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4. ARBITRATION

Lawrence **BOO**
LLB (University of Singapore), LLM (National University of Singapore); FSIArb; FCIArb; FAMINZ; Chartered Arbitrator; Solicitor (England and Wales); Advocate and Solicitor (Singapore); Adjunct Professor, Faculty of Law, National University of Singapore; Adjunct Professor, Faculty of Law, Bond University (Australia).

Chloé **TERRAPON**
BLaw, MLaw, LLM (National University of Singapore); Attorney-at-law (Switzerland).

4.1 In 2017, Singapore courts had to deal with an important number of arbitration cases, the majority of which involved the enforcement of arbitration agreements and setting-aside applications. Based on the decisions reported, Singapore courts have been asked to stay their own court proceedings in favour of arbitration on six occasions.[1] The decrease in the number of setting-aside applications observed in 2016 (only four cases down from nine cases in 2015) was not an exception: there were only five applications to set aside arbitral awards, including the first application before Singapore courts to set aside an award on the merits in an investor–state dispute. Two applications to review the arbitral tribunal's jurisdiction under s 10(3) of the International Arbitration Act[2] ("IAA") were reported. An application to stay the arbitral proceedings pending an appeal against a jurisdictional decision was also presented.

Enforcement of arbitration agreements

Stay of court proceedings

4.2 Applications to stay court proceedings may be made under s 6 of the IAA (or s 6 of the Arbitration Act[3] ("AA")). An additional basis to do so had been introduced by the Court of Appeal in *Tomolugen*

1 See especially s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed), s 6 of the Arbitration Act (Cap 10, 2002 Rev Ed), Art 8 of the United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: With Amendments as Adopted in 2006* (United Nations, 2008) and Art II(3) of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (10 June 1958) 330 *United Nations Treaty Series* 3.

2 Cap 143A, 2002 Rev Ed.

3 Cap 10, 2002 Rev Ed.

Holdings Ltd v Silica Investors Ltd[4] ("*Tomolugen*") on the basis of the courts' inherent case management powers. This Court of Appeal decision in *Tomolugen* has been a landmark in more ways than one and has not unexpectedly been cited by all of the six reported decisions on stay of court proceedings in favour of arbitration.

Agreement giving unilateral right to arbitrate

4.3 The underlying basis of arbitration is that it is a consensual process in which parties refer their disputes to a neutral third party to make a binding decision. The requirement for consent in the main implies that parties to such an agreed process grant to each other the mutual right to refer matters to arbitration. The general expectation, therefore, is that an arbitration agreement grants mutuality of right to arbitrate. On the other hand, given its consensual nature and the principle of freedom to contract, such right to arbitrate, if parties so agree, may be given to one party or at one party's election. It could be suggested that such agreement giving only one party the right or power to elect should not be permitted as it would normally be imposed by a stronger party, which then gives rise to the argument whether it should not constitute sufficient consent to arbitrate. At the heart of the discussion is whether mutuality of rights is so sacrosanct that negating it would be contrary to public policy in the same manner as if an arbitration agreement allows only one party the right to appoint the arbitrator.

4.4 The first case which came for consideration up to the Court of Appeal is *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd*.[5] Wilson Taylor Asia Pacific Pte Ltd ("Wilson Taylor") had engaged Dyna-Jet Pte Ltd ("Dyna-Jet") for the installation of underwater anodes in the island of Diego Garcia in the Indian Ocean. This contract contained a dispute resolution clause, which provided that "at the election of Dyna-Jet, the dispute may be referred to and personally settled by means of arbitration proceedings".[6] After a dispute arose under the contract, Dyna-Jet commenced litigation proceedings in Singapore against Wilson Taylor. Wilson Taylor applied for a stay of the court proceedings under s 6 of the IAA.

4.5 The assistant registrar had held that while there was a valid arbitration agreement, it had become "inoperative or incapable of being performed". Vinodh Coomaraswamy J took the view that such a clause

4 [2016] 1 SLR 373; see also (2015) 16 SAL Ann Rev 100 at 107–109, paras 4.24–4.29.
5 [2017] 2 SLR 362.
6 *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2017] 3 SLR 267 at [10]; see also (2016) 17 SAL Ann Rev 89 at 99–100, para 4.24.

(terming it "asymmetrical")[7] was valid, but found that Dyna-Jet's election to commence suit rendered the arbitration agreement "incapable of being performed" within the meaning of s 6(2) of the IAA.[8]

4.6 Citing its previous decision in *Tomolugen*, the Court of Appeal reiterated that three requirements must be fulfilled for a stay under s 6 of the IAA. First, there must be a valid arbitration agreement between the parties in the court proceedings; second, the dispute in the court proceedings must fall within the scope of the arbitration agreement; and third, the arbitration agreement must not be null and void, inoperative or incapable of being performed.[9] The court also affirmed once again that a *prima facie* standard of review should be adopted in the context of an application under s 6 of the IAA.[10]

4.7 The Court of Appeal confirmed that such an arbitration agreement which gave unilateral right to a party to arbitrate was valid:[11]

> It was immaterial for this purpose that the Clause: (a) entitled only the Respondent (but not the Appellant) to compel its counterparty to arbitrate a dispute (the 'lack of mutuality' characteristic); and (b) made arbitration of a future dispute entirely optional instead of placing parties under an immediate obligation to arbitrate their disputes (the 'optionality' characteristic) …

It pointed out, however, that at the time the stay application was made, the dispute did not fall within the scope of the arbitration agreement because when elected to litigate, the dispute fell outside the scope of the arbitration agreement.[12] The Court of Appeal did not, therefore, proceed to consider the third step of whether the arbitration agreement was "incapable of being performed" (as the judge so held) or was "inoperative" (as held by the asst registrar).[13]

4.8 It is interesting that the asst registrar, High Court judge and the Court of Appeal all used different bases in refusing the grant of stay. While the asst registrar and the High Court's findings would render the arbitration agreement "inoperative" or "incapable of being performed", the Court of Appeal's approach that the dispute did not fall within the scope of the arbitration agreement did no violence to the arbitration

7 *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2017] 3 SLR 267 at [61(a)].
8 *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2017] 3 SLR 267 at [160].
9 *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2017] 2 SLR 362 at [11].
10 *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2017] 2 SLR 362 at [12].
11 *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2017] 2 SLR 362 at [13].
12 *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2017] 2 SLR 362 at [15], [16], [23] and [24].
13 *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2017] 2 SLR 362 at [25].

clause. In choosing not to comment on the asst registrar or the High Court's approach, the suggestion could well be that the term "null and void, inoperative or incapable of being performed" connotes a situation that suggests that an otherwise valid arbitration agreement could under certain circumstances be impeached and rendered unenforceable by either party in respect of all matters under the contract. The Court of Appeal's approach and silence preserves the arbitration agreement as remaining capable of resolving such other disputes that could arise under the contract and which Dyna-Jet could then elect to arbitrate.

4.9 Another observation to be made in respect of the Court of Appeal's decision is that while it makes clear that a *prima facie* approach is to be adopted when considering the enforceability of arbitration agreements in stay applications, it does not mean that the court hearing such an application would not in clear cases, such as this one, defer the matter of the tribunal and decide for itself that a matter falls outside the scope of the clause.

Inherent power to stay court proceedings in the interests of case management

4.10 The statutory structure of the IAA permits only parties to the arbitration agreement to invoke the right to arbitrate and, as such, only they could seek a stay of court proceedings commenced in breach of the arbitration agreement. This limitation has since been expanded by the use of the court's case management power as introduced by the Court of Appeal in *Tomolugen* in 2016 as an additional basis to stay pending court proceedings in favour of arbitration notwithstanding that the arbitration commenced or to be commenced may not implead all the parties in the litigation.[14] Since then, this ground has been invoked by parties to support their applications. A party who is not a party to the relevant arbitration agreement may also apply for a stay of court proceedings in favour of arbitration. In such a case, the basis for the stay is not strictly under s 6 of the IAA, but under the court's inherent case management powers.

4.11 In *Gulf Hibiscus Ltd v Rex International Holding Ltd*[15] ("*Gulf Hibiscus*"), the High Court confirmed that a case management stay in favour of arbitration may be ordered when the party applying for stay is not a party to the arbitration agreement, and even when arbitration proceedings have not yet been initiated against the party to the arbitration agreement. However, in *Gulf Hibiscus*, the stay was ordered

14 See, *eg*, *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [140], [152], [164], [179], [187], [189(b)(ii)] and [190(c)]–[190(f)].

