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4. ARBITRATION

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4.1 2022 is best described as a year of contrasts. On the one hand, there was optimism as Singapore returned to normalcy with more jurisdictions lifting COVID-19 pandemic restrictions and international business travel picking up speed. On the other hand, the overall economic outlook was dampened by the uncertainties in Europe and rising inflationary pressures.

4.2 The practice of international arbitration held its own in 2022 despite the global economic headwinds. The Hong Kong International Arbitration Centre reported a 24.2% increase in arbitration case filings in 2022, up from 277 in 2021 to 344 in 2022.[1] While the Singapore International Arbitration Centre ("SIAC") reported a decrease in its overall case filings in 2022, its new case filings for 2023 are off to a strong start.[2] The London Court of International Arbitration reported 333 referrals for its services in 2022, including 293 referrals for LCIA arbitration.[3] The International Chamber of Commerce ("ICC") has not released its 2022 caseload figures as at the time of this update.

1 The Hong Kong International Arbitration Centre's detailed 2022 statistics may be found at: Hong Kong International Arbitration Centre, "Statistics: 2022 Statistics" https://www.hkiac.org/about-us/statistics (accessed May 2023).

2 The Singapore International Arbitration Centre's announcement of its 2022 statistics may be found at: Singapore International Arbitration Centre, "SIAC Announces 2022 Statistics; Q1 2023 Sees High Filings" (4 April 2023) https://siac.org.sg/siac-announces-2022-statistics-q1-2023-sees-high-filings (accessed May 2023). The institution reported 357 new case filings in 2022, down from 469 in 2021. However, the first quarter of 2023 saw a record 332 new cases (including related cases) filed.

3 The London Court of International Arbitration published its Annual Casework Report for 2022 on 26 May 2023. The announcement may be found at: London Court of International Arbitration, "LCIA News: Annual Report on 2022, Updates on the LCIA Court and 'Tylney on Tour' 2023" https://www.lcia.org/News/lcia-news-annual-report-on-2022-updates-on-the-lcia-court-and.aspx (accessed June 2023).

4.3 A wide range of arbitration-related applications were heard by the Singapore courts in 2022, with the majority being – once again – applications to set aside arbitration awards under the International Arbitration Act 1994[4] ("IAA").[5] The Singapore courts also considered a number of interesting issues in 2022 relating to the jurisdiction of the tribunal, the applicable law for the determination of pre-award arbitrability and the enforcement of foreign emergency arbitration awards.

I. Stay of court proceedings

A. Discretionary stay under the Arbitration Act 2001

4.4 Section 6 of the IAA and s 6 of the Arbitration Act 2001[6] ("AA") set out the court's powers to order a stay of court proceedings in favour of arbitration. The key difference between these two provisions is that a stay under the IAA is mandatory ("The court to which an application has been made in accordance with subsection (1) is to make an order … staying the proceedings"),[7] while the grant of a stay under the AA is subject to the court's discretion ("The court to which an application has been made in accordance with subsection (1) may, if the court is satisfied … make an order … staying the proceedings").[8] In particular, in a domestic arbitration, the court may refuse to stay proceedings when it is satisfied that there is "sufficient reason why the matter should not be referred in accordance with the arbitration agreement".[9]

4.5 In *CSY v CSZ*,[10] CSY was an insolvent company while CSZ was the company's external auditor from 2003 to 2020. In the course of administering the company's affairs, the judicial managers discovered serious irregularities in CSY's accounts since at least 2010. In particular, the judicial managers considered that CSY's audited financial statements from financial year ("FY") 2014 to FY2019 were materially misstated and did not give a true and fair view of CSY's financial position and performance.

4 2020 Rev Ed.
5 While there were fewer reported judgments in 2022 compared to the previous year, there was a higher proportion of setting-aside applications in 2022. In 2021, setting-aside applications represented 60% of all reported cases (21 out of 35); this increased to 66% (18 out of 27) in 2022.
6 2020 Rev Ed.
7 International Arbitration Act 1994 (2020 Rev Ed) s 6(2).
8 Arbitration Act 2001 (2020 Rev Ed) s 6(2).
9 Arbitration Act 2001 (2020 Rev Ed) s 6(2)(*a*).
10 [2022] 2 SLR 622.

4.6 CSY commenced an action in the General Division of the High Court ("High Court (General Division)") against CSZ alleging various breaches of contractual duties, as well as breaches of duty of care in the performance of the company's audits between 2014 and 2019.

4.7 The parties' contractual relationship was set out in a series of engagement letters, with one executed for each FY. The engagement letters between FY2014 and FY2019 contained different dispute resolution terms: while the FY2018 and FY2019 engagement letters provided for disputes to be referred to arbitration at the SIAC, the earlier engagement letters contained either an exclusive jurisdiction clause in favour of the Singapore courts or no dispute resolution mechanism at all.

4.8 CSZ applied under s 6 of the AA to stay the disputes in relation to FY2018 and FY2019, arguing that the engagement letters for these years contained an arbitration clause. Concurrently, CSZ sought a case management stay of the disputes in relation to FY2014 to FY2017 pending completion of the arbitration.

4.9 At first instance, the High Court granted CSZ's application. In coming to its decision, the court took into account the parties' arbitration agreement (which the court considered ought to be upheld), the possibility of separating the evidence for FY2018 and FY2019 from the remaining years and the stage of the High Court proceedings. The High Court was also persuaded by CSY's concession that the causes of action and factual circumstances behind the audit for each FY were distinct.

4.10 On appeal, the Court of Appeal reversed the lower court's decision. The Court of Appeal noted that the grant of a stay under s 6 of the AA is discretionary and when assessing whether a stay ought to be granted, the court would consider and balance (a) a plaintiff's right to choose whom he wishes to sue and where; (b) the court's desire to prevent a plaintiff from circumventing an arbitration clause; and (c) the court's inherent power to manage its own processes to prevent an abuse of process, and to ensure the efficient and fair resolution of disputes.[11]

4.11 The factors to be taken into account in the assessment exercise include (a) the existence of related actions and disputes; (b) whether there is any overlap in the issues before the court and in the prospective arbitration; (c) the likely shape of the process for the resolution of the entire dispute; (d) the likelihood of injustice in having the same witnesses deal with the same factual issues before two different *fora*; (e) the likelihood of disrepute to the administration of justice from inconsistent

11 *CSY v CSZ* [2022] 2 SLR 622 at [24].

findings across different *fora*; (f) the relative prejudice to the parties; and (g) the possibility of an abuse of process.[12]

4.12 The Court of Appeal found that there was a significant overlap between the issues in the FY2014 to FY2017 dispute and the FY2018 and FY2019 dispute to the extent that the disputes were nearly identical, and the evidence to be led would likely be factually sequential and interconnected. Further, having regard to the parties' long-running and continuous relationship, the arbitral tribunal – even if only seised of the dispute in respect of the FY2018 and FY2019 audits – might need to consider and express views on the parties' entire relationship period, including FY2014 to FY2017. There was therefore a real risk of inconsistent findings between the court action and the prospective arbitration, which consequently raised the attendant risk of bringing disrepute to the administration of justice.[13]

4.13 While the dispute resolution mechanism in the engagement letters was changed to arbitration in FY2018 and FY2019, the Court of Appeal did not consider this to be indicative of an intention to resolve disputes spanning multiple years in two different *fora*.[14]

4.14 The Court of Appeal therefore concluded that there was sufficient reason to refuse a stay of the FY2018 and FY2019 disputes in favour of arbitration. In light of this decision, there was also no basis for the grant of a case management stay for the FY2014 to FY2017 disputes.

