up order *ex debito justitiae*.[14] Nevertheless, if there are exceptional circumstances or cogent countervailing considerations, the winding-up court may exercise its discretion not to make a winding-up order.[15]

B. A bona fide *substantial dispute in respect of the debt*

7 The winding-up court is not the proper forum to adjudicate disputed debts, and the debtor may bring proceedings to restrain the creditor from commencing winding-up proceedings where: (a) the debtor *bona fide* disputes the debt on substantial grounds; or (b) the debtor has a genuine cross-claim based on substantial grounds equal to or exceeding the creditor's debt.[16]

8 It is trite that a disputed debt is one where the debt is disputed on *substantial* grounds.[17] A debtor has to show the existence of triable issues.[18] This requires the court to undertake a *prima facie* assessment of the merits of the underlying dispute relating to the debt. The triable issues standard is an "exacting" one, requiring a "thorough examination of the evidence".[19]

13 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 125(1)(*e*), read with s 125(2)(*a*).
14 *Sun Electric Power Pte Ltd v RCMA Asia Pte* [2021] 2 SLR 478 at [84].
15 The court may, in the exercise of its discretion, consider factors such as the viability of the company and the interests of various stakeholders: *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] 2 SLR 478 at [85]. See n 3 above. Further, the court will not wind up the company if to do so would amount to an abuse of process, *eg*, where the debt is *bona fide* disputed on substantial grounds.
16 *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 at [62] and [82].
17 *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 at [62].
18 *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491 at [23].
19 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [76], approving *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR(R) 32 at [25].

9 In *LKM Investment Holdings Pte Ltd v Cathay Theatres Pte Ltd*,[20] Judith Prakash J held that a *bona fide* dispute of a debt must:[21]

> … be bona fide in both a subjective and an objective sense … the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. 'Substantial' means having substance and not frivolous, which disputes the court should ignore. There must be so much doubt and question about the liability to pay the debt that the court sees that there is a question to be decided.

10 Where a debt has already been disputed at first instance, the court would not, as a general rule, deprive the successful creditor of the fruits of his litigation. Nevertheless, the court may restrain a creditor from commencing winding-up proceedings on the basis of the debt if there are special circumstances to justify the stay of execution.[22] The court will examine the facts of each case to determine if special circumstances exist, and it may consider, *inter alia*, the fact that the creditor may not be able to return the moneys such that an appeal would be rendered nugatory, or the fact that the successful creditor has at its disposal alternative means of obtaining some satisfaction of the judgment.[23]

III. Setting aside an arbitral award: A substantial dispute on the merits?

11 The grounds on which an arbitral award may be set aside do not sit comfortably with the legal test applicable to a stay (or dismissal) of a winding-up application – which requires the court to undertake a *prima facie* examination of the merits,

20 [2000] 1 SLR(R) 135.

21 *LKM Investment Holdings Pte Ltd v Cathay Theatres Pte Ltd* [2000] 1 SLR(R) 135 at [20].

22 *Cathay Theatres Pte Ltd v LKM Investment Holdings Pte Ltd* [2000] 1 SLR(R) 15 at [11]–[13].

23 *Cathay Theatres Pte Ltd v LKM Investment Holdings Pte Ltd* [2000] 1 SLR(R) 15 at [13]. Here, the successful judgment creditor could exercise its lien over the property and sell it to obtain some satisfaction of the judgment through the sale proceeds. The judgment creditor opted instead to wind up the defendant, and the court considered the existence of the lien and the right to sell the property as one of the factors justifying a stay.

including the evidence. However, in an application to set aside an arbitral award, the curial court may not have regard to the merits of the underlying dispute between the parties, and is limited to considering the statutorily-prescribed grounds.[24]

A. Grounds on which an arbitral award may be set aside

12 Two of these grounds relate to the jurisdiction of the arbitral tribunal, *viz*, the arbitration agreement is "not valid under the law to which the parties have subjected it";[25] or the award deals with a dispute "not contemplated by or falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration".[26] Based on the authors' research, a significant number of the cases in Singapore typically involve two scenarios: (a) the arbitral tribunal lacks jurisdiction arising from there being no valid arbitration agreement – either on the basis that there was no agreement or by reason of various vitiating factors;[27] and/or (b) the arbitral tribunal acting in *excess* of the jurisdiction

24 The UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), with the exception of Ch VIII, has the force of law in Singapore: International Arbitration Act 1994 (2020 Rev Ed) s 3. Under the Model Law, the award may be set aside if: (a) a party to the arbitration agreement was under some incapacity (Art 34(2)(*a*)(i)); (b) the arbitration agreement was not valid (Art 34(2)(*a*)(i)); (c) the party making the application was not given proper notice of the appointment of an arbitrator or of the proceedings, or was otherwise unable to present its case (Art 34(2)(*a*)(ii)); (d) the award dealt with a dispute not contemplated by or not falling within the terms of the arbitration agreement (Art 34(2)(*a*)(iii)); (e) the tribunal was improperly constituted (Art 34(2)(*a*)(iv)); (f) the subject matter of the arbitration was not capable of settlement by arbitration (Art 34(2)(*b*)(i)); or (g) the award was contrary to public policy (Art 34(2)(*b*)(ii)). There are two additional grounds available under s 24 of the International Arbitration Act 1994 (2020 Rev Ed), namely, that the award was induced or affected by fraud or corruption (s 24(*a*)), or a breach of the rules of natural justice has occurred with the making of the award (s 24(*b*)).

25 Article 34(2)(*a*)(i) of the Model Law.

26 Article 34(2)(*a*)(iii) of the Model Law.

27 For example, *ST Group Co Ltd v Sanum Investments Ltd* [2020] 1 SLR 1, where an arbitral award was issued against multiple respondents, one of which was not a party to the arbitration agreement. The Court of Appeal affirmed the decision of the High Court to set aside an order granting leave to enforce in respect of the respondent who was not a party to the arbitration agreement. See also *AQZ v ARA* [2015] 2 SLR 972; *CPU v CPX* [2022] 4 SLR 314 and *Vitol Asia Pte Ltd v Machlogic Singapore Pte Ltd* [2021] 4 SLR 464.

that the parties had conferred on it, for example, by deciding an issue that was not referred to it (collectively, the "Jurisdictional Grounds").[28]

13 In *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK*[29] ("*CRW*"), the court helpfully classified these grounds into a triple typology of jurisdictional, procedural and substantive grounds:[30]

> First, an award may be challenged on jurisdictional grounds (*ie*, the non-existence of a valid and binding arbitration clause, or other grounds that go to the adjudicability of the claim determined by the arbitral tribunal). Second, an award may be challenged on procedural grounds (*eg*, failure to give proper notice of the appointment of an arbitrator), and, third, the award may be challenged on substantive grounds (*eg*, breach of the public policy of the place of arbitration).

14 The court considers a jurisdictional challenge *de novo*.[31] Typically, arguments are made on the grounds that there is no valid arbitration agreement, or that the tribunal exceeded the scope of its jurisdiction.[32] An arbitral award may also be set aside where there has been a breach of natural justice.[33] However, the threshold to be satisfied before a court will set aside an arbitral award on this basis is high.[34] Lastly, the court may set aside an arbitral award on substantive grounds, *eg*, where it is contrary to public policy.[35]

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28 See *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305; *Phoenixfin Pte Ltd v Convexity Ltd* [2022] 2 SLR 23; *CEF v CEH* [2022] 2 SLR 918; *Lao Holdings NV v Government of the Lao People's Democratic Republic* [2023] 1 SLR 55; and *CNQ v CNR* [2022] SGHC 267.

29 [2011] 4 SLR 305.

30 *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [27].

31 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [164].

32 A claim that the arbitral tribunal has acted in excess of its jurisdiction presupposes that there is a valid arbitration agreement.

33 International Arbitration Act 1994 (2020 Rev Ed) s 24(*b*).

34 *AKN v ALC* [2015] 3 SLR 488 at [46].

35 See Art 34(2)(*b*)(ii) of the Model Law, where upholding the award will "shock the conscience … or is clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public": *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [59].

B. A conceptual conundrum: Is a challenge to an arbitral award a dispute on the merits?

15 Where the dispute has been arbitrated and an award is issued, the award creditor would rely on the award as the basis of the statutory demand. However, none of the grounds on which an arbitral award may be set aside relate to the underlying merits of the dispute between the parties.[36] Thus, whether an award debtor can show that there is a substantial dispute on the merits by reason of a challenge to the arbitral award and enjoin the award creditor from winding-up the award debtor is not straightforward, particularly where Jurisdictional Grounds are invoked.[37] Notwithstanding this, in certain circumstances the merits of the underlying dispute could overlap with the merits of the application to set aside the arbitral award. Such circumstances may include, for example, a dispute as to the formation (and hence the very *existence*) of the arbitration agreement.