15 [2017] SGHC 210.

under conditions, in particular that the arbitration proceedings be commenced within a certain deadline.[16]

4.12 The plaintiff, Gulf Hibiscus Limited ("Gulf Hibiscus"), as well as Rex Middle East Limited ("RME") and Schroder & Co Banque SA ("Schroder") were shareholders in Lime Petroleum PLC ("Lime PLC"), an Isle of Man company. The first and second defendants, Rex International Holding Limited and Rex International Investments Pte Ltd, were respectively the ultimate and the intermediate holding companies of RME. Gulf Hibiscus, RME, Schroder and Lime PLC – but not the two defendants – were parties to a shareholders' agreement ("SHA") which contained an arbitration clause.[17] Disputes arose in this context and several court proceedings were initiated in Singapore, the Isle of Man and Norway against various defendants. In particular, Gulf Hibiscus commenced court proceedings in Singapore against the defendants.[18]

4.13 Aedit Abdullah JC (as his Honour then was) allowed the stay requested by the defendants, and noted that the basis for the exercise of case management powers is "the wider need to control and manage proceedings between the parties for a fair and efficient administration of justice".[19] This power turns on the balance between a plaintiff's right to choose the party it wants to sue and the court's desire to prevent a plaintiff from avoiding an arbitration clause and the court's inherent power to manage its processes to prevent abuses of process and ensure the efficient and fair resolution of disputes. In the present case, "the ends of justice would be better served" by upholding the arbitration agreement between Gulf Hibiscus and RME.[20] However, the court found that an undefined opportunity for arbitration to be commenced would not be in the interests of justice, therefore a conditional stay was appropriate in the present case. In particular, if the SHA was not triggered by any of the parties to the SHA within three months or an arbitration was not commenced within five months, the parties would be at liberty to apply to the court to lift the stay. Also, the defendants would be bound by the findings of fact made in any arbitration under the SHA.[21]

4.14 This decision draws clear distinctions between situations covered by the IAA or the AA and situations in which there is no

16 *Gulf Hibiscus Ltd v Rex International Holding Ltd* [2017] SGHC 210 at [53].
17 *Gulf Hibiscus Ltd v Rex International Holding Ltd* [2017] SGHC 210 at [5].
18 *Gulf Hibiscus Ltd v Rex International Holding Ltd* [2017] SGHC 210 at [9].
19 *Gulf Hibiscus Ltd v Rex International Holding Ltd* [2017] SGHC 210 at [59].
20 *Gulf Hibiscus Ltd v Rex International Holding Ltd* [2017] SGHC 210 at [93].
21 See, *eg*, *Gulf Hibiscus Ltd v Rex International Holding Ltd* [2017] SGHC 210 at [89(f)].

arbitration agreement between the relevant parties to the court proceedings. Also, by ordering a conditional stay, Abdullah JC created an appropriate balance between the different interests at stake.

Bare arbitration clause – No seat, no rules

4.15 In *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd*[22] ("*KVC Rice*"), the High Court dealt with two arbitration clauses which specified neither the seat of arbitration nor the procedure for the appointment of the arbitrators. The court confirmed that such "bare" arbitration clauses are not invalid, as long as there is a clear agreement to arbitrate.[23]

4.16 Pang Khang Chau JC found that the power to appoint the arbitral tribunal under Art 11(3) of the UNCITRAL[24] Model Law on International Commercial Arbitration ("Model Law"),[25] conferred on the Singapore International Arbitration Centre ("SIAC") President, is not excluded when the place of arbitration is unclear or not yet determined. In such a case, the SIAC President can enquire whether it has jurisdiction for the purposes of Art 11(3) of the Model Law. The standard of review to be applied in this context is "much lower" than the standard of review adopted by an arbitrator in determining his jurisdiction. The appointing authority, unlike an arbitrator, is exercising an administrative function and is not expected to conduct hearings or hear witnesses. In addition, the primary responsibility for determining questions relating to the existence, validity and interpretation of the arbitration agreement belongs to the arbitrators and examining these issues with the same standard as the arbitral tribunal would be a "usurpation of the arbitrator's role and a waste of time and expenses".[26] Therefore, the appointing authority only needs to be satisfied that it has *prima facie* jurisdiction. This does not usurp the arbitral tribunal's authority to determine the place of arbitration, since the appointing authority's *prima facie* enquiry is limited to the purpose of determining whether it should exercise its appointment powers. In addition, this is also consistent with the policy position taken by the drafters of the Model Law. In the case at hand, there was a *prima facie* case in favour of

22 [2017] 4 SLR 182.

23 *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] 4 SLR 182 at [29].

24 "UNCITRAL" stands for "United Nations Commission on International Trade Law".

25 United Nations Commission on International Trade Law, UNCITRAL *Model Law on International Commercial Arbitration 1985: With Amendments as Adopted in 2006* (United Nations, 2008).

26 *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] 4 SLR 182 at [47c].

the view that the SIAC President was able to act under Art 11(3) of the Model Law.[27]

4.17 The court, however, considered the possibility that the SIAC President would take the view that he had no power to act and came to the view that if that should occur, the court would retain a residual jurisdiction to directly appoint an arbitrator to ensure that the arbitration may proceed notwithstanding any deadlock between the parties regarding the appointment of the arbitrators, provided that the dispute has some connection with Singapore.[28] The court did not answer the question whether an inability to constitute the arbitral tribunal without the co-operation of the defendant would render the arbitration clause "incapable of being performed".[29]

4.18 The decision in *KVC Rice* is in line with Singapore's consistent pro-arbitration policy. While parties would be well advised to provide at least for the place of arbitration in order to avoid wasting time and costs, it remains that bare arbitration clauses clearly fall under the definition of arbitration agreement as contained in s 2A of the IAA. As long as the parties have clearly indicated their intention to arbitrate potential disputes, courts should endeavour to give effect to this agreement.

4.19 The court in this case, while considering an application for stay of an action pending before it, has the duty only to consider if a valid arbitration agreement exists and, if so, whether the same is "null and void, inoperative or incapable of being performed".[30] It is for the party who wishes to invoke the arbitration agreement to commence such proceedings in the seat it chooses. If such a choice is made incorrectly or improperly, it is for the appointing body and subsequently, the tribunal if one is so appointed, to decide. While acknowledging that the IAA provides for the SIAC President as the statutory appointing authority, the court's suggestion that it has "residual jurisdiction" to make an appointment should the SIAC President subsequently refuse to make the appointment is perhaps inappropriate.[31] It may create more issues than it seeks to resolve. The power to appoint arbitrators by the court has been removed following the enactment of the IAA and AA. The question of

27 *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] 4 SLR 182 at [45]–[63].

28 *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] 4 SLR 182 at [71] and [74].

29 *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] 4 SLR 182 at [75]–[76].

30 See, *eg*, *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] 4 SLR 182 at [18].

31 *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] 4 SLR 182 at [67].

whether the SIAC President would decide a seat, whether on a preliminary basis or not, lies with the SIAC President and eventually the arbitral tribunal, and not the courts.

Arbitration clause providing for arbitration under rules "of the relevant exchange" not enforceable as no exchange was involved in the particular case

4.20 Singapore courts have hitherto been generous when asked to enforce problematic arbitration clauses. However, in *TMT Co Ltd v The Royal Bank of Scotland plc*[32] ("*TMT*"), the High Court found that an arbitration agreement providing for arbitration "under the arbitration rules of the relevant exchange or any other organisation as the relevant exchange may direct"[33] was *prima facie* not enforceable.[34]

4.21 In 2007, the plaintiff, TMT Co Ltd ("TMT"), entered into an FFA Account Agreement with the Royal Bank of Scotland ("RBS"), governed by English law. A dispute arose, and in 2010, TMT filed a claim against RBS in the English Commercial Court which was, however, settled by a settlement agreement which provided for exclusive jurisdiction of the English courts. In 2015, TMT started proceedings in Singapore against RBS, The Royal Bank of Scotland Plc (Singapore Branch) ("RBS Singapore"), as well as the then chief executive officer and two employees of RBS. Three of the defendants, including RBS, sought a stay of the Singapore proceedings before the asst registrar, which was granted. TMT appealed this decision.[35]

4.22 Abdullah JC took the view that the arbitration clause in the FFA Account Agreement was "inoperative" but upheld the stay on the ground that TMT's claims against RBS and RBS Singapore fell within the scope of the abovementioned Settlement Agreement, which provided exclusive jurisdiction of the English courts. The proceedings against the other defendants ought to be stayed as a matter of case management as the cases against them were linked and dependent upon the case against RBS and RBS Singapore.