4.15 This is a rare case where the court exercised its discretion not to stay proceedings despite the existence of an arbitration agreement between the parties. The Court of Appeal's analysis shows that while the parties' agreement to arbitrate is an important consideration, that agreement must be viewed against the particular facts of the dispute. This case also provides an insight into how the court assesses the various competing considerations when determining whether a stay under s 6 of the AA should be granted. The outcome of this case would have been different if the *lex arbitri* was the IAA. Parties in a domestic contract may sometimes wish to consider whether to opt for the IAA rather than the AA, having regard to the different provisions in both pieces of legislation.

12 *CSY v CSZ* [2022] 2 SLR 622 at [25].
13 *CSY v CSZ* [2022] 2 SLR 622 at [27]–[35].
14 *CSY v CSZ* [2022] 2 SLR 622 at [36].

II. Jurisdiction of the tribunal

4.16 An arbitral tribunal's power to decide a dispute is determined by the jurisdiction conferred on it by the parties through the arbitration agreement. Where there is a dispute as to whether a given dispute is within the tribunal's jurisdiction, the principle of *kompetenz-kompetenz* applies and empowers the tribunal to decide on its own jurisdiction.

4.17 Sometimes a dispute may arise as to whether or when a tribunal's jurisdiction has been terminated. This was the case in *York International Pte Ltd v Voltas Ltd*,[15] where the High Court (General Division) had to determine whether an arbitral tribunal had the jurisdiction to issue a further award.

4.18 The parties had participated in an arbitration which culminated in the issuance of an award titled "Final Award" in 2014 ("the 2014 Award"). In the 2014 Award, the tribunal found York International Pte Ltd ("York") liable to reimburse Voltas Ltd ("Voltas") for certain third-party claims ("the RWS claims"). However, as Voltas did not – at the time the 2014 Award was due to be issued – appear to have paid for the RWS claims, the tribunal framed its order for reimbursement of the RWS claims as being conditional upon Voltas making payment to the third party.

4.19 Voltas subsequently settled the RWS claims at a sum lower than what had been claimed in the arbitration. It then sought reimbursement of the reduced sum from York. However, York claimed that Voltas had failed to provide sufficient evidence that it had indeed satisfied the RWS claims and refused to make payment to Voltas.

4.20 In August 2020, Voltas applied to the tribunal for a further award to determine whether Voltas had in substance paid for the RWS claims, the amount paid and the sum to be reimbursed by York. York strongly objected to the steps taken by Voltas, arguing that the arbitrator was *functus officio* in relation to the arbitration and had no jurisdiction to issue any further award. The tribunal issued a decision ("the 2021 Decision") holding that it did retain jurisdiction to issue a further award and gave directions for the filing of submissions.

4.21 York applied under s 21(9) of the AA to challenge the tribunal's ruling on jurisdiction. The High Court allowed the application, agreeing that the tribunal was indeed *functus officio* after issuing the 2014 Award. The court, applying the principles in *ZCCM Investment Holdings plc v*

15 [2022] SGHC 153.

Kansanshi Holdings plc,[16] held that the 2014 Award was dispositive of all the issues in the arbitration and the tribunal was consequently *functus officio*.[17] It was clear from the 2014 Award that the tribunal intended to fully resolve the parties' disputes – on both liability and quantum – and did do so by issuing a conditional award in the form of the 2014 Award[18] and without making any express reservation of jurisdiction.[19]

4.22 Voltas also argued that York was not entitled to make an application under s 21(9)(*a*) of the AA as the 2021 Decision was not a ruling on a "preliminary question" as to whether the arbitrator had jurisdiction. Relying on the High Court decision of *Tan Poh Leng Stanley v Tang Boon Jek Jeffrey*,[20] Voltas contended that the "preliminary question" referred to in s 21(9)(*a*) of the AA referred only to "positive jurisdictional rulings made at the early or initial stages of the arbitral proceedings".[21] The court rejected this argument, holding that while parties are "generally obliged to raise jurisdictional challenges in a timely manner under ss 21(4) and 21(6), the overall architecture of s 21 recognises the tribunal's power and discretion to decide on a jurisdictional objection at *any* stage of the proceedings"[22] [emphasis in original], and there is no reason to limit the interpretation of the phrase "preliminary question" to only a ruling made at the early or initial stages of the arbitration.[23] The drafting history of Art 16(3) of the Model Law on International Commercial Arbitration[24] ("MAL"), upon which ss 21(8) and 21(9) of the AA were modelled, also makes it clear that the phrase "preliminary question" does not refer to a ruling made at the initial stages of the arbitration proceedings, and instead refers to an interim decision on the tribunal's jurisdiction that is issued separately from a decision on the substantive merits.[25]

4.23 The court also rejected Voltas's argument that it would be left without recourse if a further award was not issued, holding that the lack of further recourse "cannot itself be a basis for finding that the arbitrator retains jurisdiction to issue a Further Award".[26] In any event, the court

16 [2019] EWHC 1285.
17 *York International Pte Ltd v Voltas Ltd* [2022] SGHC 153 at [55].
18 *York International Pte Ltd v Voltas Ltd* [2022] SGHC 153 at [58]–[59].
19 *York International Pte Ltd v Voltas Ltd* [2022] SGHC 153 at [62].
20 [2000] 3 SLR(R) 847.
21 *York International Pte Ltd v Voltas Ltd* [2022] SGHC 153 at [24]–[25] and [28].
22 *York International Pte Ltd v Voltas Ltd* [2022] SGHC 153 at [34].
23 *York International Pte Ltd v Voltas Ltd* [2022] SGHC 153 at [35].
24 UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006).
25 *York International Pte Ltd v Voltas Ltd* [2022] SGHC 153 at [36]–[42].
26 *York International Pte Ltd v Voltas Ltd* [2022] SGHC 153 at [87].

noted that Voltas could still apply to enforce the 2014 Award, although difficulties could arise during the enforcement process.[27]

4.24 This case highlights the challenges that may be faced with conditional awards, not only in respect of disputes arising over whether the conditions that have been imposed have been satisfied but also in relation to enforcement. If circumstances require a conditional award to be issued, arbitrators and parties should carefully consider whether any safeguards should be put in place – such as a reservation of jurisdiction – so as to be able to resolve any disputes arising from the conditions.

4.25 An arbitrator's jurisdiction may also be challenged on the basis that the agreed procedure for the constitution of the arbitral tribunal was not complied with. In *Hunan Xiangzhong Mining Group Ltd v Oilive Pte Ltd*,[28] the parties had entered into a contract which provided for arbitration to be conducted in accordance with the SIAC arbitration rules "for the time being in force" and that the dispute was to be resolved by a tribunal consisting of "a single arbitrator agreed upon by both parties, or if so not agreed, by the chairman for the time being of SIAC".[29]

4.26 Disputes arose between the parties which led to Oilive Pte Ltd ("Oilive") commencing an arbitration against Hunan Xiangzhong Mining Group Ltd ("Hunan") under the 2016 SIAC Arbitration Rules[30] ("2016 SIAC Arbitration Rules"). Hunan, however, did not participate in the arbitration and the parties were therefore unable to agree on a sole arbitrator. The sole arbitrator was eventually appointed by the President of the Court of Arbitration of SIAC (instead of by the Chairman of SIAC as provided for in the arbitration agreement) following a request from Oilive that the appointment be made.

4.27 Hunan did not participate in the arbitration after the tribunal was constituted, nor did it attend the evidential hearing. However, shortly before final written submissions were due, Hunan instructed counsel who then objected to the continuation of the arbitration on the basis that the sole arbitrator had not been appointed in accordance with the parties' arbitration agreement.[31] The jurisdictional objection was rejected by the sole arbitrator. Dissatisfied with the arbitrator's decision, Hunan applied to the High Court (General Division) under s 10(3)(*a*) of the

27 *York International Pte Ltd v Voltas Ltd* [2022] SGHC 153 at [75].
28 [2022] 5 SLR 239.
29 *Hunan Xiangzhong Mining Group Ltd v Oilive Pte Ltd* [2022] 5 SLR 239 at [3].
30 6th Ed, 1 August 2016.
31 *Hunan Xiangzhong Mining Group Ltd v Oilive Pte Ltd* [2022] 5 SLR 239 at [14]–[15].