16 The following discussion focuses on the scenario where the existence, and hence validity, of the arbitration agreement is called in question, although both aspects of Jurisdictional Grounds which involve a challenge to the tribunal's jurisdiction (either on the basis that the tribunal lacks jurisdiction or has acted in excess of jurisdiction) have as their conceptual basis the absence of consent, which is the doctrinal foundation of arbitration. As far as the authors are aware, there are only two local reported decisions which have specifically considered the

36 The current legal framework provides for "minimal curial intervention by respecting finality in the arbitral process" and "acknowledges the primacy which ought to be given to the dispute resolution mechanism that the parties have expressly chosen": *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [25]. The judicial stance of minimal curial intervention reflects the policy values underpinning arbitration law of party autonomy and *pacta sunt servanda*.

37 See *COT v COU* [2023] SGHC 69 at [169], where the court stated that a challenge:

> … on grounds of jurisdiction under Art 34(2)(*a*)(iii) of the Model Law … *raises a fundamental issue*. It engages at a general level the scope of the parties' agreement to arbitrate and at a more specific level the scope of the individual submission to arbitration. Although the tribunal has the power to determine its own jurisdiction, it has no power (absent the parties' agreement) to cure a lack of jurisdiction. [emphasis added]

former scenario, *ie*, where it is asserted that there is no valid arbitration agreement.[38]

17 In the first case of *BCY v BCZ*[39] ("*BCY*"), the court considered the issue of whether an arbitration agreement was *formed*.[40] The key disputed issue of whether an arbitration agreement was formed arose in the context of the parties' negotiations on the terms of the substantive contract for the sale and purchase of shares which included an arbitration clause. The court found that the parties did not conclude an arbitration agreement as there was no objective manifestation of mutual intention by the parties to be bound when the sixth draft of the sale and purchase agreement ("SPA") was circulated.

18 In the second case of *COT v COU*[41] ("*COT*"), the court found that the parties, who were engaging in ongoing negotiations, had objectively reached *consensus ad idem* and concluded an agreement "on basic and essential terms" including an arbitration agreement.[42] *BCY* and *COT* are examples where no conceptual

38 For completeness, an agreement to arbitrate may not be invoked where the preconditions for arbitration, such as compliance with a specific set of dispute resolution procedures, have not been fulfilled: see *International Research Corp PLC v Lufthansa Asia Pacific Pte Ltd* [2014] 1 SLR 130. However, such a scenario does not, strictly speaking, touch on the *validity* of the arbitration agreement. See also, Darius Chan & Joel Soon, "Non-Satisfaction of Pre-Arbitration Requirements: Moving Away From Conditions Precedent Towards the Admissibility of a Claim – *NWA v NVF*" [2022] Sing JLS 450, where the authors consider the interesting issue of whether the Singapore courts should approach a party's failure to comply with preconditions for arbitration as a question of admissibility rather than jurisdiction.

39 [2017] 3 SLR 357.

40 See *BCY v BCZ* [2017] 3 SLR 357 at [9]–[39] for the background facts. In a challenge under s 10(3) of the IAA, the court found that the parties did not conclude an arbitration agreement. The court observed (at [80]) that where an arbitration agreement is intended to be part of an underlying contract, the validity and existence of the arbitration agreement and the underlying contract are typically resolved together. The court considered (at [81]) it significant that the purchaser's position was that an arbitration agreement was concluded prior to the SPA and it therefore bore the burden of proving this. On the facts, the court found (at [83]) that there was no objective manifestation of mutual intention by the parties to be bound by the arbitration agreement in the drafts of the SPA circulated.

41 [2023] SGHC 69.

42 The vendor of certain goods ("Modules") who had contracted with the purchaser to deliver Modules withheld further delivery of Modules when the purchaser failed to pay for earlier deliveries. The purchaser was the designated

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conundrum would arise as the merits of the underlying dispute and the merits of the setting aside application would overlap.

19 The authors consider that a challenge to an arbitral award on Jurisdictional Grounds is readily distinguishable from the other grounds[43] on which awards may be challenged, namely those falling within the *CRW* procedural and substantive categories.[44] As party consent is the doctrinal foundation of arbitration, challenging an arbitral award on Jurisdictional Grounds raises fundamental issues.[45]

20 In contrast, the other grounds on which arbitral awards are challenged arguably stand on a different footing – in those cases, the parties had in fact entered into an arbitration agreement, but disputed the validity of the arbitration agreement by reason of vitiating factors, or the manner in which the arbitration was conducted. For example, the grounds on which an arbitral award could be set aside on the basis of how the arbitration was conducted would include a breach of natural justice,[46] fraud and/or corruption.[47] Further, an award could also be set aside on substantive grounds, *eg*, if it is contrary to public policy.[48]

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purchasing entity for various goods, including the Modules, in the specified group of companies. The intended user of the Modules ("User"), its holding company ("HoldCo") and the engineering, procurement and construction entity (collectively, the "Purchasers"), all of whom were part of the same group of companies, then entered into negotiations with the vendor. The court found that while the parties had continued engaging in negotiations after objectively reaching *consensus ad idem*, their subjective belief that no contract had been formed and that they were continuing to negotiate a contract that had yet to be formed did not dissolve the contract which had objectively been formed on basic or essential terms.

43 As provided for under Art 34 of the Model Law and s 24 of the International Arbitration Act 1994 (2020 Rev Ed).

44 For example, Arts 34(2)(*a*)(ii), 34(2)(*a*)(iv), 34(2)(*b*)(ii) of the Model Law and s 24 of the International Arbitration Act 1994 (2020 Rev Ed).

45 See n 37 above.

46 See, *eg*, *Phoenixfin Pte Ltd v Convexity Ltd* [2022] 2 SLR 23.

47 See, *eg*, *Vitol Asia Pte Ltd v Machlogic Singapore Pte Ltd* [2021] 4 SLR 464.

48 See n 35 above. See also, *AJU v AJT* [2011] 4 SLR 739, where AJT sought to set aside the arbitral award on the basis that, *inter alia*, the award went against the public policy of Singapore by enforcing a contract that was illegal and unenforceable in Thailand.

C. No arbitration agreement in existence

21 *COT* aptly illustrates this dichotomy and the reasons a challenge to an arbitral award based on Jurisdictional Grounds raises fundamental, *a priori* questions. The facts of *COT* have parallels with those of *BCY*. As briefly stated above, the vendor, and the intended user of the goods, its holding company ("HoldCo") and the engineering, procurement and construction entity (collectively, the "Purchasers") were discussing the terms of an undertaking which contained an arbitration agreement.[49] The parties' discussions progressed quickly within a short period of time during which the Purchasers made various substantive changes to the draft undertaking containing the arbitration agreement. The HoldCo then signed the undertaking and sent it to the vendor who claimed that the document did not reflect the parties' agreement. The Purchasers contended that the parties negotiated on but did not conclude an arbitration agreement. The vendor contended that both the arbitration agreement and the undertaking were agreed. However, it was common ground that the arbitration agreement and main contract would stand or fall together.[50]

22 The arbitral tribunal found that the parties did conclude an arbitration agreement and proceeded to make a final award against the Purchasers. Each Purchaser applied to the curial court to set aside the arbitral award on Jurisdictional Grounds. The High Court dismissed the applications, finding that the parties had objectively concluded an agreement (including an arbitration agreement) even though none of the parties subjectively thought that an agreement had been concluded.[51]

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49 See *COT v COU* [2023] SGHC 69 at [61]–[107] for the background facts. The court's reasoning and analysis may be found at [117]–[136].

50 In the authors' view, this is a sensible position to take. Arbitration agreements are not discussed and negotiated in a vacuum. Where commercial parties do not conclude an arbitration agreement, this would almost invariably mean that they did not conclude the main contract. As stated in *BCY* at [61], the contention that negotiations resulted in the conclusion of an arbitration agreement independently of the main contract does not accord with commercial reality.

51 *COT v COU* [2023] SGHC 69 at [126]. All three parties have appealed to the Court of Appeal. As at the time of writing, all three appeals are pending.

D. "Enforcing" an arbitral award through the winding-up process

23 Given the fundamental nature[52] of a challenge made on Jurisdictional Grounds, it is understandable that a party in the position of the award debtor in such a situation would feel especially aggrieved by the award creditor's conduct. From its perspective, the parties did not conclude *any* agreement – how, then, could the award creditor be permitted to wind up the award debtor on the basis of the final award made by an arbitral tribunal that, in the award debtor's view, did not have any *jurisdiction* over it in the first place? On the other hand, from the perspective of the award creditor, it should be entitled to proceed to take action on the basis of the final award, which is final and binding[53] unless and until it is set aside.

24 On a conceptual level, the argument that a putative application to set aside the award constitutes a *bona fide* dispute on the *merits* is not without difficulty, bearing in mind that the curial court may not revisit the merits of the underlying dispute.[54] While the merits of the underlying dispute may overlap with the merits of the challenge to the arbitral award to some extent (and, where it is asserted that the tribunal lacked jurisdiction, to a considerable extent), the merits of the underlying dispute would still be distinct. The distinction remains even where the merits of the underlying dispute relate to the *formation* of the substantive contract containing the arbitration agreement, although it may be argued that the distinction between the merits of the underlying dispute and the merits of the challenge to the award in such a case is merely notional. As the authors have argued,[55] there would be no conceptual conundrum in cases where the merits of the underlying dispute and the merits of the setting aside application overlap, such as in *BCY* and *COT*.