4.23 In coming to the view that the arbitration clause in the FFA Account Agreement was "inoperative", the court accepted that the clause contemplated that the future trades would be carried through a "relevant exchange" but parties in fact executed the trades in the "London Clearing House", which is not an exchange and, therefore, absent the

32 [2017] SGHC 21.
33 *TMT Co Ltd v The Royal Bank of Scotland plc* [2017] SGHC 21 at [65].
34 *TMT Co Ltd v The Royal Bank of Scotland plc* [2017] SGHC 21 at [68].
35 *TMT Co Ltd v The Royal Bank of Scotland plc* [2017] SGHC 21 at [9]–[11].

existence of an exchange for a dispute to fall under, the arbitration agreement would be considered "inoperative". The court remarked that while party autonomy in selecting arbitration would be encouraged and supported, the court would not "readily rewrite the agreements entered into between parties",[36] in particular in the context of commercial agreements between commercial entities.

4.24 There is no suggestion that that intention of the parties to arbitrate disputes under the FFA Account Agreement was clear. Whether the London Clearing House could be considered as an exchange or whether the term "exchange" is wide enough to cover any institution engaged in trading the instruments under the FFA Account Agreement properly lie within the remit of the institution and the tribunal should one be later appointed. It is not uncommon for courts in Singapore and elsewhere to uphold arbitration clauses which may be ambiguous[37] or have conflicting institutions named,[38] or have named non-existent arbitration institutions;[39] or have named one institution to administer under the rules of another institution;[40] all of which are fraught with some difficulties but could still remain "operative".

Arbitrability of subject matter

Claims under s 131(1) of Companies Act[41]

4.25 Section 11(1) of the IAA, provides that "[any] dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless it is contrary to public policy to do so". The question of arbitrability was once again at stake in *Duncan, Cameron Lindsay v Diablo Fortune, Inc.*[42] This decision has been widely commented in the context of corporate and insolvency law as it addresses the issue whether a lien over sub-freights and sub-hire is a charge within the meaning of s 131(1) of the Companies Act. It

36 *TMT Co Ltd v The Royal Bank of Scotland plc* [2017] SGHC 21 at [68].
37 See *KVC Rice Intertrade Co Ltd v Asian Mineral Resources Pte Ltd* [2017] 4 SLR 182 mentioned in paras 15–19 above and *William Co v Chu Kong Agency Co Ltd* [1993] 2 HKC 377.
38 See *Yokogawa Engineering Asia Pte Ltd v Transtel Engineering Pte Ltd* [2009] 2 SLR(R) 532.
39 See *Lucky-Goldstar International (HK) Ltd v Ng Moo Kee Engineering Ltd* [1993] 2 HKLR 73; see also Case III ZR 143/92 (Germany), summarised in [1995] ADRLJ 120, *Circus Productions, Inc v Rosgoscirc*, summarised in [1994] 1 SINARB 3, *Warnes SA v Harvic International Ltd*, summarised in [1994] ADRLJ 65 and Case 2U 1010/94 (Germany), summarised in [1994] ADRLJ 40.
40 See *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936.
41 Cap 50, 2006 Rev Ed.
42 [2017] SGHC 172.

is, however, also interesting in the arbitration context, as the court refused to grant the stay requested by the defendant on the ground that the dispute did not fall within the scope of the arbitration agreement and was not arbitrable.[43]

4.26 The dispute arose in the context of a charter between Siva Ships International Pte Ltd ("Company") and the defendant, which provided for a lien in favour of the defendant ("Bareboat Charter"). The Bareboat Charter also provided that any disputes shall be referred to arbitration in London.[44] After the Company filed a winding-up application in Singapore, the defendant sought to exercise its lien under the Bareboat Charter. The Company's Liquidators started proceedings seeking a determination that the lien was void against them pursuant to s 131(1) of the Companies Act for want of registration. The defendant applied, *inter alia*, for a stay of the proceedings in favour of arbitration.

4.27 Audrey Lim JC found that the Liquidators' application was not covered by the arbitration agreement in the Bareboat Charter. The dispute did not concern the validity of the lien, but whether such lien was a charge that was void against the Liquidators for want of registration under s 131 of the Companies Act. Such an issue could arise only in the course of the liquidation of a company and an arbitration clause should not ordinarily be construed as to cover a claim under s 131(1) of the Companies Act in the absence of express language to the contrary. The court also found that even if the arbitration clause did include such express language, which was not the case here, disputes arising under s 131 of the Companies Act are not arbitrable for public policy reasons of creditors' protection, as they involve the operation of the insolvency regime and not a mere commercial dispute between the parties.[45]

Minority oppression claims

4.28 In *Maniach Pte Ltd v L Capital Jones Ltd*[46] ("*Maniach*"), the High Court had refused to stay minority oppression proceedings in favour of arbitration, taking the view that minority oppression claims are not arbitrable. However, this question was decided subsequently in *Tomolugen*,[47] in which the Court of Appeal held that statutory minority oppression claims are generally arbitrable. Overturning the decision in *Maniach*, the Court of Appeal confirmed this position in *L Capital Jones*

43 *Duncan, Cameron Lindsay v Diablo Fortune, Inc* [2017] SGHC 172 at [18].
44 *Duncan, Cameron Lindsay v Diablo Fortune, Inc* [2017] SGHC 172 at [2].
45 *Duncan, Cameron Lindsay v Diablo Fortune, Inc* [2017] SGHC 172 at [20].
46 [2016] 3 SLR 801.
47 See (2015) 16 SAL Ann Rev 100 at 107–109, paras 4.24–4.29.

Ltd v Maniach Pte Ltd.[48] The appellants at the appeal, however, argued that the Court of Appeal in *Tomolugen* had left open the possibility that the facts of particular claims might raise public policy considerations against arbitration and submitted that the dispute raised issues of public policy and abuse of the judicial process. The Court of Appeal disagreed and took the view that nothing in the present case engaged concerns rendering this particular dispute non-arbitrable. Nevertheless, the appeal was dismissed on the ground that the appellants had taken steps in the proceedings by applying to strike out the proceedings on the merits.

4.29 The five-member bench of the Court of Appeal has settled the issue of the arbitrability of minority oppression claims underscoring the importance of the issue.[49] Given the court's holding that notwithstanding the general arbitrability of claims under s 216 of the Companies Act, other features of the dispute might render the claim non-arbitrable on the basis of public policy considerations, Singapore courts and tribunals are likely to be dealing again with the arbitrability of *specific* minority oppression claims in the future.

4.30 Another feature which had a direct impact on the appeal in this case was the fact that the appellants were held to have taken a step in the proceedings, namely, that the second appellant had applied for a striking-out of the substantive claims on the merits (that there was "no reasonable cause of action") and had made submissions on the application, even though it decided not to proceed with the application, and that this step could be attributed to the first appellant. In the Court of Appeal's view, such an inquiry "should not be approached with undue technicality or formalism; rather, the court must look at the substance of the events that transpired to determine whether the party in question had taken a step in the proceedings".[50]

Staying of arbitral proceedings

Pending jurisdictional challenge

4.31 Courts do not have the power to stay an ongoing arbitration unless the statute specifically so provides.[51] Section 10(9)(*a*) of the IAA provides a residual power for the court to do so where an application to

48 [2017] 1 SLR 312.
49 *L Capital Jones Ltd v Maniach Pte Ltd* [2017] 1 SLR 312 at [26].
50 *L Capital Jones Ltd v Maniach Pte Ltd* [2017] 1 SLR 312 at [85].
51 See Art 5 of the First Schedule to the International Arbitration Act (Cap 143A, 2002 Rev Ed).

review the tribunal's decision on jurisdiction under Art 16(3) of the Model Law or s 10(3) of the IAA is made. Such a power is discretionary and would not ordinarily be exercised as the default position is that "such application shall not operate as a stay of the arbitral proceedings or of execution of any award or order made in the arbitral proceedings unless the High Court orders otherwise".[52] The question is how and in what circumstances this discretion should be exercised to order such a stay.