IAA for a declaration that the arbitrator did not have jurisdiction over the arbitration.

4.28 Hunan's arguments before the High Court were similar to those advanced in the arbitration, namely:

(a) The parties' agreement that the sole arbitrator be appointed by the Chairman of SIAC must be strictly upheld; a failure to do so could lead to enforcement difficulties in foreign jurisdictions.

(b) The parties had agreed that the Chairman of SIAC was to nominate and appoint an arbitrator for the arbitration proceedings. There was no agreement to assign the "nomination" role to the Chairman of SIAC and the "appointment" role to the President of the SIAC Court.

(c) Even if the parties had agreed that the Chairman of SIAC was to nominate but not appoint the sole arbitrator, the appointment was still improper because the chairman did not nominate the sole arbitrator in this case.

(d) Under the 2016 SIAC Arbitration Rules, a party was entitled to raise an objection no later than in a statement or in a statement of defence to a counterclaim.[32] As Hunan had not filed a statement of defence in the arbitration, it was still within time to raise a jurisdictional objection.

4.29 The High Court dismissed Hunan's argument that the jurisdictional objection had been filed within time. The court noted that Hunan did not at any time deny receiving communications regarding the commencement and progress of the arbitration, and no reasons had been proffered by Hunan for its late appointment of counsel. In the circumstances, the court considered that a "reasonably strong inference may be made"[33] that Hunan had "chosen not to participate" in the arbitration. Hunan's argument that it was entitled to object to jurisdiction at the time it did because it had not filed a statement of defence was "wholly untenable".[34] The purpose of r 28.3 of the 2016 SIAC Arbitration Rules and Art 16(2) of the MAL is to ensure that jurisdictional objections are raised at the earliest possible time. It would be "entirely antithetical" to the purpose of both r 28.3 and Art 16(2) if a respondent was allowed

32 Singapore International Arbitration Centre Arbitration Rules (6th Ed, 1 August 2016) (hereinafter "2016 SIAC Arbitration Rules") r 28.3(a).

33 *Hunan Xiangzhong Mining Group Ltd v Oilive Pte Ltd* [2022] 5 SLR 239 at [40].

34 *Hunan Xiangzhong Mining Group Ltd v Oilive Pte Ltd* [2022] 5 SLR 239 at [41]–[42].

to wait until the very last minute to launch a jurisdictional objection and derail the ongoing arbitration proceedings.[35]

4.30 However, the court was not precluded from considering a jurisdictional objection under s 10(3) of the IAA simply because the objection had been brought out of time.[36] Referring to the Court of Appeal's decision in *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Service (Pte) Ltd*,[37] the court observed that a non-participating respondent's failure to raise a jurisdictional objection within the framework of the applicable arbitration rules during the arbitration did not preclude it from raising a jurisdictional objection under s 10(3) of the IAA before an award is rendered.[38] In addition, there was no prohibition or bar in Art 16(2) of the MAL against the supervisory court hearing an appeal under s 10(3) of the IAA if the jurisdictional objection had been made out of time in the arbitration.[39]

4.31 In respect of the merits of Hunan's application, the High Court held that the appointment of the arbitrator was in fact in accordance with the parties' arbitration agreement. The court noted that the 2016 SIAC Arbitration Rules drew a distinction between the "nomination" of an arbitrator and the "appointment" of an arbitrator.[40]

4.32 Therefore, by agreeing to apply the 2016 SIAC Arbitration Rules to their dispute, the parties must be taken to accept this distinction between "nomination" and "appointment",[41] even though this was not expressly stated in the arbitration agreement. In addition, the parties must have known that the Chairman of SIAC no longer has any institutional powers to appoint the sole arbitrator.[42]

4.33 Arbitration clauses purporting to empower the Chairman of SIAC to appoint arbitrators (sometimes referred to as "Chairman clauses") are historical and were commonplace pre-2013 when the Chairman of SIAC acted as the institutional appointing authority under the SIAC arbitration

35 *Hunan Xiangzhong Mining Group Ltd v Oilive Pte Ltd* [2022] 5 SLR 239 at [45]–[48].
36 *Hunan Xiangzhong Mining Group Ltd v Oilive Pte Ltd* [2022] 5 SLR 239 at [50].
37 [2019] 2 SLR 131.
38 *Hunan Xiangzhong Mining Group Ltd v Oilive Pte Ltd* [2022] 5 SLR 239 at [60].
39 *Hunan Xiangzhong Mining Group Ltd v Oilive Pte Ltd* [2022] 5 SLR 239 at [61]. This may be contrasted with the absolute three-month time limit in Art 34(3) of the Model Law on International Commercial Arbitration UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 June 1985; amended 7 July 2006) (hereinafter "MAL") which prevents the supervisory court from hearing a setting-aside application brought after the expiry of that time limit.
40 *Hunan Xiangzhong Mining Group Ltd v Oilive Pte Ltd* [2022] 5 SLR 239 at [69]–[70].
41 *Hunan Xiangzhong Mining Group Ltd v Oilive Pte Ltd* [2022] 5 SLR 239 at [69].
42 *Hunan Xiangzhong Mining Group Ltd v Oilive Pte Ltd* [2022] 5 SLR 239 at [71].

rules. This was changed when the SIAC Court of Arbitration was introduced in 2013. It bears noting that the 2013 SIAC Arbitration Rules[43] contained transitional provisions which defined "Chairman" as meaning the President of the SIAC Court of Arbitration. While the "Chairman" definition was excluded in the 2016 SIAC Arbitration Rules, it is apparent from r 9.3 of the said rules[44] that only the President of the SIAC Court of Arbitration possesses any institutional powers of appointment.

4.34 This is the first case addressing the interaction between historical chairman clauses and the 2016 SIAC Arbitration Rules, and provides a useful overview of how the appointment provisions under the SIAC arbitration rules have changed over time.

4.35 Another interesting case touching upon the ambit of a tribunal's jurisdiction was *CUG v CUH*.[45] CTM, CTN, CTO and CUH ("the JV parties") were parties to a joint venture that had been formed to participate in a refinery construction project. CTM was the designated joint venture leader under the joint venture agreement.

4.36 During the course of the project, the joint venture encountered problems collecting unpaid sums from their employer. CTM, CTN and CTO agreed to engage CUG as a collection agent. Under the terms of the service agreement with CUG, CUG would be entitled to a percentage fee for the sums it collected from CTM. CUH refused to sign the service agreement as it did not agree to the fees demanded by CUG.

4.37 Despite the service agreement being signed only by three out of the four joint venture parties, CUG started work and successfully collected substantial amounts for the JV parties. The amounts collected by CUG were deposited into a bank account operated by the joint venture ("the JV account") and paid out to the JV parties based on their respective shares of the outstanding payments. CUG's fees were also paid out of the JV account.

4.38 Disputes subsequently arose in respect of the service agreement. CUG initiated the first ICC arbitration in September 2019 against the JV parties. A settlement was reached and CUG withdrew this first arbitration. Further disputes arose, and in July 2020, CUG commenced a second ICC arbitration against the JV parties. In the second arbitration,

43 5th Ed, 1 April 2013.

44 Rule 9.3 of the 2016 SIAC Arbitration Rules states: "In all cases, the arbitrators nominated by the parties, or by any third person including by the arbitrators already appointed, shall be subject to appointment by the President in his discretion."

45 [2022] 5 SLR 22.