52 See n 37 above.
53 See para 27 *ff* below.
54 Which, in the usual case, relates to the substantive rights and liabilities under, or that flow from, a contract.
55 See paras 15–18 above.

25 Further questions arise. For instance, where jurisdictional arguments that have been raised before and rejected by the tribunal and the curial court are again relied on before the winding-up court, can it therefore be said that such arguments are unmeritorious? Would the answer remain the same where there is a pending appeal against the decision of the curial court? In the authors' view, the focus of the inquiry before the winding-up court on the merits of the challenge to the arbitral award in no way suggests that the dismissal of the application to set aside the arbitral award by the curial court had no legal significance in so far as the grounds of challenge to the award were concerned. It simply recognises that where the award debtor has challenged the arbitral award before the curial court, unless and until that challenge is fully and finally determined by the appellate court, the winding-up court is not precluded from considering the merits of the challenge in exercising its discretion. *A fortiori*, where the award creditor has not taken any steps to register and enforce the arbitral award; where this is the case, and the award debtor has brought an application to set aside the award, the award creditor may not obtain leave to enforce the award.[56] In principle, there ought not be a difference in the approach as between an application to enjoin the award creditor from commencing winding-up proceedings and an application to restrain the substantive hearing of the winding-up application from proceeding. In both cases, the primary issue to be determined is whether the award debt is disputed. If the debt is disputed, then the award creditor's standing as a creditor and its right to invoke the jurisdiction of the winding-up court are called into question.[57] However, it is trite that the commencement of winding-up proceedings is not a mode of enforcement. Furthermore, it is not settled as a matter of law that a court would refuse leave to enforce where there is a pending application to set aside an arbitral award.[58] From a practical perspective, the sum total of these principles, which remain sound as a matter of law, may well result in an outcome that could be perceived

56 *Fastfreight Pte Ltd v Bulk Trident Shipping Ltd* [2022] SGHC 210 at [37]–[38].
57 *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 at [62].
58 This issue was not specifically considered in *Fastfreight Pte Ltd v Bulk Trident Shipping Ltd* [2022] SGHC 210.

by lay persons, including sophisticated business persons, to be curious (if not unsatisfactory). How is it that an award creditor is entitled to commence winding-up proceedings and potentially wind up the award debtor even as the latter pursues its right to challenge the arbitral award through the curial court?

26 Although it would not be entirely straightforward for the award debtor to successfully enjoin the award debtor from commencing winding-up proceedings in light of these considerations, the award debtor is certainly not precluded from doing so in law, for the reasons discussed in the following sections.

IV. Limits of a "final and binding" arbitral award

27 Under the International Arbitration Act 1994[59] ("IAA"), an arbitral award is "final and binding".[60] In this context, "final and binding" references the principle of finality – the award has *res judicata* effect, and creates a debt. It does not mean that the award may not be challenged.

28 However, in light of the existing authorities and the long-established principle that an arbitral award may not be reviewed on the merits (even in the face of errors of fact and/or law) and may only be challenged on limited, statutory grounds,[61] it would not be entirely straightforward for an award debtor to establish "triable issues" amounting to a *bona fide* substantial dispute.

29 Notwithstanding this, it would be equally difficult to accept the conclusion that an award debtor is unable to enjoin the award creditor from commencing winding-up proceedings because the award debtor could never demonstrate the existence of a substantial dispute on the merits. Such a conclusion would be counter-intuitive. Further, the "finality" of an arbitral award does not necessarily or inevitably lead to the conclusion that there is no substantial dispute when determining whether the award creditor ought to be restrained from commencing

59 2020 Rev Ed.
60 See s 19B of the International Arbitration Act 1994 (2020 Rev Ed).
61 *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [57].

winding-up proceedings. On the contrary, finality in the present context is expressly subject to the award debtor's statutory right to challenge the award as enshrined in the IAA.

A. Finality under the International Arbitration Act 1994

30 The concept of finality does not preclude the award debtor's right to challenge the award. Section 19B of the IAA states:

> **19B.**— (1) An award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties and on any persons claiming through or under them and may be relied upon by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction.
>
> …
>
> (4) *This section does not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this Act and the Model Law.*
>
> [emphasis added]

31 Plainly, an arbitral award, although final and binding, is not unimpeachable. It is expressly subject to the right to challenge the award, as expressly provided for in s 19B(4) of the IAA and as the court held in *PT First Media TBK v Astro Nusantara International BV*[62] ("*First Media*").

32 In *First Media*, the respondents successfully obtained an arbitral award for a joinder of additional claimants within their group of companies as parties to the arbitration, notwithstanding the appellant's objections and the fact that the additional claimants were not parties to the contracts in question. The tribunal subsequently issued four other awards on the merits, and the respondents obtained leave to enforce the awards in Singapore. The appellant applied to set aside the enforcement order, *inter alia*, on the basis that there was no arbitration agreement between the appellant and the additional claimants. At first instance, the High Court held that the time limit for

62 [2014] 1 SLR 372.

bringing a jurisdictional challenge had expired, such that the tribunal's ruling on jurisdiction could not be challenged.

33 On appeal, the court held that the award is final to the extent that the issues determined under the award are *res judicata*, but this does not affect the availability of curial remedies.[63] Hence, the court could consider the appellant's jurisdictional objections, and it found that there was no doubt that the additional claimants were technically strangers to the arbitration agreement.[64] As the 2007 Singapore International Arbitration Centre Rules did not confer on the tribunal the power to order a forced joinder (*ie*, joinder without procuring the consent of all parties to the arbitration), the court stated that a forced joinder is a "major derogation from the principle of party autonomy".[65] The tribunal had acted in excess of its jurisdiction by ordering the joinder and the appeal was allowed to the extent that leave to enforce the awards was refused in relation to the orders that purported to apply to the additional claimants.[66]

B. A final and binding arbitration award is not unimpeachable

34 As the court stated in *First Media*, the phrase "final and binding" does not mean that an arbitral award is unimpeachable.[67] In arriving at its decision, the court approved[68] a passage from *Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd*[69] where the English court stated that the expression "final and binding" in the context of arbitration and arbitration agreements has "long been used to state the well-recognised rule" that "an award is final and binding in the traditional sense and creates a *res judicata* between the parties" and that "the finality and binding nature of an award does not exclude the possibility of challenging an award, by any available arbitral process of appeal or review".[70]

63 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [142].
64 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [159].
65 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [188].
66 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [230].
67 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [142].
68 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [141].
69 [2009] 2 CLC 481.
70 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [141].

35 On this basis, the court agreed that s 19B(1) of the IAA relates to *res judicata*[71] and not the availability of remedies:[72]

> … it is clear that s 19B(1) had everything to do with *res judicata* of issues which results in the tribunal being *functus officio* in relation to awards already made, and nothing to do with the availability of curial remedies. … *The point of s 19B(4) is a negative one. As Gloster J pointed out, although issues determined under the award are res judicata, it was important to dispel the misconception that the award then becomes unimpeachable. On the contrary, it may still be challenged in accordance with the available processes of appeal or review of the award permitted by the law governing the arbitration. In short, s 19B(4) in fact clarifies what 'final and binding' does not amount to.* [emphasis added]

36 Accordingly, the "final and binding" nature of an award is subject to limits which includes a party's statutory right to challenge the award.[73] It therefore is not the case that the "final and binding" nature of an award precludes the award debtor from challenging it, since finality in this context relates only to the creation of a *res* and does not affect the availability of curial remedies.

C. Enforcement of arbitral awards

37 Relevantly, the court in *First Media* also held,[74] from the perspective of the "passive" remedy of resisting enforcement

71 The court referred to Parliament's intention that all awards should reflect the principle of finality: *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [140].

72 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [142].