4.32 The only reported decision dealing with this issue was that of the asst registrar in *AYY v AYZ*,[53] in which the learned asst registrar declined to grant the application ruling that the applicant had failed to meet the "irreparable prejudice" test.[54]

4.33 Belinda Ang Saw Ean J in *BLY v BLZ*[55] adopted a slightly different approach. The plaintiff in that case had applied for a stay of an International Chamber of Commerce ("ICC") arbitration pending the final determination of its application under s 10(3) of the IAA to review the tribunal's ruling that it had jurisdiction. The stay application was motivated by the fact that the tribunal had since issued a ruling on document production ordering the exchange of certain documents. The court first rejected the plaintiff's argument that the appropriate test under s 10(9)(*a*) of the IAA should be a balance of convenience test but also did not accept the "irreparable prejudice" test adopted by the asst registrar in *AYY v AYZ*, considering that such a test may be inappropriately over-inclusive or under-inclusive depending on the circumstances.[56] The court found that such a power ought to be exercised only if there are special circumstances to depart from the default rule under s 10(9)(*a*) of the IAA set down by Parliament, namely, that an appeal against the tribunal's decision does not operate as a stay of the arbitral proceedings. The statutory discretion to stay arbitral proceedings should be exercised "judiciously", which in turn "requires the court to exercise its discretion by reference to all the circumstances of the particular case".[57]

4.34 The learned judge gave some useful guidelines as to the circumstances, *viz*, firstly, such discretion should not be exercised in a way that would render the default position "meaningless" and secondly, the circumstances must be "special".[58] In the court's view, the fact that

52 International Arbitration Act (Cap 143A, 2002 Rev Ed) s 10(9)(*a*).
53 [2015] SGHCR 22.
54 *AYY v AYZ* [2015] SGHCR 22 at [8].
55 [2017] 4 SLR 410.
56 *BLY v BLZ* [2017] 4 SLR 410 at [19] and [20].
57 *BLY v BLZ* [2017] 4 SLR 410 at [8].
58 *BLY v BLZ* [2017] 4 SLR 410 at [8].

the potential detriment of wasted time and costs incurred resulting from the continuing participation in the arbitration or any potential bias that the tribunal may harbour against it when rendering the arbitral award are not circumstances which are so "special" as to justify a stay.[59] Finally, the court also took the view that the strength of the jurisdictional objection itself is also not a sufficient reason to grant a stay.[60]

4.35 In rejecting the application, the court found that the plaintiff had not demonstrated how the information contained in the documents ordered to be produced was so sensitive or confidential that a stay should be ordered. As disclosure orders are common in arbitration, allowing a stay on this basis would have the consequence that stays would be routinely granted. In addition, the terms of reference in the ICC arbitration included a confidentiality clause, and further safeguards as to confidentiality were provided by the tribunal in its order on document production.[61]

4.36 The requirement for "special" circumstances to justify granting a stay of arbitration is clearly a logical one. The test focuses on what could constitute an exception to the default position prescribed by statute that an application for review of the tribunal's decision should not operate as a stay. Indeed, the mere fact that a tribunal could be in some way not so sympathetic with the applicant or that costs and time could be wasted should the appeal succeed are not unexpected and do not, therefore, constitute "special" circumstances. Otherwise, every appeal against a tribunal's decision by a dissatisfied party could warrant a stay and would run afoul of the default statutory position.

Jurisdiction of arbitral tribunal

Arbitration agreement still binding despite previous litigation proceedings

4.37 In *BMO v BMP*,[62] the High Court had to consider whether there was still a binding or operative arbitration agreement despite the parties having previously participated in litigation proceedings regarding the same dispute.[63]

59 *BLY v BLZ* [2017] 4 SLR 410 at [15].
60 *BLY v BLZ* [2017] 4 SLR 410 at [17].
61 *BLY v BLZ* [2017] 4 SLR 410 at [25].
62 [2017] SGHC 127.
63 *BMO v BMP* [2017] SGHC 127 at [2].

4.38 The dispute in that case concerned BMP's ownership of the share capital of its Vietnamese subsidiary. In July 2014, BMP started litigation proceedings in the British Virgin Islands ("BVI") against BMO and two former directors of BMP ("BVI litigation"). Subsequently, on 10 March 2015, BMP filed a Notice of Arbitration against BMO with SIAC, for the same causes of action and the same reliefs as sought for in the BVI proceedings. The BVI litigation came to an end in March 2016 after BMP's claim was struck out for failure to comply with an order to pay the security of costs on time. On 19 April 2016, the tribunal constituted in the arbitration held that it had jurisdiction and ordered the arbitration to proceed on the merits, following which BMO contested the tribunal's jurisdiction before the High Court under s 10(3) of the IAA. The court upheld the tribunal's decision on jurisdiction and dismissed BMO's application. This decision addresses several interesting issues.

4.39 As a preliminary matter, Ang J had to determine the applicable law of the arbitration agreement. In this regard, the learned judge considered the English Court of Appeal decision in *SulAmérica Cia Nacional de Seguros SA v Enesa Engelharia SA*,[64] as well as the decision of the asst registrar in *FirstLink Investments Corp Ltd v GT Payment Pte Ltd*,[65] which was rejected by the court in *BCY v BCZ*,[66] and *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd*.[67] Her Honour found that since the parties impliedly chose Vietnamese law to govern the charter in which the arbitration clause was contained, Vietnamese law also governed the arbitration agreement.[68]

4.40 BMO argued that in commencing the BVI litigation, BMP adopted a position inconsistent with the right to arbitrate and that it had, therefore, waived such a right. The arbitration clause would consequently be rendered "inoperative". The court ruled that this argument failed on the basis that waiver by election is available only as a response, when there is an element of choice. After a contractual breach, the choice between the two inconsistent rights that arise (affirmation or termination of the contract) belongs to the *innocent party*. In the present case, it was, therefore, BMO, and not BMP, which had a choice between affirming or terminating the breach of the arbitration agreement by BMP.[69]

64 [2013] 1 WLR 102.
65 [2014] SGHCR 12.
66 [2016] SGHC 249.
67 [2017] 3 SLR 267; see also (2016) 17 SAL Ann Rev 89 at 99–100, para 4.24.
68 *BMO v BMP* [2017] SGHC 127 at [36].
69 *BMO v BMP* [2017] SGHC 127 at [74].

4.41 BMO further contended that the defendant's commencement of the BVI litigation constituted a repudiatory breach of the arbitration agreement and that BMO had accepted it through its participation in the BVI litigation. The court held, however, that the commencement of litigation proceedings does not *per se* constitute a repudiatory breach of the arbitration agreement.[70] What is required is that the party who allegedly breached the arbitration agreement no longer intends to be bound by it. The court ruled that BMO had not established that BMP's commencement of the BVI litigation showed its intent to repudiate its obligation to arbitrate: on the contrary, BMP commenced litigation proceedings because it was not aware of the existence of the arbitration agreement. BMP had even proposed that the BVI litigation be stayed after the commencement of the arbitration. In the court's view, BMP did not intend to pursue parallel proceedings in breach of the arbitration agreement.[71] The steps taken by BMO in the BVI litigation would not have been sufficient to constitute unequivocal acceptance of any purported repudiation.[72]

4.42 BMO's argument that BMP was estopped from pursuing the arbitration was also rejected as the commencement of the BVI litigation did not constitute forbearance or forgoing of any rights.[73] Further, estoppel is an argument that may be raised against a party seeking to enforce its rights in response to another party's breach. In the present case, the situation was the reverse. The defendant's commencement of the BVI litigation did not constitute a clear and unequivocal promise not to arbitrate.[74]

4.43 This decision makes clear that the mere commencement of court proceedings would not of itself constitute an intention to abandon the right to arbitrate. In the learned judge's words, "[the] key enquiry, which is relevant to the present case, is whether there is some explanation for the breaching party's conduct and if there is, there can be no inference of an intention to repudiate".[75] There are indeed many situations where a party could proceed to court other than for the pursuit of substantive claims including, *viz*, to obtain security for claims, interim measures to prevent dissipation of assets or destruction of evidence or to preserve status quo pending the arbitration. To this, the court had interestingly added another, that a party could commence

70 *BMO v BMP* [2017] SGHC 127 at [61].
71 *BMO v BMP* [2017] SGHC 127 at [106].
72 *BMO v BMP* [2017] SGHC 127 at [109]–[117].
73 *BMO v BMP* [2017] SGHC 127 at [124].
74 *BMO v BMP* [2017] SGHC 127 at [122].
75 *BMO v BMP* [2017] SGHC 127 at [94].

court action "simply to test whether the defendant would invoke the arbitration agreement".[76]

No legal effect given to the term "umpire" in an arbitration agreement under ICC Rules of Arbitration ("ICC rules")

4.44 The notion of "umpire" is dealt with in English law at s 21 of the English Arbitration Act 1996.[77] Prior to the repeal of the Arbitration Act[78] in 2002, the use of umpires in Singapore tracked closely that of English law. With the enactment of the IAA in 1994 and of the AA, consistent with the Model Law framework, the concept of an "umpire" in arbitration is no longer given similar recognition. The use of such a term could still be found in contracts containing legacy term adopted from English form contracts. The concept of an "umpire" in English arbitration arises in a two-member tribunal and with a third person appointed as an umpire who would play a role only if and when the two members of the tribunal could not come to a decision, whereupon his role crystallises and the umpire would then make a decision as if he were the sole arbitrator. This contrasts with the role of the third arbitrator under the Model Law, who is the presiding arbitrator and makes decision collegially with the other members of the tribunal.