CUH successfully objected to the tribunal's jurisdiction on the basis that it did not sign and was not a party to the service agreement.

4.39 CUG, CTM, CTN and CTO then applied under s 10(3) of the IAA to appeal the tribunal's negative jurisdiction ruling. The applicants argued that CUH had, by its conduct, become a party to the service agreement and the arbitration clauses therein. In particular, CUH "had performed the Agreements, by its authorisation of the payments out of the [JV account] and by its payment of its 37.5% share of the fees to CUG pursuant to the terms of the Agreements", and its "authorisation of full payments of CUG's invoices conveyed to CUG that CUH's objections to the Agreements no longer existed, and that CUH accepted the Agreements".[46] Further, CUH signed the settlement agreement (to the first arbitration) and paid its share of the settlement sum "without any qualifications nor objections".[47] CUH was therefore estopped from denying the binding effect of the service agreement.[48]

4.40 The Singapore International Commercial Court ("SICC") upheld the tribunal's negative jurisdiction ruling. While the absence of a signature on the service agreement does not preclude the coming into existence of a binding contract, "the relevant conduct on the part of the parties which 'crosses the line' may nevertheless justify a conclusion that the parties are to be regarded as having entered a legally binding contract on the terms of such written agreement".[49] The SICC considered that CUH had "made it absolutely plain to all concerned" that it was not prepared to enter into the service agreement,[50] and this position was communicated and understood by the applicants.[51]

4.41 Although payments may in certain circumstances be conduct that "crosses the line" to justify a conclusion that parties should be regarded as having entered into a legally binding agreement, this was not the case here. For one, while payments were indeed made to CUG pursuant to the service agreement, these had been made by the joint venture to CUG. No payment had been made directly by CUH to CUG. CUG also did not have actual knowledge of whether it was CUH or the other JV parties that had authorised payment to CUG.[52] When the payments made to CUG were considered against the backdrop of CUH's continued refusal to sign the service agreement, there was no conduct on the part of CUH

46 *CUG v CUH* [2022] 5 SLR 22 at [73(a)(ii)].
47 *CUG v CUH* [2022] 5 SLR 22 at [73(a)(vi)].
48 *CUG v CUH* [2022] 5 SLR 22 at [73(e)].
49 *CUG v CUH* [2022] 5 SLR 22 at [95].
50 *CUG v CUH* [2022] 5 SLR 22 at [96].
51 *CUG v CUH* [2022] 5 SLR 22 at [97].
52 *CUG v CUH* [2022] 5 SLR 22 at [108], [113] and [114].

"which crossed the line, and which might justify a reasonable assumption on the part of CUG that CUH was agreeing to be bound" by the service agreement.[53]

4.42 The key takeaway from this decision is that an obligation to arbitrate may be imposed by conduct.[54] Accordingly, a party that does not intend to be bound by an arbitration agreement must ensure that its actions do not "cross the line" to the extent that it is then regarded as being party to and bound by the arbitration agreement.

III. Setting aside of awards

4.43 Any discussion about developments in Singapore arbitration law must include an examination of the applications to challenge arbitration awards. A party who is dissatisfied with the outcome of the Singapore-seated arbitration may apply to the Singapore courts under Art 34 of the MAL, s 24 of the IAA or s 48 of the AA – depending on whether the arbitration is international or domestic – to set aside the arbitration award.

4.44 There are only limited grounds upon which a setting-aside application may be made, although it is possible to rely on multiple grounds in a single application. The grounds most often relied upon in the reported judgments of 2022 are breach of natural justice,[55] that the party applying to set aside the award had been unable to present its case,[56] that the award exceeds the scope of the submission to arbitration[57] and that the arbitral procedure was contrary to the parties' agreement.[58]

4.45 In 2022, 18 applications to set aside arbitration awards were reported, of which five applications were allowed, either in whole or in part. The Singapore judiciary adopts a policy of minimal judicial interference in arbitration proceedings, and the general approach when faced with a setting-aside application is to review the award in a manner that is likely to uphold it.[59]

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53 *CUG v CUH* [2022] 5 SLR 22 at [109].

54 See also ss 2A(3) and 2A(4) of the International Arbitration Act 1994 (2020 Rev Ed), which provide that an arbitration agreement may be concluded orally, by conduct or by other means. These sections were introduced in 2012 following the amendments made to the MAL in 2006.

55 International Arbitration Act 1994 (2020 Rev Ed) s 24(*b*); Arbitration Act 2001 (2020 Rev Ed) s 48(1)(*a*)(vii).

56 MAL Art 34(2)(a)(ii); Arbitration Act 2001 (2020 Rev Ed) s 48(1)(*a*)(iii).

57 MAL 34(2)(a)(iii); Arbitration Act 2001 (2020 Rev Ed) s 48(1)(*a*)(iv).

58 MAL Art 34(2)(a)(iv); Arbitration Act 2001 (2020 Rev Ed) s 48(1)(*a*)(v).

59 *CNQ v CNR* [2022] 4 SLR 1150, citing *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86.

A. Section 24(b) of the International Arbitration Act: Breach of natural justice

4.46 The supervisory court may set aside an arbitral award under s 24(*b*) of the IAA if "a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced". In order to be successful in an application under this section, the applicant must not only identify the rule of natural justice that has been breached and how the rule was breached but also satisfy the court that the breach was connected to the making of the arbitral award and that its rights have been prejudiced by reason of the said breach.[60]

4.47 In *Sai Wan Shipping Ltd v Landmark Line Co Ltd*,[61] a peremptory order issued by a tribunal raised sufficiently serious issues of breach of natural justice which resulted in a successful setting-aside application.

4.48 Landmark Line Co Ltd ("Landmark") (the vessel owner) and Sai Wan Shipping Ltd ("Sai Wan") (the charterer) were parties to a charterparty. Disputes arose in respect of unpaid hire which eventually led to Landmark commencing an *ad hoc* arbitration against Sai Wan. Landmark sought an immediate interim award against Sai Wan for the undisputed portion of the hire sum. This was granted by the sole arbitrator who issued a first partial final award for the undisputed sum.

4.49 About ten months later, Landmark served further submissions in respect of the remaining portion of its claim and requested that Sai Wan serve its defence submissions within 28 days, failing which Landmark would seek a default award from the tribunal.[62] The sole arbitrator then, without inviting any submissions from Sai Wan as to how much time it would need to prepare and serve its defence submissions, directed that Sai Wan file its defence by 4.00pm London time on 31 March 2021, failing which Landmark "may apply for a short final and peremptory order which will include a severe sanction" against Sai Wan should it fail to comply.[63]

4.50 While Sai Wan did not respond to the sole arbitrator's directions, it corresponded directly with Landmark seeking an extension of time until 9 April 2021 to serve its defence submissions. The correspondence was forwarded by Landmark to the sole arbitrator on 1 April 2021 with a

60 See *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 at [18].
61 [2022] 4 SLR 1302.
62 *Sai Wan Shipping Ltd v Landmark Line Co Ltd* [2022] 4 SLR 1302 at [11].
63 *Sai Wan Shipping Ltd v Landmark Line Co Ltd* [2022] 4 SLR 1302 at [12].

request that the sole arbitrator "review the exchange and make whatever order it considers appropriate".[64]

4.51 The sole arbitrator then proceeded to issue a final and peremptory order on 1 April 2021 setting a deadline of 9 April 2021, 5.00pm London time, for Sai Wan to file its defence submissions. This order included the following text:[65]

> If [Sai Wan] fail[s] to comply with this order, the sanction will be that they are barred from advancing any positive case by way of defence (or counterclaim) and from adducing any positive evidence in the matter and it will then simply be for [Landmark] to prove their case.