73 As s 19B(4) of the International Arbitration Act 1994 (2020 Rev Ed) recognises.

74 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [84] and [99]. The court recognised (at [84]) that "de-emphasising the seat of arbitration by maintaining the award debtor's 'choice of remedies' and alignment with the grounds under the New York Convention are the pervading themes under the enforcement regime of the Model Law". That said, the court held that in the specific context of a party who elects not to challenge the tribunal's preliminary ruling on its jurisdiction, that party is not precluded from relying on its passive remedy to resist recognition and enforcement on the grounds set out in Art 36(1). However, the court opined 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": *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [132].

of an arbitral award,[75] that the same grounds for resisting enforcement under Art 36(1)[76] of the Model Law are "equally available" to a party resisting enforcement under s 19 of the IAA.[77] The court stated that the choice of remedies regime "was not just a facet of the Model Law enforcement regime; it is the *heart* of its entire design"[78] [emphasis in original] and this applies to both domestic[79] and foreign international arbitration awards.[80]

38 As such, a party who elects not to pursue the "active" remedy of setting aside under the choice of remedies regime but instead to exercise his "passive" remedy of resisting enforcement ought also, in principle, to be able to resist the winding-up process if he can demonstrate that the award debt is *bona fide* disputed on substantial grounds to the requisite standard.[81]

75 As opposed to the "active" remedy of initiating setting-aside proceedings under Art 34.

76 Recognition or enforcement of an award may be refused under Art 36(1)(*a*) on essentially the same grounds provided for in Art 34(2) (as to which, see n 24 above). Additionally, Art 36(1)(*b*) provides that recognition or enforcement may also be refused if: (a) the subject matter of the dispute is not capable of settlement by arbitration; or (b) the recognition or enforcement of the award would be contrary to the public policy. However, Art 36 (which is in Pt VIII of the Model Law) does not have the force of law in Singapore.

77 Section 19 of the International Arbitration Act 1994 (2020 Rev Ed) governs the enforcement of domestic international arbitration awards. See para 71 *ff* below for a discussion on enforcing arbitral awards in Singapore.

78 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [65].

79 A reference to a "domestic award" in this article is a reference to a domestic international award. A domestic international award is to be distinguished from a domestic arbitration award governed by the Arbitration Act 2001 (2020 Rev Ed).

80 In *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [71], the court stated that:

> … the *travaux* make it clear … that the Model Law provides for the system of 'choice of remedies', and that this system applies equally to both foreign and domestic awards which are treated uniformly under the Model Law. It follows that … parties that do not actively attack a domestic international award remain able to passively rely on defences to enforcement absent any issues of waiver.

81 The question of which standard should govern is discussed at paras 60–63 below.

V. Restraining the award creditor from commencing winding-up proceedings

39 Recent authority[82] has held that the award debtor may seek to enjoin the award creditor from commencing winding-up proceedings on the basis of an unpaid award debt which is not indisputably due – either because it is the subject of pending appeal or review proceedings before the curial court; or it is the subject of a cross-claim by the award debtor equal to or exceeding the award debt. Earlier authority,[83] however, suggested that the award debtor did not have a basis on which to seek a stay of winding-up proceedings.

A. The high-water mark

40 In *Pacific King Shipping Pte Ltd v Glory Wealth Shipping Pte Ltd*[84] ("*Pacific King*"), the High Court held that the award creditor may serve a statutory demand and subsequently, apply to wind up the award debtor, without first applying to enforce the award under the IAA.

41 The award creditor served a statutory demand which included sums awarded in a final award made by a foreign arbitral tribunal. At all material times, the award creditor did not seek leave to enforce the arbitral award. The award debtor failed to comply with the statutory demand and the award creditor commenced winding-up proceedings. The award debtor filed an application to stay or strike out the winding-up petitions on the ground that they were an abuse of process because there was a *bona fide* dispute on substantial grounds. The award creditor argued, *inter alia*, (a) the award was not enforceable and would not be enforceable under s 31(2)(c) of the IAA;[85] and (b) one of the award debtors had a cross-claim equal to or exceeding the sums awarded.

82 *Fastfreight Pte Ltd v Bulk Trident Shipping Ltd* [2022] SGHC 210.
83 See para 40 below.
84 [2010] 4 SLR 413.
85 As it was unable to present its case in the arbitration proceedings.

42 The court held that an award creditor is entitled to serve a statutory demand on the award debtor even though it has not obtained leave to enforce the award.[86] Notably, the award debtor took no steps to challenge the award in the seat of arbitration. As the award had not been challenged in the curial court,[87] the court held that it remained "effective on the face of it".[88]

43 The court further held that winding up is not a mode of enforcement[89] and there was no obstacle to the award creditor making a statutory demand founded on a binding arbitration award, whether or not that award had been registered under the IAA.[90]

44 The court accepted the award creditor's submission that it was free to elect either to enforce the award under the IAA or to use the debt arising from the award as the basis for its statutory demand for the purposes of a winding-up petition.[91] Citing s 27(2) of the IAA,[92] the court rejected the award debtor's

86 *Pacific King Shipping Pte Ltd v Glory Wealth Shipping Pte Ltd* [2010] 4 SLR 413 at [11].

87 Philip Pillai J considered (at [8]) that the "real question" before him was whether the defendant was precluded from issuing a statutory demand based on a debt that is "founded on an arbitration award because such an award can only and exclusively be enforced under the IAA". This question was answered in the negative, and the court held (at [11]) that there was "no authority" for the proposition that an award creditor is confined to enforcement action under the IAA and is "thereby precluded from issuing a statutory demand based on a foreign arbitration award followed … by a winding-up application". The court further held that, in any event, on the facts there was no basis to find that there was a *bona fide* dispute relating to the debt.

88 *Pacific King Shipping Pte Ltd v Glory Wealth Shipping Pte Ltd* [2010] 4 SLR 413 at [8].

89 Citing *In re International Tin Council* [1987] Ch 419. The court further stated at [17] that it was "not required to consider enforceability issues in these proceedings". With respect, while it is technically correct that winding-up proceedings are not a mode of enforcement, this distinction may be cold comfort to award debtors given the serious consequences that typically follow in practice when a winding-up application is made.

90 *Pacific King Shipping Pte Ltd v Glory Wealth Shipping Pte Ltd* [2010] 4 SLR 413 at [18].

91 *Pacific King Shipping Pte Ltd v Glory Wealth Shipping Pte Ltd* [2010] 4 SLR 413 at [10].

92 Under these provisions, "enforcement" in relation to a foreign award "includes the recognition of the award as binding for any purpose". See also s 29 of the International Arbitration Act 1994 (2020 Rev Ed).

argument that the award creditor must obtain leave to enforce the award before commencing winding-up proceedings.

45 In the authors' view, *Pacific King* likely represents the high-water mark in respect of an award creditor's right to take steps to "enforce" an unregistered foreign arbitral award.[93] After all, and notwithstanding the provisions of s 27(2) of the IAA, absent leave to enforce[94] the foreign arbitral award, the award creditor may not attempt to levy execution on the basis of an unregistered award. Following *Pacific King*, therefore, the question whether an application to set aside an arbitral award amounts to a *bona fide* substantial dispute sufficient to restrain the award creditor from commencing winding-up proceedings was, arguably, entirely open. At least, the question was not settled.

46 Until the issue is authoritatively settled, the authors consider that the award creditor only has a cause of action based on the award unless the award creditor successfully obtains leave to enforce the award, and the award is thereby recognised. This approach is consonant with how foreign judgments are approached under Singapore law, *viz*, they are not enforceable as of right in Singapore unless leave is first obtained under applicable statute[95] or the foreign judgment creditor commences proceedings against the judgment debtor on the foreign judgment and obtains judgment accordingly. Further, such an approach would be generally consistent with the doctrine of merger of a cause of action in a judgment.[96] Accordingly, until the award creditor obtains leave to enforce the award, the award creditor's

93 The approach to enforcing awards is discussed at para 71 *ff* below.

94 Section 29(1) of the International Arbitration Act 1994 (2020 Rev Ed) provides for a foreign award to be enforced "in the same manner" as a Singapore award under s 19 of the International Arbitration Act 1994 (2020 Rev Ed).

95 For example, the Choice of Court Agreements Act 2016 (2020 Rev Ed) or the Reciprocal Enforcement of Foreign Judgments Act 1959 (2020 Rev Ed).

96 The doctrine of merger of a cause of action in a judgment is beyond the scope of this article. In *The Bank of East Asia Ltd v Tan Chin Mong Holdings (S) Pte Ltd* [2000] 3 SLR(R) 769 at [45], the court briefly described the doctrine as follows:

> At common law, the general rule was that a judgment against joint guarantors resulted in a joint judgment. The judgment extinguished the original cause of action by the doctrine of merger. The act of court transformed the claims into a superior right empowering the creditor to take execution proceedings.

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rights in the arbitration award have not been merged into a judgment and an arbitral award accordingly does not have the same effect as a judgment.[97]

B. The Malaysian approach: Ahead of its time?

47 In *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd*[98] ("*Mobikom*"), the Malaysian Court of Appeal ("MCA") considered an argument that there was no *bona fide* dispute as to the debt owed by the award debtor due to the *existence* of the arbitral award.

48 Unlike in *Pacific King*, the award debtor in *Mobikom* had applied to set aside the award, and the award creditor issued the Malaysian equivalent of a statutory demand to the award debtor in respect of the award sum while the award debtor's application to set aside was pending. The award debtor applied for an injunction to restrain the award creditor from commencing winding-up proceedings.