4.45 In *BNP v BNR*,[79] the parties had entered into a shareholders' agreement, which referred disputes to arbitration under the ICC rules. The arbitration agreement provided that the number of arbitrators shall be one, but that it shall be three in case the parties were not able to agree with the sole arbitrator within 30 days. In such a case, each party shall nominate an arbitrator and the third arbitrator, "who shall act as an umpire", was to be nominated by the two appointed arbitrators, or in the absence of agreement, in accordance with the ICC rules.[80] A dispute arose between the parties and arbitration proceedings were instituted. The two party-appointed arbitrators jointly nominated the third member of the panel to act as the third arbitrator and president of the tribunal and this was confirmed by the ICC court. The plaintiffs objected to the role of the third member as arbitrator and president. The tribunal issued a partial award in which it found that the third member was validly confirmed as president. The plaintiffs challenged the decision under s 10(3) of the IAA and sought a determination that the tribunal did not have jurisdiction over the arbitration as it was

76 *BMO v BMP* [2017] SGHC 127 at [94].
77 c 23.
78 Cap 10, 1985 Rev Ed.
79 [2018] 3 SLR 889.
80 *BNP v BNR* [2018] 3 SLR 889 at [2].

improperly constituted, the third member having been appointed as president and not as an umpire, contrary to the arbitration agreement.[81]

4.46 The application was dismissed. The central question was whether, by providing for the selection of an "umpire" in their arbitration agreement, the parties had agreed on a three-member tribunal or on an arbitral panel of two arbitrators and one umpire (the umpire not being a member of the tribunal).[82] According to the plaintiffs, by providing that the third arbitrator shall act as an umpire, the parties had made their own arrangements on the procedure for the constitution of the arbitral tribunal, which superseded the procedure under Art 12(5) of the ICC rules.[83]

4.47 The court noted that the arbitration agreement was silent as to the role and function of the "umpire".[84] Unlike the position in English and Hong Kong law, the IAA does not contain any provision as to the role and function of an umpire. There is, therefore, a departure in Singapore law from the umpire system and as such any reference to the English Arbitration Act or English decisions would not be proper. In the court's view, the parties had clearly agreed that the tribunal would be composed of three arbitrators in case they were unable to agree on a sole arbitrator, and that the tribunal was to be constituted in accordance with the ICC rules.[85] Article 12(5) of the ICC rules provides that the third arbitrator shall act as president of the tribunal. Both the ICC rules and the Model Law envisage decision-making by majority. There is, therefore, an inconsistency and incompatibility between these Rules and the IAA and the role of the "umpire" as understood under English law.[86] Therefore, the arbitration agreement ought to be interpreted such that the third arbitrator is intended to act as a chairman or president. In doing so, the court gave no legal effect to the word "umpire".[87]

4.48 This decision reminds all that the use of old forms or the adoption of clauses culled from English contract precedents may give rise to unnecessary procedural complications. Such issues could occur as was the case in *BNP v BNR* by the use of a term not known in the Model Law, or more commonly, by referring to the "Arbitration Act 1996" when the seat of arbitration is not in England. Lawyers should always bear in mind that the current legislative framework for international arbitration has departed from that in England and obliges our courts to

81 *BNP v BNR* [2018] 3 SLR 889 at [1].
82 *BNP v BNR* [2018] 3 SLR 889 at [6].
83 *BNP v BNR* [2018] 3 SLR 889 at [20].
84 *BNP v BNR* [2018] 3 SLR 889 at [10].
85 *BNP v BNR* [2018] 3 SLR 889 at [12].
86 *BNP v BNR* [2018] 3 SLR 889 at [16].
87 *BNP v BNR* [2018] 3 SLR 889 at [18].

put aside English judicial decisions as we develop our own jurisprudence consistent with those jurisdictions which have adopted the Model Law.

Termination of arbitration

Permanent anti-suit injunction against further action

4.49 The High Court re-explored the principles for granting and limiting permanent anti-suit injunctions in *BC Andaman Co Ltd v Xie Ning Yun*[88] ("*BC Andaman*"). The dispute arose in the context of the development of a country club in Phuket, Thailand ("Blue Canyon Project"). The fifth plaintiff, the Thai company Murex Co Limited ("Murex"), owned the Blue Canyon Country Club and various hotels, golf courses and condominiums.[89] It was owned or controlled by a complex network, including companies incorporated in the BVI and in Thailand, *inter alia* – the first plaintiff, BC Andaman Co Limited ("Andaman"); the second plaintiff, Legacy Resources Limited ("Legacy"); the third plaintiff, Ace United International Limited ("Ace"); and the fourth plaintiff, Legacy Resources (Thailand) Co Limited ("Legacy Thailand").[90] In 1998, two individuals (that is, the defendants) invested in Murex through Legacy. In 2002, the defendants entered into a joint venture with Deutsche Bank AG ("DB"), to develop the Blue Canyon Project and in 2005, Ace took out a loan from DB for the purposes of the Blue Canyon Project, which was secured by charges over the defendants' shares in Legacy and Legacy's shares in Ace ("Bridge Loan").[91] In 2006, various parties involved in the joint venture entered into an amended shareholder's agreement ("ARSHA") in relation to the Blue Canyon Project.[92] The ARSHA was, *inter alia*, signed by the defendants, Andaman, Legacy, Ace and Legacy Thailand, but not by Murex. The ARSHA contained an arbitration clause which provided for arbitration seated in Singapore under the SIAC rules[93] ("Arbitration Agreement"). Following assignment of the interest in the Bridge Loan and failure by Ace to repay it, a series of events led to the defendants

88 [2017] 4 SLR 1232.
89 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [4].
90 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [5]–[9].
91 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [10].
92 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [11].
93 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [13(f)].

being removed as directors of Legacy and Ace and their employment with Murex terminated.[94]

4.50 As a consequence of these disputes, in April 2014, the defendants started proceedings in the BVI High Court against 19 entities, including, *inter alia*, Murex, Andaman, Legacy and Ace.[95] In February 2015, the BVI High Court recorded a consent order which provided that the BVI Proceedings would be stayed in favour of arbitration.[96] The defendants had in July 2014 also commenced proceedings in Bangkok against 12 defendants, including Murex.[97] Following the BVI High Court consent order, in May 2015, the defendants commenced SIAC Arbitration Proceedings in Singapore against various entities, including Legacy and Ace.[98] In 2016, following an order by the tribunal ordering them to pay the costs of the BVI Proceedings, the defendants asked for the discontinuation of the arbitration. The tribunal declared the proceedings closed and issued its Final Award dismissing the defendant's claims with prejudice.[99] Finally, in June 2016, after the arbitration was closed but before the Final Award was rendered, the defendants commenced new proceedings in Bangkok, this time against all the plaintiffs, as well as other entities. This led to the plaintiffs initiating proceedings in the Singapore High Court seeking a permanent anti-suit injunction to restrain the defendants from pursuing the two Thai proceedings, as well as any other proceedings in breach of the Arbitration Agreement, and a declaration that all claims arising out of or in connection with the Blue Canyon Country Club in Phuket had been dismissed with prejudice in the Final Award.[100]

4.51 Quentin Loh J explored the law on anti-suit injunctions and the applicable principles. In particular, anti-suit injunctions are not directed against the foreign court or foreign proceedings, but against the party pursuing foreign proceedings, and that such remedy must be exercised with caution.[101] The relevant factors which must be taken into consideration are whether Singapore courts have jurisdiction over the defendant, whether Singapore is the natural forum for the resolution of the dispute, whether the foreign proceedings are vexatious or