4.52 Sai Wan eventually served its defence submissions on 9 April 2021, but after the stipulated time due to technical issues. On 10 April 2021, the sole arbitrator wrote to the parties saying that unless Landmark was prepared to accept Sai Wan's defence submissions that had been filed after the ordered deadline, he must abide by his own orders of 1 April 2021. Landmark did not consent to Sai Wan's defence submissions being admitted into evidence. The sole arbitrator then wrote to the parties confirming that Sai Wan's defence submissions would not be admitted into evidence.

4.53 Sai Wan unsurprisingly objected to the sole arbitrator's directions, noting that no prejudice had been suffered by Landmark. The sole arbitrator maintained his orders, stating:[66]

> I refer to your email of earlier today. However [Sai Wan] (and doubtless) their legal advisers … were aware of the severity of the final and peremptory order and the sanction for non compliance. Therefore the decision of the tribunal cannot have come as a surprise and will not be revisited.

4.54 The sole arbitrator then invited Landmark to put in further evidence and submissions to prove its case but did not allow Sai Wan to respond. In response to objections raised by Sai Wan, the sole arbitrator maintained that he was duty-bound to apply the sanction in view of Sai Wan's failure to comply with the peremptory order. The sole arbitrator eventually issued a second partial award without hearing witnesses and on a documents-only basis as requested by Landmark.[67]

64 *Sai Wan Shipping Ltd v Landmark Line Co Ltd* [2022] 4 SLR 1302 at [13].
65 *Sai Wan Shipping Ltd v Landmark Line Co Ltd* [2022] 4 SLR 1302 at [14].
66 *Sai Wan Shipping Ltd v Landmark Line Co Ltd* [2022] 4 SLR 1302 at [20].
67 *Sai Wan Shipping Ltd v Landmark Line Co Ltd* [2022] 4 SLR 1302 at [21].

4.55 Sai Wan applied to set aside the second award under, *inter alia*, s 24(*b*) of the IAA as well as Art 34(2)(a)(ii) of the MAL. The issues before the High Court were:

> (a) whether an arbitrator in an *ad hoc* arbitration has the power to make and enforce peremptory orders and how such powers should be exercised;
>
> (b) whether the sole arbitrator had acted within his powers and exercised them in accordance with the principles of natural justice; and
>
> (c) whether any breach of natural justice was connected to the making of the second award and caused prejudice to Sai Wan.[68]

4.56 The High Court (General Division) first noted that the term "peremptory order" was not found in the MAL or the IAA.[69] While Arts 23 and 25 of the MAL give arbitral tribunals the power to proceed with arbitration proceedings despite a party's default, these provisions do not confer a mandate to issue general peremptory or unless orders.[70] The sole arbitrator's order of 1 April 2021, coupled with the sole arbitrator's decision – based on Landmark's request – to proceed on a documents-only basis, not only prevented Sai Wan from putting forward a positive defence but also effectively prohibited Sai Wan from responding to Landmark's evidence and submissions. The order therefore exceeded the powers under Art 25 of the MAL.[71]

4.57 In the absence of any agreement, agreed procedure or procedural rules, natural justice requires the tribunal to consult not one but both parties when establishing procedural steps and timelines. The sole arbitrator failed to do so not only when setting the original timelines for the filing of Sai Wan's defence submissions but also prior to issuing the peremptory order on 1 April 2021.[72] The sole arbitrator also failed to consider whether Sai Wan's late filing of its defence submission on 9 April 2021 justified the imposition of a sanction.[73]

4.58 In the premises, the High Court allowed Sai Wan's application and set aside the second award in its entirety. The sole arbitrator's repeated

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68 *Sai Wan Shipping Ltd v Landmark Line Co Ltd* [2022] 4 SLR 1302 at [39].
69 In contrast, the UK Arbitration Act 1996 (c 23) contains specific provisions dealing with the grant of peremptory orders: see ss 41 and 42 of that Act.
70 *Sai Wan Shipping Ltd v Landmark Line Co Ltd* [2022] 4 SLR 1302 at [41]–[46].
71 *Sai Wan Shipping Ltd v Landmark Line Co Ltd* [2022] 4 SLR 1302 at [65].
72 *Sai Wan Shipping Ltd v Landmark Line Co Ltd* [2022] 4 SLR 1302 at [64].
73 *Sai Wan Shipping Ltd v Landmark Line Co Ltd* [2022] 4 SLR 1302 at [64].

failures to treat the parties in an even-handed manner, and his apparent deference to only Landmark's submissions, could not be rectified by remitting the second award to the sole arbitrator. As observed by the court:[74]

> … this is hardly a case of mere oversight in failing to give a party a reasonable opportunity to be heard on some aspect of a dispute. Rather, the peremptory order and the exclusion of the defence submissions seems to have been the product of a haste quite out of keeping with the time accorded to [Landmark] for its submissions. It is striking that not once did the arbitrator either ask for or consider input from [Sai Wan] on the procedure to be adopted, the timetable to be imposed, reasons for any non-compliance or the content and application of any sanction. [Sai Wan's] lack of confidence in the arbitrator to decide the matter fairly if remitted is not without reasonable basis.

4.59 This decision is undoubtedly correct. Based on the facts in the judgment, there did not seem to be any conduct on the part of Sai Wan to have justified the approach taken by the sole arbitrator. The sole arbitrator's apparent preference for Landmark's submissions and positions really left Sai Wan no choice but to file the application to set aside the second award.

4.60 The sole arbitrator in this case appeared to have little familiarity with the rules of Singapore-seated arbitrations, which likely was what led him to making the peremptory order in the first place. This case sounds a cautionary note for arbitrators: it is important to be aware of and understand the laws of the applicable seat. One should never simply assume that the *lex arbitri* of one jurisdiction is the same as, or similar to, another jurisdiction.

4.61 In *CEF v CEH*[75] ("*CEF*"), the parties had entered into two contracts for the supply of engineering equipment and services for a steel manufacturing plant. Disputes subsequently arose relating to delays in the construction of the plant and shortfall in the plant's production capacity. This led to CEF and CEG (the contractors) and CEH (the plant owner's assignee) commencing ICC arbitrations against each other.

4.62 In its final award, the tribunal upheld CEH's claims against the contractors and rescinded both contracts. In addition, the tribunal ordered that CEF and CEG (a) make restitution of the contract price (less certain sums) to CEH ("the repayment order"); (b) transfer title in the

74 *Sai Wan Shipping Ltd v Landmark Line Co Ltd* [2022] 4 SLR 1302 at [78].
75 [2022] 2 SLR 918.

steel manufacturing plant to CEH in return for payment ("the transfer order"); and (c) pay damages under the Misrepresentation Act[76] to CEH.

4.63 CEF and CEG applied to set aside the final award for breach of natural justice under both s 24(*b*) of the IAA as well as Art 34(2)(a) of the MAL. One of the arguments advanced by CEF and CEG was that the repayment order was in breach of the "no evidence rule". That rule has sometimes been applied in Australia and New Zealand to set aside arbitration awards which contain material findings of fact with no evidential basis for breach of natural justice.[77]

4.64 The Court of Appeal rejected this argument, holding that:[78]

> In our judgment, the 'no evidence rule' should not be adopted as part of Singapore law, as to do so would run contrary to the policy of minimal curial intervention in arbitral proceedings. Further, it would not add anything to the existing grounds for setting aside an award but would instead be (as the [High Court] Judge stated) 'an impermissible invitation to the courts to reconsider the merits [of] a tribunal's findings of fact as though a setting-aside application were an appeal'.

4.65 *CEF* represents the first time that the Singapore courts have definitively rejected the adoption of the "no evidence rule" as a separate rule of natural justice in Singapore. This decision nonetheless reinforces the Singapore judiciary's pro-arbitration stance and its refusal to re-open factual findings of fact that have been made by an arbitral tribunal.