49 The MCA held that an arbitral award does not immediately entitle the award creditor to levy execution, and that it is first necessary to convert the award into a judgment or order of court. Until leave to enforce the award is obtained, the award is not final and binding and can be challenged by the parties. Accordingly, the award creditor only has a cause of action at common law to enforce the arbitral award prior to registration of the award. Crucially, the MCA restrained the award creditor from commencing winding-up proceedings as it was of the view that an application brought by the award debtor to set aside the arbitral award constitutes a *bona fide* dispute of the alleged debt.[99]

See also, *Zavarco Plc v Tan Sri Syed Mohd Yusof Bin Tun Syed Nasir* [2021] EWCA Civ 1217 and the recent decision in *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] SGHC 159.

97 See s 29(2) of the International Arbitration Act 1994 (2020 Rev Ed), which states:

> 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.

98 [2007] 3 MLJ 316.

99 *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316 at [15].

50 Notably, unlike in *Pacific King*, as the award debtor had applied to set aside the award, this addressed the argument that the existence of the award meant that there was no *bona fide* dispute as to the debt. Respectfully, the MCA was correct to note that the award does not immediately entitle the award creditor to levy execution and it is first necessary to convert the award into a judgment or order of court, notwithstanding that the award is final and binding. To put it another way, prior to obtaining leave to enforce the award, all the award creditor has is a cause of action – albeit one that is founded on a *res judicata*.[100] The authors consider such an approach to be sound as a matter of principle. Until the award creditor obtains leave to enforce the award and enters judgment on the award, there is no merger of the award creditor's right in the arbitral award in the same way achieved by a judgment.

C. A paradigm shift?

51 In *Fastfreight Pte Ltd v Bulk Trident Shipping Ltd*[101] ("*Fastfreight v Bulk Trident*")[102], the court had occasion to consider a similar issue that arose in respect of a partial final award issued by a London-seated arbitral tribunal.

52 The award debtor, Fastfreight Pte Ltd ("Fastfreight"), entered into an English law governed time charterparty with the vessel owner and award creditor, Bulk Trident Shipping Ltd ("BTS"). A dispute arose and BTS commenced arbitration in London against Fastfreight for alleged breaches of the charterparty. Fastfreight counterclaimed for damages claimed by a subcharter against Fastfreight, the amount of demurrage that

100 Under Singapore's Rules of Court (both the Rules of Court (2014 Rev Ed) and Rules of Court 2021), the granting of leave to enforce an arbitral award is not absolute *per se* and is subject to the award debtor's right to apply to set aside the order granting leave. See para 72 below.

101 [2022] SGHC 210.

102 The authors are aware that Bulk Trident has appealed against the High Court's decision *vide* CA/CA 37/2022. On 24 January 2023, the English High Court dismissed the award debtor's appeal on question of law under s 69 of the English Arbitration Act 1966 (c 23) (UK): see *Fastfreight Pte Ltd v Bulk Trident Shipping Ltd* [2023] EWHC 105. The authors are further aware that the Singapore High Court entered judgment against the award debtor on 28 March 2023.

would have been due to Fastfreight under a subcharterparty and overpaid hire. In December 2021, the arbitral tribunal issued a partial final award (the "PFA") for the sum of US$2,147,717.79 (the "PFA Sum") against Fastfreight.

53 Fastfreight did not pay the PFA Sum. Instead, it amended its counterclaim to include a claim for the PFA Sum. The arbitral tribunal determined that Fastfreight was obligated to pay the PFA Sum to BTS, but permitted Fastfreight to proceed with a cross-claim to establish that the relevant vessel was off-hire and the PFA Sum must be repaid to Fastfreight.

54 Shortly after the arbitral tribunal issued the PFA, BTS's Singapore solicitors served a statutory demand on Fastfreight for the PFA Sum. At the material time, BTS did not commence proceedings to obtain leave of court to register and enforce the PFA in Singapore. Fastfreight commenced proceedings to restrain BTS from presenting a winding-up petition.

55 Fastfreight subsequently obtained leave to appeal the PFA to the English courts on a question of law.[103] In granting leave to appeal, the English court noted that the arbitral tribunal's decision on the question of law "[was] open to serious doubt".[104]

56 The court granted the injunction sought by Fastfreight. In the court's view, both of the alternative grounds for the grant of such an injunction were satisfied, *viz*, the debt was disputed by Fastfreight on *bona fide* or substantial grounds and/or Fastfreight had a genuine cross-claim based on substantial grounds which are equal to or exceeding the debt. The court accepted on a *prima facie* standard[105] that the PFA Sum was a disputed debt because

103 See *Fastfreight Pte Ltd v Bulk Trident Shipping Ltd* [2023] EWHC 105 at [15] where the question of law was:

> Where a charterparty clause provides that no deductions from hire (including for off-hire or alleged off-hire) may be made without the shipowner's consent: Is non-payment of hire a 'deduction' if the Vessel is off hire at the instalment date?

104 *Fastfreight Pte Ltd v Bulk Trident Shipping Ltd* [2022] SGHC 210 at [16].

105 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [56], where the court held that a *prima facie* standard of review is to be adopted where the court is faced with a disputed debt or cross-claim that is subject to an arbitration agreement. *AnAn* concerned a debtor

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of the pending appeal before the English courts and the fact that Fastfreight had not obtained leave to enforce the PFA. Further, the court held that there was a genuine cross-claim subject to the arbitration agreement which exceeds the PFA Sum.[106]

57 The court found that PFA Sum was presently payable to BTS under the contractual framework and arbitration process agreed by the parties.[107] However, the court stated that it does not necessarily follow from the PFA that there was no longer any dispute over the PFA Sum such that BTS was entitled to commence winding-up proceedings in a Singapore court.[108] In the court's view, the PFA Sum was not enforceable as a debt in Singapore as BTS had not taken any steps to seek leave to enforce the PFA Sum. Counsel for BTS "candidly admitted" that BTS may face difficulty obtaining leave to enforce the PFA in Singapore,[109] and the court considered it anomalous if Fastfreight could be wound up on the basis of the PFA Sum when that sum is not capable of being the subject of enforcement proceedings under Singapore law.[110]

VI. In search of a coherent approach

58 The court in *AnAn* considered that the arbitration of the dispute *vis-à-vis* the debt is a "necessary precondition to bringing the insolvency regime into the equation".[111] The court thus neatly resolved – at least on a conceptual level – the tension between the conflicting policy interests of the arbitration and

company resisting a winding-up application. In the authors' view, there may be doubt as to whether the *prima facie* standard of review ought also to apply in cases where the alleged debtor company seeks to restrain the alleged creditor from presenting a winding-up application: see *BWG v BWF* [2020] 1 SLR 1296 at [128].

106 *Fastfreight Pte Ltd v Bulk Trident Shipping Ltd* [2022] SGHC 210 at [46]. Fastfreight's counterclaim of US$9,809,562.18 (which included the PFA Sum) exceeded the amount of the debt (*ie*, the PFA Sum) and was subject to the arbitration agreement between the parties.

107 *Fastfreight Pte Ltd v Bulk Trident Shipping Ltd* [2022] SGHC 210 at [35].

108 See para 66 *ff* below.

109 *Fastfreight Pte Ltd v Bulk Trident Shipping Ltd* [2022] SGHC 210 at [37].

110 *Fastfreight Pte Ltd v Bulk Trident Shipping Ltd* [2022] SGHC 210 at [38].

111 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [71].

insolvency regimes. In the court's view, there was no conflict of policy interests in the referenced scenario, *ie*, in an application to stay or dismiss a winding-up application on the ground that the dispute involving pre-insolvency rights and obligations ought to be determined by arbitration, especially where, as was the case on the facts before the court, there is only a "single disputed claim against the debtor-company which is subject to arbitration".[112]

59 However it is reasonably plain that there is, in fact, conflict between the policy objectives underpinning the arbitration and insolvency regimes. In resolving the conflict as it did in *AnAn*, the court was expressing a normative preference for the values of the former, particularly party autonomy[113] and *pacta sunt servanda*.[114] The conflict stems at least in part from the expansive reach of both regimes coupled with an expansive conception of the respective corresponding rights: at the heart of the insolvency regime is the right to payment of an unpaid debt;[115] whereas from the perspective of the arbitration regime, parties should be held

112 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [71].

113 The Singapore courts view party autonomy as the "cornerstone underlying judicial non-intervention in arbitration" in Singapore: *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [28]. See also, *CJD v CJE* [2021] 4 SLR 734 at [1]–[2].

114 See Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2021) at para 1.02[B], where the author noted that the objectives of international arbitration include the maximisation of party autonomy and the enforceability of agreements and awards. The expressed preference for the values underpinning the arbitration regime manifests itself in judicial decisions: see, *eg*, the oft-cited English case of *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589 ("*Salford*"), where the English Court of Appeal held that the standard of review in respect of a disputed debt governed by an arbitration agreement should be the *prima facie* standard, and that, when faced with a disputed debt that is subject to an arbitration agreement, the English courts ought to dismiss or stay the winding-up application, save in "wholly exceptional circumstances". The court in *Salford*, which remains good law in England, recognised (at [40]) that this approach was "in accordance with the accepted principle which mandated upholding the parties' agreement to arbitrate and the legislative policy in favour of arbitration".