94 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [1]–[15].
95 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [17].
96 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [21].
97 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [24].
98 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [29].
99 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [37]–[38].
100 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [39].
101 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [54(d)].

oppressive, whether an anti-suit injunction would cause any injustice to the defendant, and whether the commencement of the foreign proceedings is in breach of any agreement between the parties.[102]

4.52 Regarding Legacy and Ace, Loh J found that the defendants in commencing the Second Thai Proceedings almost immediately after the SIAC Arbitration Proceedings had been declared closed was unconscionable and justified the grant of a permanent anti-suit injunction.[103] In addition, the injunctions could also be granted to protect Legacy's and Ace's contractual rights to enforce the Arbitration Agreement. Loh J also granted the permanent anti-suit injunctions requested by Andaman and Legacy Thailand, to protect their rights under the Arbitration Agreement,[104] and noted that a court will readily grant an anti-suit injunction to restrain proceedings brought in breach of an arbitration agreement, unless the contrary is justified by "strong reasons".[105] The court, however, refused to grant the injunction to Murex, which was not a party to the ARSHA or to the consent order in the context of the BVI Proceedings.[106] Murex also did not enjoy sufficient privity of interest with Andaman, Legacy, Ace and Legacy Thailand in the SIAC arbitration to entitle it to invoke the Final Award to resist claims by the defendants.[107] In addition, the facts pointed to Thailand as the natural forum to hear the case between the defendants and Murex and granting the anti-suit injunction would violate the principle of comity.[108] Finally, the court refused to declare that all claims arising out of or in connection with the Blue Canyon Country Club had been dismissed with prejudice in the Final Award, because such request was too broad and unnecessary in light of the fact that it had granted the requested anti-suit injunctions, except to Murex.[109]

4.53 This decision shows that Singapore courts are prepared and would grant anti-suit injunctions in aid of arbitration proceedings seated in Singapore, even when such arbitrations have been discontinued as it was the case here. Whether the court would have reached the same decision if the arbitration had been discontinued "without prejudice" remains open. The decision also draws the line between anti-suit injunctions based on the protection of a party's substantive right under an arbitration agreement, and those protecting against vexatious or oppressive foreign proceedings. The facts of this

102 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [56].
103 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [60].
104 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [62].
105 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [65].
106 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [102]–[107].
107 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [98].
108 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [107].
109 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [110].

decision also highlight the danger of parties commencing and thereafter withdrawing their claims. The court in this case made specific mention of the fact that the defendants had sought to discontinue the proceedings and yet left the issue of "whether the proceedings should be terminated 'with prejudice' was a matter for the Tribunal".[110] There is some uncertainty as to the question of whether a termination of arbitration should be considered to be with or without prejudice against the party who had commenced the arbitration, ought to be properly decided by the tribunal seized with the arbitration or by any subsequent court or tribunal before which that matter is then taken to.

Setting aside an award under International Arbitration Act

Setting aside of investor–state award

4.54 The first arbitral award arising from an investor–state dispute sought to be set aside came before Kannan Ramesh J in *Kingdom of Lesotho v Swissbourgh Diamond Mines Pty Ltd*[111] ("*Lesotho v Swissbourgh*").

4.55 The Kingdom of Lesotho ("Lesotho") is a member of the Southern African Development Community ("SADC"), which is an inter-governmental socio-economic organisation of Southern African States created by treaty on 17 August 1992 ("SADC Treaty"). The SADC Treaty also established a tribunal ("SADC Tribunal"). On 18 August 2006, SADC signed a Protocol on Finance and Investment ("Investment Protocol"). Article 28 of Annex 1 to the Investment Protocol ("Annex 1") provided for an option to refer investment disputes to international arbitration after the exhaustion of local remedies.[112]

4.56 The nine defendants in *Lesotho v Swissbourgh* commenced proceedings before the SADC Tribunal in 2009 for alleged expropriation of their mining leases by Lesotho. However, the SADC Tribunal was dissolved by a resolution of the SADC members before it could rule on the defendants' claim. Subsequently, in 2012, the defendants commenced international arbitration proceedings against Lesotho under Annex 1 before an *ad hoc* tribunal constituted under the auspices of the Permanent Court of Arbitration ("PCA Tribunal"). They contended that Lesotho, by contributing to or facilitating the shutting down ("shuttering") of the SADC Tribunal and not providing alternative

110 *Eg*, *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [61].
111 [2017] SGHC 195.
112 *Kingdom of Lesotho v Swissbourgh Diamond Mines Pty Ltd* [2017] SGHC 195 at [2].

means for the defendants' expropriation contentions to be heard, breached its obligations under the SADC Treaty. The PCA Tribunal rendered a partial final award on jurisdiction and merits on 18 April 2016 ("Award") and a final award on costs on 20 October 2016, both in favour of the defendants.[113] Lesotho applied to set aside the Award in its entirety, principally contesting the PCA Tribunal's jurisdiction and arguing that the Award exceeded the terms or scope of the submission to arbitration. The court found in favour of Lesotho with regard to five of the six jurisdictional objections raised.[114]

4.57 As a preliminary point, the learned judge found that the court had no jurisdiction to set aside the Award on the basis of s 10(3) of the IAA, reaffirming the position in *AQZ v ARA*,[115] in which the High Court had concluded that ss 10(3) of the IAA and/or 16(3) of the Model Law do not apply to an award that deals with the merits of the dispute, even if only marginally.[116] However, the court has jurisdiction to determine Lesotho's jurisdictional challenges under Art 34(2)(*a*)(iii) of the Model Law.[117] His Honour also accepted that the court must apply a *de novo* standard of review even in relation to an investor–state arbitration.[118] This was also the approach adopted by the Court of Appeal in *Sanum Investments Ltd v Government of the Lao People's Democratic Republic*[119] ("*Sanum v Laos*").

4.58 As the claims made before the PCA Tribunal was not the expropriation of their mining rights, the court ruled that the defendants' "secondary" right to refer disputes to the SADC Tribunal, which it said was stifled by the shuttering of the SADC Tribunal, was not an "investment" for the purposes of Art 28 of Annex 1. In the court's view, such a right was not part of the bundle of rights created by the defendants' mining leases as the defendants had acquired the leases before the existence of the SADC Treaty and the establishment of the SADC Tribunal. Therefore, the advantage of treaty protection and access to the SADC Tribunal was not part of their investment.[120]

113 *Kingdom of Lesotho v Swissbourgh Diamond Mines Pty Ltd* [2017] SGHC 195 at [3].
114 *Kingdom of Lesotho v Swissbourgh Diamond Mines Pty Ltd* [2017] SGHC 195 at [4].
115 [2015] 2 SLR 972.
116 *AQZ v ARA* [2015] 2 SLR 972 at [65]–[71].
117 *Kingdom of Lesotho v Swissbourgh Diamond Mines Pty Ltd* [2017] SGHC 195 at [67].
118 *Kingdom of Lesotho v Swissbourgh Diamond Mines Pty Ltd* [2017] SGHC 195 at [87].
119 [2016] 5 SLR 536.
120 *Kingdom of Lesotho v Swissbourgh Diamond Mines Pty Ltd* [2017] SGHC 195 at [228].

4.59 The court also found that the defendants had not exhausted all available local remedies before commencing the PCA Arbitration. The court accepted that an Aquilian action for pure economic loss exists under Lesotho law. Even if it was unclear whether an Aquilian action was in fact available in a case such as the one in contention, the defendants had failed to discharge their burden of proving that it would have been unavailable or ineffective. The court also rejected the defendants' contention of partiality of Lesotho's courts, noting that they had found in the defendants' favour in past proceedings.

4.60 The court also found that as Swissbourgh and five other defendants would not be "investors" for the purposes of Art 28 of Annex 1 as they were in fact Lesotho nationals and entities, there was a failure to meet the *ratione personae*.