4.66 CEF and CEG, however, did succeed in persuading the Court of Appeal to set aside the damages order for breach of the fair hearing rule. The tribunal had applied a "flexible approach" in awarding damages to CEH and did not indicate prior to its decision that it intended to do so. CEF and CEG argued that they were consequently deprived of an opportunity to consider whether to seek disclosure of the relevant documentary evidence or expert opinion.[79]

4.67 The Court of Appeal held that the tribunal's chain of reasoning in respect of the damages order "was not one which the parties had reasonable notice that the Tribunal could adopt, nor did it have a sufficient nexus to the parties' arguments",[80] and that this breach of natural justice was connected to the making of the award.[81] Had the tribunal informed

76 Cap 390, 1994 Rev Ed.
77 *CEF v CEH* [2022] 2 SLR 918 at [101].
78 *CEF v CEH* [2022] 2 SLR 918 at [102].
79 *CEF v CEH* [2022] 2 SLR 918 at [110].
80 *CEF v CEH* [2022] 2 SLR 918 at [116].
81 *CEF v CEH* [2022] 2 SLR 918 at [121].

the parties that it would be applying the "flexible approach", CEF and CEG:[82]

> … would have had the opportunity to inform the Tribunal of its objections to such an approach, or … would have had the opportunity to decide whether to ask the respondent to produce the source documents or to take a forensic risk by resting their defence only on the burden of proof. This compliance with the rules of natural justice could reasonably have made a difference to the outcome of the Arbitration.

4.68 *Bagadiya Brothers (Singapore) Pte Ltd v Ghanashyam Misra & Sons Pte Ltd*[83] concerned an application to set aside a final award on the basis that a breach of natural justice had occurred in the making of the award. The parties were in the business of sale and purchase of commodities, and had entered into two contracts for the sale of iron ore fines. Due to defects in the first cargo shipment, the parties agreed to addenda to the contracts which provided for the payment of a provisional price by Bagadiya Brothers (Singapore) Pte Ltd ("Bagadiya") to Ghanashyam Misra & Sons Pte Ltd ("Ghanashyam"), with a subsequent price adjustment after Bagadiya's onward sales to third parties.

4.69 Disputes subsequently arose between the parties as to whether they had each fulfilled their respective obligations under the amended contracts. Ghanashyam initiated an SIAC arbitration against Bagadiya seeking outstanding sums under the two contracts; Bagadiya counterclaimed for excess sums that had been paid to Ghanashyam. The key issue in the arbitration was how the price of iron ore fines ought to be calculated.

4.70 In the course of the arbitration, Ghanashyam queried the role of Glencore International AG ("Glencore") in the sale of iron ore fines to third parties. Bagadiya indicated that Glencore was its agent and not a buyer and sought to introduce into evidence copies of Glencore invoices which would establish Glencore's role.

4.71 The arbitrator refused to admit the invoices. In the final award, the tribunal found in favour of Ghanashyam on the basis of s 8(2) of the UK Sale of Goods Act 1979[84] ("SOGA") and ordered Bagadiya to pay a "reasonable price" to Ghanashyam for the iron ore fines.

4.72 Bagadiya applied to set aside the award, arguing that neither party had pleaded or raised in the arbitration the ambiguity of the

82 *CEF v CEH* [2022] 2 SLR 918 at [121].
83 [2022] SGHC 246.
84 c 54.

price adjustment mechanism in the addenda to the contracts, or the applicability of s 8 of the SOGA. The tribunal had "deprived the parties of a reasonable opportunity to be heard on the Ambiguity Issue and the SOGA Issue, and this was a breach of the rules of natural justice".[85]

4.73 The High Court (General Division) agreed that a breach of natural justice had occurred as the tribunal had failed to allow parties a reasonable opportunity to be heard on s 8(2) of the SOGA.[86] While the tribunal's reference to s 8(1) of the SOGA in the award could be said to have corresponded with the parties' pleadings and was something the parties would have had reasonable notice of,[87] neither party had raised the concept of "reasonable price" under s 8(2) of the SOGA in the arbitration.[88] The court further observed that "had the Arbitrator intended to adopt a chain of reasoning based on s 8(2) of the SOGA, she was, in my judgment, obliged to ensure that the parties had been put on notice that they were expected to address that chain of reasoning".[89] Even if there was a "logical link" between the tribunal's rejection of the arguments under s 8(1) of the SOGA and her reliance on s 8(2), this "did not necessarily mean that the parties had reasonable notice that the Arbitrator would adopt a chain of reasoning based on s 8(2) of the SOGA".[90]

4.74 It was, however, within the tribunal's remit to conclude that the price adjustment mechanism in the addenda was vague and ambiguous, even if this was not argued by either party.[91] An arbitrator is not bound to only select between the two price calculations advanced by the parties and is "perfectly entitled to embrace a middle path (even without apprising the parties of his provisional thinking of analysis) so long as it is based on evidence that is before him".[92]

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85 *Bagadiya Brothers (Singapore) Pte Ltd v Ghanashyam Misra & Sons Pte Ltd* [2022] SGHC 246 at [25].

86 *Bagadiya Brothers (Singapore) Pte Ltd v Ghanashyam Misra & Sons Pte Ltd* [2022] SGHC 246 at [55] and [66].

87 *Bagadiya Brothers (Singapore) Pte Ltd v Ghanashyam Misra & Sons Pte Ltd* [2022] SGHC 246 at [45].

88 *Bagadiya Brothers (Singapore) Pte Ltd v Ghanashyam Misra & Sons Pte Ltd* [2022] SGHC 246 at [55].

89 *Bagadiya Brothers (Singapore) Pte Ltd v Ghanashyam Misra & Sons Pte Ltd* [2022] SGHC 246 at [60].

90 *Bagadiya Brothers (Singapore) Pte Ltd v Ghanashyam Misra & Sons Pte Ltd* [2022] SGHC 246 at [62].

91 *Bagadiya Brothers (Singapore) Pte Ltd v Ghanashyam Misra & Sons Pte Ltd* [2022] SGHC 246 at [50].

92 *Bagadiya Brothers (Singapore) Pte Ltd v Ghanashyam Misra & Sons Pte Ltd* [2022] SGHC 246 ("*Bagadiya*") at [50], citing *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [65(e)]. See also *Bagadiya* at [51].

B. Article 34(2)(a)(iii) of the MAL: Scope of submission to arbitration

4.75 The High Court had in 2021 considered several cases where challenges were made on the basis that the award exceeded the scope of the reference as pleaded by the parties. Two of these cases went on appeal to the Court of Appeal in 2022 – *Phoenixfin Pte Ltd v Convexity Ltd*[93] ("*Phoenixfin*") and *CJA v CIZ*[94] ("*CJA*").

4.76 In *Phoenixfin*, the High Court (General Division) set aside a final award on the basis that the tribunal's decision was based on an issue that was out of scope of the submission to jurisdiction. Phoenixfin Pte Ltd ("Phoenixfin") had engaged Convexity Ltd ("Convexity") to provide certain services under a 24-month contract. In the event the contract was terminated early, Phoenixfin would be obliged to pay Convexity a "Make Whole Amount". Phoenixfin terminated the contract after ten months and Convexity commenced an SIAC arbitration seeking payment of the Make Whole Amount.

4.77 Phoenixfin did not plead in its original defence filed in the arbitration that the Make Whole Amount clause was a penalty under English law ("the Penalty Issue"); its application to amend the defence to include this issue was dismissed by the tribunal. In the final award, the tribunal dismissed Convexity's claims on the sole basis of the Penalty Issue. The High Court found that the tribunal's decision on the penalty issue was out of the scope of submission to arbitration and set aside the award.