115 Once the creditor has established, with the aid of the presumption of insolvency, that the debtor is insolvent, the burden is on the debtor to show that the debt is *bona fide* disputed on substantial grounds and that the winding-up application is therefore an abuse of process.

to their bargain to arbitrate disputes.[116] Certainly, the conflict remains very much alive where the dispute has been arbitrated and an award issued, but available curial remedies have yet to be exhausted. How ought the conflict to be resolved in *this* situation?

VII. A balancing act: The standard of review

A. The applicable threshold/standard of review

60 It may be helpful to approach the question from the perspective of the applicable standard of review. In this regard, the legal threshold to be satisfied to successfully enjoin an award creditor from commencing winding-up proceedings where the award is challenged has not been authoritatively settled.

61 While the *prima facie* standard laid down in *AnAn*[117] was applied in *Fastfreight v Bulk Trident*,[118] this standard would not be applicable in cases where the dispute has been referred for arbitration and a final award has been issued (such as in *COT*). In such cases where the underlying dispute has been heard and determined, and the "debt" has been established by the arbitral

116 The courts are not concerned with the parties' substantive rights and obligations where those rights and obligations are to be resolved in the appropriate forum, *ie*, in arbitral proceedings, pursuant to an arbitration agreement. Accordingly, the courts are only concerned to ensure that there is a valid arbitration agreement in place and will not consider the merits of the dispute, as to do so would undermine the arbitration agreement. This policy stance favouring arbitration manifests itself in the stay provisions under s 6 of the International Arbitration Act 1994 (2020 Rev Ed) and s 6 of the Arbitration Act 2001 (2020 Rev Ed).

117 It would be recalled that the creditor in *AnAn* had served a statutory demand and threatened to commence winding-up proceedings *prior to* commencing arbitration. As the court in *AnAn* noted, a party to an arbitration agreement should not be permitted to "bypass" the arbitration agreement by commencing winding-up proceedings: *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [30] and [63].

118 The applicable standard of review was not in issue in *Fastfreight v Bulk Trident*. Pertinently, both parties proceeded on the basis that the *prima facie* standard would apply and the High Court therefore proceeded on that basis: see *Fastfreight Pte Ltd v Bulk Trident Shipping Ltd* [2022] SGHC 210 at [22] and [24] in respect of the parties' respective submissions; see also *Fastfreight Pte Ltd v Bulk Trident Shipping Ltd* [2022] SGHC 210 at [28]. Accordingly, the issue of the applicable standard of review is arguably not foreclosed as a matter of Singapore law.

award, the policy imperatives that guided the court's analysis in *AnAn* are fully engaged.[119] In this situation, the application of the *prima facie* standard, which has been acknowledged to be a lower standard,[120] would tilt the balance too far in favour of the award debtor, potentially depriving a successful award creditor of the fruits of arbitration. This is arguably inconsistent with the judicial policy of promoting and facilitating arbitration.

62 Accordingly, when considering whether there is a "substantial dispute" in respect of the "debt" (*ie*, with the focus being on the arbitral award, and not the underlying dispute), the courts should assess the merits of the award debtor's challenge to the outcome of the arbitration through an application to set aside the arbitral award. In other words, the focus is not on the merits of the underlying dispute but on the merits of the challenge to the arbitral award. In this regard, the merits should be assessed on the triable issues standard, *ie*, the grounds of the challenge to the award are substantial in the sense of not being shadowy, or legally or factually unsustainable.[121]

63 This approach is consonant with the established parameters according to settled principles of insolvency and arbitration law. In the insolvency context, the winding-up court is concerned to ensure that its powers are not used to wind up companies on the basis of a disputed debt. In this regard, the winding-up court does not conduct a full inquiry into the merits of the dispute, which is to be resolved in the appropriate forum, *ie*, the curial court, if the debtor is able to demonstrate that its challenge is "not frivolous".[122] In the arbitration context, holding an award debtor to this higher standard places the onus squarely

119 As the court stated in *AnAn* (at [74]-[77]), the triable issue standard "is an exacting one, and it requires a thorough examination of the evidence". If the court winds up "the company on the basis that its defences are unmeritorious, the court in effect takes the place of the arbitral tribunal".

120 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [60]. See also *BDG v BDH* [2016] 5 SLR 977 at [23].

121 As the court in *LKM Investment Holdings Pte Ltd v Cathay Theatres Pte Ltd* [2000] 1 SLR(R) 135 stated at [20], a "substantial dispute" is one that has "substance" and is "not frivolous". Plainly, from these definitions the court is concerned with the *merits* and not the *nature* of the grounds on which the debt is challenged.

122 That is, not shadowy, or legally or factually unsustainable.

on it to demonstrate that the grounds of challenge of the award, whether in the context of a setting aside application or resisting enforcement, are substantial and *bona fide*. It is also consistent with the key policy objective of arbitration law of holding the parties to their agreement to arbitrate – which includes, in the present context, compelling the parties to submit to available processes of review or appeal before the curial courts.

B. The merits of an application to the curial court to set aside an arbitral award are relevant at the post-arbitration stage

64 The applicable standard of review is an issue that is of no small moment given Singapore's position as a leading hub for dispute resolution and international arbitration in particular. Award creditors expect to enjoy their fruits of arbitration while award debtors expect to be able to exercise their statutory right of recourse to the curial courts as a matter of due process. An appropriate standard of review must balance these competing interests between the users of arbitration.

65 Until the issue is authoritatively settled by the Singapore courts, the authors submit that the merits of the putative application to the curial court to set aside an arbitral award and any appeals therefrom (referred to collectively as "setting-aside proceedings") are relevant to the issue of whether a disputed debt exists and the court's exercise of discretion to enjoin an award creditor from commencing winding-up proceedings on the basis of an arbitral award that is undergoing challenge before the curial court.

66 Although the court in *AnAn* emphasised that "the merits of the dispute are irrelevant",[123] the court's remarks must be read in the context of the facts of *AnAn*.[124] Further, and notably,

123 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [112].

124 Although *AnAn* concerned the situation of a debtor resisting winding-up proceedings, the principles enunciated by the court would be equally applicable to the situation of a debtor attempting to restrain the creditor from commencing winding-up proceedings: *Fastfreight Pte Ltd v Bulk Trident Shipping Ltd* [2022] SGHC 210 at [29], citing *BWG v BWF* [2020] 1 SLR 1296 at [128].

notwithstanding that the *prima facie* standard was applied in *Fastfreight v Bulk Trident*, the court took into consideration the merits of the award debtor's appeal to the English courts on a point of law. The court noted[125] that the English courts, in granting leave to the award debtor to appeal the PFA, had held that the question of (English) law raised by the award debtor was "well arguable":

> However, it does not necessarily follow that there is no longer any dispute over the PFA Sum, such that the defendant is entitled to commence winding-up proceedings in a Singapore court. The defendant's contractual right to payment of the PFA Sum is being disputed by the plaintiff through its appeal to the English courts. The plaintiff is entitled to pursue this avenue of appeal that is available under the law of the seat … and in that limited sense, there is still a dispute that falls within the scope of the parties' arbitration agreement. *As Baker J held, it is 'well arguable' that the tribunal had erred in law in deciding that the 'no deductions' clause in the Charterparty … applied when the Vessel was off-hire. Put another way, the tribunal might well have been wrong in deciding that the plaintiff was required to pay the disputed hire to the defendant first, even though the plaintiff's position was that the Vessel was off-hire at the material time.* That question is presently before the English courts, and it is the English courts that will have the final say as to whether the PFA Sum is indeed due and payable. ***Given that, I am not prepared to accept that the PFA Sum is a debt that is indisputably due such that the defendant is entitled to proceed with a winding-up application under Singapore law*** on the basis of that debt. [emphasis added in italics and bold italics]

67 Such an approach is consistent with the settled principle that a curial court considers issues relating to an arbitral tribunal's jurisdiction, including issues relating to the existence of an arbitration agreement, on a *de novo* basis and it is not bound by nor required to have regard to the findings of the arbitral tribunal in this respect.[126] As stated in *COT*,[127] a curial court is *obligated* to independently determine for itself that the arbitration agreement is valid and the arbitral tribunal had jurisdiction over the parties:

125 *Fastfreight Pte Ltd v Bulk Trident Shipping Ltd* [2022] SGHC 210 at [36].
126 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [163].
127 *COT v COU* [2023] SGHC 69 at [50]–[52].