4.61 The learned judge undertook in his decision an extensive review of investment law jurisprudence and authorities, showing that Singapore courts are willing to seriously deal with cases involving complex public international law or investment law issues. However, the decision revives the debate on whether national courts, particularly a Singapore court, should be able to review investor–state tribunals' decisions on investment treaty claims. In *Lesotho v Swissbourgh*, apart from the tribunal's choice of Singapore as the seat of the arbitration, the matter had no connection to Singapore. As was the case in *Sanum v Laos*, no consideration was given to the fact that, as earlier observed by the author,[121] Singapore courts' power to review arbitral awards when the seat of the arbitration is Singapore is based on the IAA, which itself incorporates the Model Law, an instrument which applies only to international *commercial* arbitration. As the relationship between Lesotho and the claimants in the PCA Arbitration arose (if at all) out of the SADC Treaty and the derivative protocol (Annex 1), it would be a stretch to consider the same as a "relationship of a commercial nature".[122]

4.62 In both the *Sanum v Laos* and the *Lesotho v Swissbourgh* decisions, it was the State that had applied to the Singapore courts seeking relief and thereby submitting to the Singapore court's jurisdiction. The situation could well be different if the application were made by the investor-parties. Such an issue would not arise in the context of arbitrations under the rules of the International Centre for Settlement of Investment Disputes ("ICSID"), as the framework

121 See (2016) 17 SAL Ann Rev 89 at 93, para 4.9.

122 See Art 1(1) and Art 1(1), fn 1 of the United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: With Amendments as Adopted in 2006* (United Nations, 2008); see also the long title and s 5(2)(*b*)(ii) of the International Arbitration Act (Cap 143A, 2002 Rev Ed).

provided for under the ICSID Convention is self-contained, preventing any review on the merits of ICSID awards made by the courts of any Member State.

Award containing decisions beyond agreed issues

4.63 In *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd*[123] ("*Midea v Tornado*"), the dispute concerned an International Exclusive Distribution Agreement on Midea Brand Home Appliances ("MBA") between the parties. The tribunal's award contained findings on and related to cl 4.2 of the MBA, an issue which had not been submitted to it by the parties.

4.64 Chua Lee Ming J found that the tribunal had exceeded its jurisdiction pursuant to Art 34(2)(*a*)(iii) of the Model Law.[124] Neither the Notice of Arbitration, nor the pleadings or the parties' agreed list of issues referred to any breach of cl 4.2 of the MBA. The tribunal's findings on this clause were unrelated to and unnecessary for the determination of the issues set out in the parties' agreed list of issues. In addition, the tribunal had acted in breach of the procedure agreed between the parties (Art 34(2)(*a*)(iv) of the Model Law). The parties' agreed list of issues constituted a part of the parties' agreed arbitral procedure, since it was submitted to the tribunal pursuant to the tribunal's Procedural Order No 1. It was clearly contemplated that the dispute would be framed by the list of issues. Further, Chua J also found that the award ought to be set aside on the basis of Art 34(2)(*a*)(ii) of the Model Law and s 24(*b*) of the IAA. By making its findings on cl 4.2 without giving notice to the parties, the tribunal acted in breach of the rules of natural justice. Finally, his Honour also set aside the tribunal's other findings which were linked to and flowed from the tribunal's findings on cl 4.2. The court also refused to remit the findings set aside to the tribunal, considering that this was not appropriate in such a case, as they concerned an issue which was never submitted to the tribunal in the first place.[125]

4.65 Although Singapore courts have rarely set aside awards, they would not hesitate to do so when the parties' fundamental right to delimit the tribunal's jurisdiction is breached, which is rightly so. An interesting observation is the weight given by the court to the parties' agreed list of issues, which was considered as a part of the procedure

123 [2017] SGHC 193.

124 *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd* [2017] SGHC 193 at [60].

125 *GD Midea Air Conditioning Equipment Co Ltd v Tornado Consumer Goods Ltd* [2017] SGHC 193 at [69]–[70].

agreed between the parties. Agreed lists of issues or similar documents are increasingly common in international arbitration and a very useful tool for tribunals to keep in sight the framework of the dispute, especially in complex cases.

Failure to determine whether International Arbitration Act or Arbitration Act is applicable not a ground for setting aside

4.66 The case of *Prometheus Marine Pte Ltd v King, Ann Rita*[126] came first before the High Court and then went on appeal.[127]

4.67 Prometheus, against whom the award was made, sought to challenge the award on the basis that the tribunal had not stated in the award whether the arbitration was one under the AA or the IAA and as such the tribunal had "delocalised" the arbitration and therefore the award would not be enforceable in Singapore as being contrary to public policy.[128] The Court of Appeal clarified that an arbitration is "delocalised" when it is detached from the control of the law of the seat of arbitration and emphasised that Singapore courts do not accept that arbitral proceedings may "stand free from control of the national legal system of the seat of the arbitration".[129] In any case, this was not the issue here, since Prometheus accepted that the seat of the arbitration was Singapore and that the arbitration was, therefore, governed either by the IAA or the AA.[130] As the arbitrator had found that the respondent was not resident in Singapore, the Court of Appeal considered that it was "probably *implicit*" [emphasis in original] that the IAA was applicable.[131] The court also noted that in any case, the fact that an arbitrator has failed to determine whether the IAA or the AA is applicable is not *per se* a valid ground for setting aside an arbitral award under the IAA or the AA.[132]

4.68 The Court of Appeal considered all the grounds and allegations made on behalf of Prometheus and found no merit in any of them and dismissed the appeal. The Court of Appeal further reaffirmed that an arbitral tribunal's errors of law or fact, "however irrational", are not sufficient ground to set aside an award, emphasising the following:[133]

126 [2017] SGHC 36.
127 *Prometheus Marine Pte Ltd v King, Ann Rita* [2018] 1 SLR 1.
128 *Prometheus Marine Pte Ltd v King, Ann Rita* [2018] 1 SLR 1 at [44].
129 *Prometheus Marine Pte Ltd v King, Ann Rita* [2018] 1 SLR 1 at [46].
130 *Prometheus Marine Pte Ltd v King, Ann Rita* [2018] 1 SLR 1 at [47].
131 *Prometheus Marine Pte Ltd v King, Ann Rita* [2018] 1 SLR 1 at [48].
132 *Prometheus Marine Pte Ltd v King, Ann Rita* [2018] 1 SLR 1 at [49].
133 *Prometheus Marine Pte Ltd v King, Ann Rita* [2018] 1 SLR 1 at [57].

> [A] critical foundational principle in arbitration is that the parties choose their adjudicators; but just as the parties enjoy many of the benefits of party autonomy, they must also accept the consequences of their choices, which is reflected in the policy of minimal curial intervention in arbitral proceedings …

This statement may seem trite, but is, nevertheless, a necessary reminder, as it is still not rare in practice that parties rely on natural justice or public policy arguments as an attempt to revisit tribunals' findings on the merits.

4.69 This case is one of the rare cases before a Singapore court where counsel were chastised and made to bear costs personally for mounting allegations of fraud and corruption against the arbitrator and bias against the judge without any basis.

High threshold for breach of natural justice

4.70 It is settled law that the threshold for setting aside an award on the ground of breach of natural justice under s 24(*b*) of the IAA is a high one. This was reaffirmed by the Singapore High Court in *Zynergy Solar Projects & Services Pvt Ltd v Phoenix Solar Pte Ltd*.[134] The plaintiff contended that the sole arbitrator had breached the rules of natural justice by failing to give regard to some of its submissions and arguments. Ang J recalled that a party challenging an award on the ground of breach of natural justice must establish (a) the rule of natural justice that was breached, (b) how this rule was breached, (c) whether there was a causal link between the breach and the making of the award, and (d) how it prejudiced the applicant's rights.[135] The threshold for setting aside an award on the ground that the arbitrator has not considered an important pleaded issue is high and may usually only be reached by a "clear and virtually inescapable" inference.[136] In the case at hand, the arbitrator had considered the plaintiff's arguments, and had eventually rejected them. There was no basis to draw the inference that the arbitrator had failed to consider the plaintiff's submissions.[137]

134 [2017] SGHC 223.

135 *Zynergy Solar Projects & Services Pvt Ltd v Phoenix Solar Pte Ltd* [2017] SGHC 223 at [9].

136 *Zynergy Solar Projects & Services Pvt Ltd v Phoenix Solar Pte Ltd* [2017] SGHC 223 at [9].

137 *Zynergy Solar Projects & Services Pvt Ltd v Phoenix Solar Pte Ltd* [2017] SGHC 223 at [11].

Domestic arbitration under Arbitration Act

Rule against hearsay in arbitration

4.71 The grounds for setting aside domestic awards are provided for in s 48 of the AA and are largely similar to the setting aside grounds under the IAA and the Model Law.