4.78 Phoenixfin appealed against the High Court's decision. The Court of Appeal dismissed the appeal, agreeing with the High Court that a breach of natural justice had occurred as Convexity did not have full opportunity to address the Penalty Issue.

4.79 While Convexity might have had notice that the Penalty Issue could have been introduced into the arbitration had Phoenixfin's amendment application been allowed, Convexity was not obliged to lead evidence on this issue before the pleadings had been amended.[95] Indeed, the tribunal's dismissal of Phoenixfin's amendment application meant that the Penalty Issue "never arrived at the table".[96]

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93 [2022] 2 SLR 23, on appeal from *Convexity Ltd v Phoenixfin Pte Ltd* [2021] SGHC 88.
94 [2022] 2 SLR 557; on appeal from *CIZ v CJA* [2021] SGHC 178.
95 *Phoenixfin Pte Ltd v Convexity Ltd* [2022] 2 SLR 23 at [43].
96 *Phoenixfin Pte Ltd v Convexity Ltd* [2022] 2 SLR 23 at [42].

4.80 The Court of Appeal stated as follows:[97]

> When … the court has to consider whether a party has been afforded natural justice during arbitration proceedings, the pivotal question is whether that party has been given a fair opportunity to deal with an issue that has been raised in the arbitration either by the other party or by the tribunal itself. *The extent of the opportunity needed to be given depends on the nature of the issue. If the issue is a legal one, then sufficient time to make legal submissions is all that is required. But if the issue is a factual one or a mixed fact and law question then, apart from submitting on the law, a party needs to be able to question the evidence produced in support of the issue as well as have the chance to itself introduce relevant rebuttal evidence. And in order to do all this, there has to be clarity and precision regarding what issue is being raised and what evidence will be relied on to support it. It is in situations like this that the pleadings will assume a more significant role in indicating the kind of opportunity that natural justice requires to be given and in preventing 'unexpected surprises'*, to use the words of *CBX*. [emphasis added]

4.81 In the Court of Appeal's view, the Penalty Issue was a mixed question of fact and law (which Phoenixfin itself recognised by filing the amendment application in the first place). As such, in order for the tribunal to be in a position to determine this issue, the tribunal had to "have regard to not only whether the legal point was flagged, but also whether the evidentiary material relevant to that legal point had been engaged with".[98] However, Phoenixfin did not lead any evidence on the Penalty Issue, nor did it cross-examine Convexity's witnesses on this issue; consequently, Convexity did not have any case to respond to. In the circumstances, there was no basis upon which the tribunal could make a finding on the Penalty Issue, and any award on this issue was outside the scope of submission to arbitration.[99]

4.82 In *CJA*,[100] the High Court (General Division) had set aside a final award on the basis that the tribunal's award was based on grounds that were entirely different from CJA's case in the arbitration.[101]

4.83 The factual background of *CJA* is as follows: the parties had entered into a consultancy agreement under which CJA was to source for business opportunities for CIZ. In the event certain conditions were satisfied, CJA would be entitled to a "success fee". CJA commenced arbitration against CIZ for non-payment of two business opportunities which CJA claimed it had presented to CIZ. As the original agreement

97 *Phoenixfin Pte Ltd v Convexity Ltd* [2022] 2 SLR 23 at [52].
98 *Phoenixfin Pte Ltd v Convexity Ltd* [2022] 2 SLR 23 at [54].
99 *Phoenixfin Pte Ltd v Convexity Ltd* [2022] 2 SLR 23 at [64] and [71].
100 See para 4.78 above.
101 *CIZ v CJA* [2021] SGHC 178 at [59].

term had expired, CJA's claim in the arbitration was premised on (a) an oral agreement for the extension of the consultancy agreement between the parties; (b) an implied contract between the parties on the same terms as the original consultancy agreement; or (c) estoppel. The tribunal found in favour of CJA, holding that CJA was entitled to payment of the "success fee" "as long as a clear link to the successful completion of the opportunity"[102] was shown.

4.84 On appeal by CJA, the Court of Appeal reversed the lower court's decision, holding that the High Court judge had erred in characterising CJA's case in the arbitration as running entirely on the basis of a subsisting agreement.

4.85 The Court of Appeal observed that:[103]

> … in a situation involving questions of fact, pleadings assume greater significance in indicating the kind of opportunity that natural justice requires to be given.
>
> On the other hand, in the present case involving a legal issue of the contractual interpretation of various provisions of the [consultancy agreement], we are satisfied that parties indeed submitted on this issue and that the respondent had sufficient opportunity to canvass evidence on, amongst other things, the contextual dimension and commercial purpose of the [consultancy agreement].
> …

4.86 The Court of Appeal found that although the reasoning adopted by the tribunal in the final award was not expressly pleaded by CJA, "it [was] clear that the more general question of the interaction between the payment obligations and the expiry date under these provisions in the [consultancy agreement] was canvassed before the tribunal".[104] Further, the tribunal's chain of reasoning in the award "bore sufficient nexus to the parties' cases" in that it had "arisen by reasoning implication on parties' pleadings, or at the very least, been brought to the notice of the respondent".[105] In any event, the tribunal had "sufficiently apprised the parties of its provisional thinking", which had been picked up by CJA in its closing submissions and which CIZ had the opportunity to address.[106]

4.87 Both these cases highlight the importance of ensuring that the issues submitted to arbitration are properly defined. While pleadings may not necessarily play as significant a role in arbitration as compared to

102 *CJA v CIZ* [2022] 2 SLR 557 at [36].
103 *CJA v CIZ* [2022] 2 SLR 557 at [76]–[77].
104 *CJA v CIZ* [2022] 2 SLR 557 at [77].
105 *CJA v CIZ* [2022] 2 SLR 557 at [78].
106 *CJA v CIZ* [2022] 2 SLR 557 at [3].

court litigation, it remains necessary to ensure that arbitration pleadings are sufficiently comprehensive so that the relevant facts can be set out and tested.

C. Article 34(2)(a)(iv) of the MAL: Arbitral procedure not in accordance with parties' agreement

4.88 Party autonomy is one of the fundamental tenets of arbitration. Where an arbitration is not conducted in accordance with a procedure that has been agreed by the parties, the award risks being set aside under Art 34(2)(a)(iv) of the MAL.

4.89 One of the questions before the Court of Appeal in *CEF*[107] was whether the transfer order ought to be set aside on the basis that it is uncertain, ambiguous, impossible and/or unenforceable and therefore not in accordance with the parties' agreement and the MAL.[108] These arguments were roundly rejected by the Court of Appeal which held that:

> (a) In an arbitration under the Rules of Arbitration of the ICC ("ICC Arbitration Rules"), a tribunal's primary duty under Art 41 of the rules is to ensure that the procedural requirements for enforcement are satisfied. These include ensuring that the procedural rules for the arbitration are complied with, signing and dating the award, and arranging for the delivery of the award to the parties in accordance with the applicable rules.[109]
>
> (b) In so far as a tribunal's substantive requirements for enforcement are concerned, "the tribunal will be found to have discharged its duty under Art 41 as long as it demonstrates that it has used 'every effort' to ensure the enforceability of the award in the jurisdictions wherein the award can reasonably be expected to be enforced".[110]
>
> (c) Uncertainty or ambiguity is not a basis to set aside an award under Art 34(2)(a)(iv) of the MAL.[111] This sub-article concerns the composition of the arbitral tribunal or non-compliance with an agreed arbitral procedure, and has nothing to do with the uncertainty or ambiguity of an award.[112]

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107 The facts are set out at paras 4.61–4.63 above.
108 *CEF v CEH* [2022] 2 SLR 918 at [31(a)(i)].
109 *CEF v CEH* [2022] 2 SLR 918 at [39].
110 *CEF v CEH* [2022] 2 SLR 918 at [39].
111 *CEF v CEH* [2022] 2 SLR 918 at [43].
112 *CEF v CEH* [2022] 2 SLR 918 at [47]. In any event, the Court of Appeal did not consider the transfer order to be uncertain or ambiguous: see [48].