> 50 … *a court hearing a challenge under the second limb of Art 34(2)(a)(i) is not only entitled but obliged to determine for itself, on the merits, whether an arbitration agreement exists and is valid.* That is ultimately because arbitration is consensual. A tribunal can exercise no jurisdiction over any person unless that person has consented to the tribunal doing so. …
>
> 51 *A court hearing a challenge under the second limb of Art 34(2)(a)(i) must therefore determine for itself de novo whether an arbitration agreement exists between the parties and is valid* …
>
> 52 The court approaches a challenge under the second limb of Art 34(2)(*a*)(i) *de novo* because *it is properly the court's role to determine whether an arbitration agreement exists and is valid*.
>
> [emphasis added]

68 In any event, restraining an award creditor from presenting a winding-up application entails the exercise of the court's discretion, in the same way that any application for injunctive relief does. Where the award debtor seeks to enjoin the award creditor from pursuing winding-up proceedings, the exercise of the court's discretion to issue an injunction would be engaged once the award debtor can demonstrate that the award is *bona fide* disputed on substantial grounds,[128] and the court can exercise its discretion having regard to all the circumstances including the specific facts of the case. As a matter of general principle, the list of factors that a court takes into consideration in this regard is not closed, however, they will certainly, and necessarily, involve a consideration of the merits.

69 As we have argued, and recognising that there is a crucial distinction between the merits of an arbitral tribunal's decision on the dispute and the merits of the application to set aside the award, merits in the present context must relate to the merits of the challenge to the award. Nevertheless, the merits of a setting aside application may in certain circumstances substantially overlap (or be coterminous) with the merits of the underlying dispute in so far as the challenge is based on Jurisdictional

128 See *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [110]–[111], where the court recognised that there is flexibility to grant an order reflecting the "appropriate middle ground" and a stay (as opposed to a dismissal) may be granted.

Grounds, since these raise the fundamental issue of the existence of the contract and arbitration agreement.[129]

70 Further, while a challenge to an arbitral award on natural justice grounds is generally regarded as being "procedural"[130] in nature, as a matter of principle, the same standard of view should apply to jurisdictional, substantive and procedural grounds. As the court stated in *AnAn* (albeit in a different context), "there is no principled basis to apply differing standards to what is essentially the same disputed debt".[131] In the same vein, the same standard of review ought to apply in a principled manner regardless of the grounds forming the basis for setting-aside proceedings.

C. The merits of a putative application to set aside an order of court granting leave to enforce

71 In Singapore, the enforcement of arbitral awards is governed by ss 19, 29 and 31 of the IAA. Section 19 of the IAA governs the enforcement of domestic international awards while ss 29 and 31 of the IAA govern the enforcement of foreign international awards. Interestingly, although s 31 of the IAA specifies the grounds on which the Singapore courts may refuse leave to enforce a foreign award, the grounds on which leave to enforce a domestic award may be refused under s 19 of the IAA are not expressly stated. Notwithstanding that Ch VIII of

129 As was the case in *BCY*, where the court departed from the findings of the arbitral tribunal. See paras 15-18 above.

130 Nevertheless, a breach of the rules of natural justice in an arbitration may give rise to substantive jurisdictional issues. See *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [71] for an "extreme example". In practice, it is likely that most arguments regarding the scope of submission to arbitration would ultimately be resolved on a similar basis as arguments that are based on a breach of the rules of natural justice. As noted in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 (at [71]):

> … just because an issue is within the scope of submission it does not *ipso facto* mean that the rules of natural justice have been obeyed. … However, in the ordinary run of cases … it is only logical and commonsensical that the answer to one should be the same as to the other.

As the authors have argued above (see para 20), a challenge under Art 34(2)(*a*)(i) of the Model Law regarding the validity (and existence) of an arbitration agreement raises fundamental, *a priori* questions.

131 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [63].

the Model Law (recognition and enforcement of awards) does not have the force of law in Singapore,[132] the grounds on which a Singapore court may refuse leave to enforce a domestic award has been resolved at common law.[133]

72 Further and from a procedural perspective, the enforcement of both domestic and foreign awards is also dealt with on a similar footing under O 69A r 6 of the previous Rules of Court[134] and O 48 r 6 the Rules of Court 2021 (the provisions in both sets of rules are *in pari materia*). Under these sets of rules, an award creditor may apply to the High Court for leave to enforce domestic and foreign arbitral awards on an *ex parte* basis.[135] If leave is granted, the order granting leave must be served on the award debtor.[136] After being served with the order, the award debtor has 14 days to apply to court to set aside the order. The provisions in the Rules of Court expressly prohibit the award creditor from enforcing the award during the specified 14-day

132 International Arbitration Act 1994 (2020 Rev Ed) s 3(1).

133 The issue was resolved in *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 where the court held (at [85] *ff*) that the carve-out in respect of Ch VIII of the Model Law under s 3(1) of the International Arbitration Act 1994 (2020 Rev Ed) does not deprive a domestic award debtor from the passive remedy of resisting enforcement.

134 2014 Rev Ed.

135 It is not mandatory for such an application to be made *ex parte*. However, the authors are not aware of any cases where the application for leave was made *inter partes*.

136 The enforcement of arbitral awards is a two-stage process in Singapore. Under the first stage ("Stage 1"), the application for leave to enforce a foreign arbitral award is a formalistic and mechanistic process and not a substantive one: *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR(R) 174 at [39]–[42]. At this stage, the award creditor is only required to comply with *formal* requirements, *viz*, the award creditor must file a supporting affidavit which: (a) exhibits the arbitration agreement and the award; (b) states the name and the usual or last known place of business of the award creditor and debtor; and (c) states either that the award has not been complied with or the extent to which it has not been complied with at the date of the application. Notwithstanding that the process of obtaining leave is a formalistic and mechanical one, a recent authority states that the award creditor is under a duty to make full and frank disclosure of all relevant facts as the application is made on an *ex parte* basis: *AUF v AUG* [2016] 1 SLR 859 at [163], followed in *CZD v CZE* [2023] SGHC 86. In this respect, a pending application to the curial court to set aside the arbitral award is a relevant fact that must be disclosed: *CZD v CZE* [2023] SGHC 86 at [49].

period or, if the award debtor applies to set aside the order, until after the application is finally disposed of.[137]

73 While the provisions in the Rules of Court expressly prohibit an award creditor from enforcing an arbitral award during the specified 14-day period or until an application to set aside the order granting leave is finally disposed of,[138] this "protection" may be insufficient from an award debtor's perspective. At common law, the service of a statutory demand and commencement of winding-up proceedings are not regarded as modes of enforcement.[139] Therefore, an award creditor may disregard the spirit of the statutory prohibition and serve a statutory demand, and thereafter commence winding-up proceedings. In the authors' view, this is curious – and unsatisfactory,[140] even if it is unlikely that a Singapore court would grant leave to an award creditor to enforce a foreign arbitral award where it is being challenged before the foreign curial court.[141] Further, the fact of a pending challenge before the foreign curial court may not be a panacea as the court may, nevertheless, grant leave, or may do so on terms.[142] In any event, such a challenge would (and should)

137 The application to set aside the order granting leave to enforce is the second stage of the process of enforcing an arbitral award ("Stage 2"). This stage is heard and decided on an *inter partes* basis and it is during this stage that the grounds under s 31(2) of the International Arbitration Act 1994 (2020 Rev Ed) are argued and decided.

138 Rules of Court (2014 Rev Ed) O 69A r 6(4). See also Rules of Court 2021 O 48 r 6(5), which is drafted in substantially similar terms. For convenience, the authors will only refer to the Rules of Court (2014 Rev Ed).

139 See para 43 above.

140 In the authors' view, the fact that an award debtor has taken no steps to set aside the arbitral award does not clothe the arbitral award with any "*prima facie*" recognition (even if the time limited to do so has expired). In that event, the award debtor is still able to resist enforcement under the choice of remedies regime (see paras 37 and 38 above).

141 See n 110 above. Although not the focus of this article, the fact that an award debtor has taken no steps to actively set aside the arbitral award should not necessarily be taken against the award debtor when it seeks to restrain the award creditor from commencing winding-up proceedings in the context of resisting enforcement. An award debtor has a fundamental right to elect the remedy that it considers most appropriate in the circumstances under the choice of remedies doctrine. However, as against this, it is arguable that an award debtor must accept the consequences of its election.

142 International Arbitration Act 1994 (2020 Rev Ed) s 31(5)(*b*). The court may order the award debtor "to give suitable security". In that event, the award creditor arguably ceases to have the requisite standing to commence winding-up proceedings as the debt would have been secured. Under

(cont'd on the next page)

be regarded as a relevant factor to be taken into account when considering all the facts and circumstances of the case.[143]

74 In the event that an award debtor elects to resist enforcement,[144] the merits of the award debtor's challenge to enforcement in accordance with s 31 of the IAA would, in principle, be relevant to the exercise of the court's discretion to restrain the award creditor from commencing winding-up proceedings against the award debtor, in the same way that the merits of a challenge to the award are.[145] By extension, also as a matter of principle and in the interest of consistency and coherence, the same standard of review should apply on the basis of the award debtor's right of election under the choice of remedies regime.

75 This article does not seek to comprehensively consider and resolve all possible factual circumstances and legal issues that may arise (nor would it be possible to do so). However, the following scenario could be considered for present purposes: an award creditor completes Stage 1 and obtains *ex parte* an order of court granting leave to enforce the arbitral award.[146] The award

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s 125(2)(*a*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed), a company is only deemed to be unable to pay its debts if it does not "pay the sum, or to secure or compound it to the reasonable satisfaction of the creditor".