4.72 The defendant in *BNX v BOE*[138] had built a mixed-use development, in which a business would be housed and operated. In this context, the defendant had given undertakings to the Urban Redevelopment Authority ("URA") to respect certain restrictions with regard to the use of the business facilities. Subsequently, the plaintiff and the defendant entered into a sale and purchase agreement ("SPA") by which the plaintiff took over ownership of the business as a going concern and the defendant also granted to the plaintiff a sublease of the premises from which the business operated. After the conclusion of the SPA, the plaintiff became aware for the first time of URA's restrictions regarding the use of the facilities. The plaintiff accused the defendant of wrongfully failing to disclose these restrictions during the negotiations of the SPA, and the dispute was eventually referred to arbitration. The tribunal dismissed the plaintiff's claim in its entirety.[139]

4.73 Vinodh Coomaraswamy J rejected the plaintiff's contentions that the tribunal exceeded its jurisdiction by deciding issues that the parties did not submit to arbitration, breached the rules of natural justice, *inter alia*, by admitting and giving weight to hearsay evidence, and that the award was contrary to public policy for various reasons.[140] The decision is instructive in a number of aspects.

4.74 The plaintiff complained, *inter alia*, that the tribunal had breached the rules of natural justice by admitting and giving weight to hearsay evidence, more specifically to evidence from the defendant as to what the project architects had advised with regard to URA's use restrictions, and that, for the same reason, upholding the award would be contrary to the public policy of Singapore.[141] The requirement that oral evidence must be direct evidence is to be found in s 62 of the Evidence Act.[142] Section 2(1) of the Evidence Act expressly provides that Pt II of the said Act (which contains s 62) does not apply to arbitration. While the learned judge did not formally exclude that there is a rule

138 [2017] SGHC 289.
139 *BNX v BOE* [2017] SGHC 289 at [1]–[4].
140 See *BNX v BOE* [2017] SGHC 289 at [50]–[72], [73]–[92] and [93]–[110].
141 *BNX v BOE* [2017] SGHC 289 at [75].
142 Cap 97, 1997 Rev Ed.

against hearsay as part of the common law of evidence in Singapore, and that such rule may apply to arbitration, at the same time, his Honour noted this:[143]

> [There is indeed] an almost insurmountable argument to be made that in all arbitrations conducted with Singapore as the seat, the tribunal is empowered to receive all relevant evidence, with the concerns which underlie the exclusionary rules at common law such as the hearsay rule going only to weight and not to admissibility …

While the learned judge did not go further to rule on this, he found that even "generously" assuming that a rule against hearsay would be relevant in the case at hand, it was, nevertheless, not breached in this instance.[144] In the court's view, an indirect statement is inadmissible only when it comes to prove the truth of the facts in the statement, but not when it is merely adduced to establish that the statement was made.[145] In the present case, the tribunal had not found that the advice given by the architects to the defendant was correct. It had merely relied on the defendant's evidence of that advice to establish that such advice was given, and that the defendant honestly *believed* it to be correct.[146]

4.75 Another interesting question raised, but not resolved, by the decision is the applicable threshold for setting aside a domestic award on public policy grounds. The plaintiff contended that the threshold is lower in domestic arbitration, and that a domestic award may be set aside on the basis of a domestic standard of public policy, wider than the international standard applicable in the context of international arbitration. Unfortunately, this question was left open by the court as it found that the plaintiff's submissions that the award was contrary to public policy were misconceived, whatever the applicable threshold.[147]

Commencing court action pending setting aside of award – Abuse of process

4.76 The case of *BNX v BOE* also dealt with the defendant's cross-application to strike out, on the basis of the doctrine of *res judicata*, a court action commenced by the plaintiff against the defendant pending the setting aside application, and concerning not the SPA, but the sublease for the premises. The learned judge reiterated that the words "*res judicata*" comprise three principles – cause of action estoppel, issue estoppel, and the extended doctrine of *res judicata* or abuse of

143 *BNX v BOE* [2017] SGHC 289 at [83].
144 *BNX v BOE* [2017] SGHC 289 at [83].
145 *BNX v BOE* [2017] SGHC 289 at [85].
146 *BNX v BOE* [2017] SGHC 289 at [86].
147 *BNX v BOE* [2017] SGHC 289 at [97].

process doctrine.[148] While cause of action estoppel and issue estoppel operate respectively to prevent a party from asserting or denying against another party the existence of a cause of action, when it has previously been decided in proceedings between the same parties by a court of competent jurisdiction, and to preclude a party from relitigating an issue, the abuse of process doctrine has a wider application and operates to bar a litigant from litigating matters even though those matters have *not* before been determined by a court of competent jurisdiction. In the context of the abuse of process doctrine, the focus is on whether the party is raising an issue which it *ought* to have raised in previous proceedings.[149]

4.77 In the present case, the court did not accept the plaintiff's argument that the SPA and the lease were wholly independent agreements, finding that the lease arose directly from the express terms of the SPA and that the court action concerned the same economic loss than the loss claimed in the context of the arbitration.[150] The plaintiff's action was in fact a collateral attack on the award and ought to be struck out for abuse of process.[151]

Enforcement of foreign awards

Error on governing law not a ground to resist enforcement of foreign award

4.78 In *Quanzhou Sanhong Trading Limited Liability Co Ltd v ADM Asia-Pacific Trading Pte Ltd*[152] ("*Quanzhou v ADM*"), the defendant ("ADM") applied to set aside an order granting leave to the plaintiff ("Quanzhou") to enforce a CIETAC[153] award obtained in the context of an arbitration seated in Beijing. In the arbitration, Quanzhou had argued that the governing law of the contract was the law of the People's Republic of China ("PRC law"), while ADM's case was that it should be English law. The tribunal had decided that one section of the contract was governed by English law, and the rest by PRC law.[154] ADM sought to

148 *BNX v BOE* [2017] SGHC 289 at [123].
149 *BNX v BOE* [2017] SGHC 289 at [128].
150 *BNX v BOE* [2017] SGHC 289 at [136].
151 *BNX v BOE* [2017] SGHC 289 at [137].
152 [2017] SGHC 199.
153 "CIETAC" stands for "China International Economic and Trade Arbitration Commission".
154 *Quanzhou Sanhong Trading Limited Liability Co Ltd v ADM Asia-Pacific Trading Pte Ltd* [2017] SGHC 199 at [12].

resist enforcement on the basis of ss 31(2)(*d*) and 31(4)(*b*) of the IAA.[155] ADM did not dispute that errors of fact or law are normally not sufficient to set aside an arbitral award, but argued that where the issue is related to governing law, an error by an arbitral tribunal would cause it to exceed its jurisdiction because it would amount to disregarding the parties' express agreement on the governing law. Chua J disagreed with this submission, reiterating that "[an] arbitral tribunal does not exceed its jurisdiction just because it comes to a wrong conclusion on an issue that was within the scope of the submission to arbitration"[156] and there was no reason to treat issues related to governing law differently. ADM's argument that enforcement of the award would be contrary to the public policy of Singapore because the arbitral tribunal had exceeded its jurisdiction was similarly rejected.[157]

4.79 This decision, in line with the previous decision in *Quarella SpA v Scelta Marble Australia Pty Ltd*,[158] in which a similar submission was rejected, makes clear that Singapore courts will not treat issues of governing law differently from other issues when it comes to resisting enforcement or setting aside awards. As noted by Chua J, it was undisputed in this case that the question of the governing law of the contract was an issue which was within the scope of the arbitral tribunal's jurisdiction, and it is settled law that errors of fact or law are not sufficient to resist enforcement.[159] The court's decision in *Quanzhou v ADM* is consistent with the strict approach adopted by Singapore courts in previous cases: the threshold to resist enforcement of a foreign award under the IAA and the Model Law is not easily reached, in accordance with the principle of minimal court intervention in international arbitration.

155 *Quanzhou Sanhong Trading Limited Liability Co Ltd v ADM Asia-Pacific Trading Pte Ltd* [2017] SGHC 199 at [9].

156 *Quanzhou Sanhong Trading Limited Liability Co Ltd v ADM Asia-Pacific Trading Pte Ltd* [2017] SGHC 199 at [14].

157 *Quanzhou Sanhong Trading Limited Liability Co Ltd v ADM Asia-Pacific Trading Pte Ltd* [2017] SGHC 199 at [21].

158 [2012] 4 SLR 1057; see also (2012) 13 SAL Ann Rev 59 at 65–66, paras 4.21–4.25.

159 *Quarella SpA v Scelta Marble Australia Pty Ltd* [2012] 4 SLR 1057 at [13].