143 In *Fastfreight v Bulk Trident*, the fact that there was a pending challenge before the English courts was regarded as a relevant (and pertinent) consideration (at [36]).

144 While the practical effect of a successful challenge to an arbitral award, whether on the basis of the active or the passive remedy, is similar, the bases of these remedies are not: see *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR(R) 174 at [55].

145 Relevantly, in the context of an application for an adjournment of enforcement proceedings under s 31(5) of the International Arbitration Act 1994 (2020 Rev Ed), the court is concerned with doing "practical justice" and can take into consideration the merits of the setting-aside proceedings pending before the curial court.In *Man Diesel Turbo SE v IM Skaugen Marine Services Pte Ltd* [2019] 4 SLR 537 [46]–[62], the court stated, *inter alia*, that: (a) whether enforcement proceedings should be adjourned is a matter of discretion and in this respect, the court takes a multi-factorial approach; (b) the court will seek to "strike a fair balance" by arriving at an outcome that is "most just or least unjust"; (c) the applicant seeking an adjournment must demonstrate he is pursuing "a meritorious application in the seat court" and the court in a detailed assessment of the facts or legal arguments of the setting-aside proceedings; and (d) the court considers which party has the "better argument" at this stage of the proceedings for the purposes of the balancing exercise.

146 See n 136 above.

creditor proceeds to serve a statutory demand[147] on the award debtor within the specified 14-day period between the first stage of the enforcement of arbitral awards in Singapore ("Stage 1") and the second stage ("Stage 2").[148] The award debtor then brings an application to enjoin the award creditor from commencing winding-up proceedings, however, at the time of its application it has not commenced Stage 2 proceedings.

76 In the foregoing scenario, how should a court approach the award debtor's application for an injunction? As a matter of principle and for the sake of parity (consistent with the award debtor's right of election under the choice of remedies regime), the same standard of review should apply in respect of Stage 2, given that the key issue is whether the "debt" is *bona fide* disputed on substantial grounds. In the specific scenario under consideration,[149] the fact that the award creditor has obtained leave to enforce the award ought not be a factor against the grant of injunctive relief as the award debtor may challenge the award creditor's right to enforce the award by commencing Stage 2 proceedings within the specified 14-day period. Unless and until the award debtor's right to do so is extinguished, whether by effluxion of time (upon the expiry of the specified 14-day period), or finally disposed of by the enforcement court, it remains open to the award debtor to resist enforcement of the award as of right.[150] In that event, the Stage 2 proceedings ought not be rendered nugatory by the award creditor's attempt to wind up the award debtor.

147 Service of a statutory demand and the commencement of winding-up proceedings are not modes of enforcement. See also para 43 above.

148 See n 137 above.

149 Nevertheless, such a scenario is unlikely to arise in practice. Under s 125(2)(*a*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed), a company is deemed to be unable to pay its debts if it does not pay, secure or compound the statutory demand within three weeks after service of the demand. Accordingly, if an award debtor wishes to resist enforcement, it would have to commence Stage 2 proceedings within two weeks of service of the leave order, *ie*, prior to the expiry to the three-week period under s 125(2)(*a*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed).

150 Even so, the court may not grant the injunction sought. Alternatively, the court may grant the injunction on terms, *eg*, it may require an undertaking from the award debtor that it will commence Stage 2 proceedings within the prescribed timeline.

D. The review/appeal should not be rendered nugatory

77 The Model Law and the IAA expressly confers on parties to arbitration the right to seek recourse from the curial courts by way of review. Further, under the rules of civil procedure in Singapore, a party has an automatic right of appeal[151] from the first instance decision of the curial court, *ie*, the High Court.

78 In the authors' experience, it is not a fanciful prospect for award creditors to serve a statutory demand on the award debtor on the basis of an arbitral award that is being challenged in the curial court in the hope of seeking a tactical advantage and/or frustrating the review and/or appeal.[152] Considering the serious consequences attendant on commencement of winding-up proceedings, service of a statutory demand would bring considerable pressure to bear on the award debtor.[153] In *Cathay Theatres Pte Ltd v LKM Investment Holdings Pte Ltd*,[154] S Rajendran J noted (in the context of a stay of execution) that the winding up of the defendant, which was a step "actively pursued" by the plaintiff, would effectively render the defendant's pending appeal nugatory.[155] On this basis, the court granted a stay of certain orders made by the High Court which formed the basis of the plaintiff's statutory demand.

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151 Although beyond the scope of this article, it would be worth considering whether a leave mechanism should be introduced such that appeals against the first instance decision may be brought only with leave of court, so as to sieve out unmeritorious appeals.

152 The court similarly recognised this in *AnAn* (at [107], albeit in a different context) when it described the "possibility of abuse by creditors unilaterally choosing the insolvency route to bypass their obligation to refer the dispute to arbitration" as a "*real* possibility"[emphasis original].

153 The courts have noted that commencement of winding-up proceedings has serious consequences on a company and may adversely affect its reputation, create cross-defaults and cut it off from financing: *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 at [82].

154 [2000] 1 SLR(R) 15. In *Cathay Theatres Pte Ltd v LKM Investment Holdings Pte Ltd* [2000] 1 SLR(R) 15, the defendant contracted to purchase the plaintiff's property but failed to complete. The plaintiff commenced proceedings. The High Court ordered, *inter alia*, that the defendant perform the contract. The defendant appealed against the decision of the High Court. In the interim, the plaintiff served a statutory demand on the defendant to demand payment of late completion interest. The defendant commenced proceedings to stay the order for completion.

155 *Cathay Theatres Pte Ltd v LKM Investment Holdings Pte Ltd* [2000] 1 SLR(R) 15 at [15].

79 The concern that winding-up proceedings may render an appeal nugatory ought also to apply to disputes that are subject to an arbitration agreement. By agreeing to arbitrate disputes, the parties implicitly agree to a party's statutory right of review by the curial court and applicable curial law.[156] More specifically, in choosing the relevant governing (substantive) law applicable to the arbitration agreement, the parties are taken to have agreed to the substantive content of that law – including, in particular, any right of curial review.[157] By necessary extension, the parties also implicitly agree to any right of appeal against a first instance decision by the curial court under the applicable rules of the seat, including civil procedure rules.

E. Notice of intention to commence winding-up proceedings: A (practical) halfway house?

80 Regardless of the award debtor's choice of remedies, one hopes that disputing parties would be able to take a reasonable and practical approach by letting any proceedings before the curial court run its course, instead of engaging in skirmishes which may lead to the parties incurring unnecessary time and costs, not to mention the wastage of precious judicial resources.

81 In most cases, the interests of both the award creditor and award debtor may be balanced by maintaining the status quo. As a matter of "practical justice", the status quo may be maintained through an undertaking by the award creditor not to commence winding-up proceedings without giving prior notice to the award debtor. It may be asked: Why would a party even consider giving such an undertaking? It is the authors' hope that parties and counsel would be able to adopt a sensible and pragmatic approach by allowing applicable processes of review and/or appeal to run their course before bringing winding-up proceedings. In certain cases, however, where better sense does not prevail, an undertaking not to commence winding-up proceedings would serve as a practical halfway house. In giving

156 See para 36 *ff* above.
157 A state that incorporates the Model Law would incorporate the right of curial remedies prescribed under the Model Law.

such an undertaking, an award creditor is not necessarily enjoined from taking steps in relation to the arbitral award simply by virtue of the fact that the award is challenged by the award debtor. From the award debtor's point of view, it would receive prior notice of any steps to bring winding-up proceedings that the award creditor may take, and it may then take the necessary steps to preserve the status quo, including applying to court for injunctive relief. However, until then, the status quo between the parties would be preserved with neither side gaining any tactical advantage over the other while the award undergoes available processes of review and/or appeal.

VIII. Conclusion

82 An award creditor should not be permitted to bypass a party's statutory rights and the parties' arbitration agreement by serving a statutory demand based on an arbitral award that is under challenge. Or, at any rate, the award creditor may do so, but the award debtor should be entitled to seek injunctive relief against the commencement (or continuation) of the winding-up process, provided he satisfies the relevant legal threshold by demonstrating that the award debt is *bona fide* disputed on substantial grounds.

83 Relatedly, it is also apposite to reiterate the settled principle that the jurisdiction of the winding-up court should not be invoked in respect of a disputed debt. As stated above, all of these considerations would have to be balanced against an award creditor's right to enjoy its fruits of arbitration. The authors consider that such a balance could be struck through the mechanism of the appropriate standard of review, *ie*, a *bona fide* dispute on substantial grounds. This would not deprive an award creditor of the fruits of arbitration (where frivolous or unmeritorious applications for review are concerned), while permitting applications that are not without merit or sufficient prospect of success to be ventilated before and decided by the curial courts. In the authors' view, this would also strike the right balance between the competing policy values underpinning the arbitration and insolvency regimes.