(d) The impossibility or unworkability of an award is also not a basis to justify setting aside an award, much less under Art 34(2)(a)(iv) of the MAL.[113]

4.90 In *Sanum Investments Ltd v Government of the Lao People's Democratic Republic*,[114] the appellants (Lao Holdings NV and Sanum Investments Ltd ("Sanum")) applied to set aside two arbitral awards made in arbitrations under bilateral investment treaties ("BITs") with the respondent ("GOL") ("BIT Arbitrations"). The disputes in the BIT Arbitrations concerned claims of expropriation and other BIT-related claims in relation to the appellants' investments in the Laotian gaming and hospitality industry.

4.91 Prior to the merits hearing in the BIT Arbitrations, the parties entered into a settlement deed ("the Deed") and a side letter agreeing to the suspension of the BIT Arbitrations. The Deed also contained provisions for the revival of the BIT Arbitrations in the event of material breach. In the event of such a revival, the parties would not be permitted to add any new claims or evidence to the arbitration, or seek any additional reliefs not already sought.

4.92 The BIT Arbitrations were indeed revived and, in the course of the revived proceedings, the tribunal allowed GOL to present evidence of Sanum's allegedly corrupt acts despite the terms of the Deed which prohibited "any new claims or evidence". The tribunal eventually found, on a balance of probabilities, that GOL had made out its allegations of illegality, bribery and corruption against the appellants.

4.93 The appellants applied to set aside the two awards arguing, amongst other things, that the tribunal's admission of new evidence constituted a breach of the parties' agreed procedure as set out in the Deed.

4.94 The Court of Appeal affirmed the SICC's decision and dismissed the setting-aside application. At the outset, the court noted that:[115]

> As a general rule, the court will not revisit a tribunal's construction of an agreed procedure in an arbitral agreement entered into between the parties

113 *CEF v CEH* [2022] 2 SLR 918 at [52]. The Court of Appeal also did not consider the transfer order to be impossible or unworkable.

114 [2022] 4 SLR 198. This is yet another Singapore court judgment relating to the long-running dispute between Lao Holdings NV and Sanum Investments Ltd against The Government of the Lao People's Democratic Republic.

115 *Sanum Investments Ltd v The Government of the Lao People's Democratic Republic* [2022] 4 SLR 198 at [102].

> where the construction is open on the text of the agreement. That is to say, even though there might be more than one construction and the court might think a construction other than that chosen by the tribunal is to be preferred, the court will accept the tribunal's construction. Where, however, a tribunal adopts and acts upon a construction of a term, providing for an agreed procedure, which is simply not open on any view of the text, then the tribunal cannot be said, on any view, to have adhered to the agreed procedure. It is open to the supervising court in such a case to determine the content of the agreed arbitral procedure.

4.95 The tribunal had interpreted the Deed and determined that it was not entirely prohibited from receiving new evidence.[116] This was an interpretation that was open to the tribunal in the context of the Deed and the applicable institutional arbitration rules. In the circumstances, there was no basis for the court to revisit the tribunal's decision.[117]

D. Other grounds for setting aside

(1) Party under some incapacity: Article 34(2)(a)(i) of the MAL

4.96 *CPU v CPX*[118] is one of the few reported cases considering whether a party's incapacity was sufficient to set aside an arbitration award. CPX (the claimant in the arbitration) had commenced an arbitration against CPU, CPV and CPW (respondents in the arbitration and applicants in the court action) alleging various breaches of a settlement agreement and a supplemental settlement agreement. As part of their defences in the arbitration, the respondents argued that the settlement agreements were void, CPX was itself in breach of certain prior agreements and the respondents were entitled to set off US$2.5m from the sums claimed by CPX.

4.97 The tribunal determined in its final award that the settlement agreements were valid and enforceable and that the respondents were liable to pay damages to CPX due to their breaches of the settlement agreements.

4.98 The respondents applied to set aside the final award arguing, *inter alia*, that they had been under some incapacity, and the tribunal's refusal to allow certain medical reports and submissions from the respondents constituted a breach of the rules of natural justice.[119] These two arguments

116 *Sanum Investments Ltd v The Government of the Lao People's Democratic Republic* [2022] 4 SLR 198 at [111].
117 *Sanum Investments Ltd v The Government of the Lao People's Democratic Republic* [2022] 4 SLR 198 at [138].
118 [2022] 4 SLR 314.
119 *CPU v CPX* [2022] 4 SLR 314 at [7].

were related in that the medical reports allegedly demonstrated that certain respondents suffered mental illnesses and were consequently under an "incapacity" at the time the settlement agreements (and the arbitration agreements) were entered into.[120]

4.99 The SICC dismissed the setting-aside application. In so far as the tribunal's refusal to admit the respondents' medical reports, the SICC considered this decision to be an exercise of the tribunal's case management powers and within the tribunal's jurisdiction.[121] The tribunal's reasons for refusing to admit the medical reports were "unobjectionable and entirely justified", and "fell well within the range of what a reasonable and fair-minded tribunal in those circumstances might have done".[122] The SICC also dismissed the respondents' substantive arguments in respect of Art 34(2)(a)(i) of the MAL, noting that the contents of the medical reports lacked any legal or factual weight and could not have reasonably made a difference to the tribunal's findings.[123]

(2) Inability to present its case: Article 34(2)(a)(ii) of the MAL

4.100 *CNQ v CNR*[124] was another interesting case concerning two related arbitrations. CNQ (the buyer) and CNR (the seller) were parties in two successive ICC arbitrations in which CNR claimed damages against CNQ for non-acceptance of goods under a sale and purchase contract. Each arbitration involved a different transaction period, and the same sole arbitrator was appointed in each arbitration. CNR was successful in both arbitrations and obtained two separate awards against CNQ.

4.101 CNQ applied to set aside both arbitration awards. It was unsuccessful in relation to the first award.[125] In relation to the second award, CNQ argued that the arbitrator had failed to attempt to understand the new evidence and contentions that had been presented in the second arbitration, and that the arbitrator had prejudged the second arbitration by being inclined to decide it in the same way as he had decided the first arbitration. The setting-aside application was advanced under both Art 34(2)(a)(ii) of the MAL and s 24(*b*) of the IAA.

4.102 The SICC dismissed the application, noting at the outset that an inference that an arbitrator had failed to consider an important pleaded issue, "if it is to be drawn at all, must be shown to be clear and virtually

120 *CPU v CPX* [2022] 4 SLR 314 at [58].
121 *CPU v CPX* [2022] 4 SLR 314 at [60].
122 *CPU v CPX* [2022] 4 SLR 314 at [60].
123 *CPU v CPX* [2022] 4 SLR 314 at [62].
124 [2022] SGHC 267.
125 Reported as *CNQ v CNR* [2022] 4 SLR 1150.

inescapable".[126] In the present case, it was apparent from the award that the arbitrator had, "far from ignoring (and failing to deal with) the case presented by [CNQ]", dealt with CNQ's case at length.[127]

4.103 The court further noted that "there was nothing inherently wrong" in having the same arbitrator decide the same issues between the same parties, and for the arbitrator to decide the issues in the same way.[128] It was clear that the arbitrator had engaged CNQ's counsel and expert at the hearing of the second arbitration, and considered the new evidence and contentions that had been raised by CNQ in respect of the second arbitration. The arbitrator demonstrably attempted to understand CNQ's case in the second arbitration and had not prejudged the issues as alleged by CNQ.

4.104 Appointing the same arbitrator for related disputes can reduce the parties' overall costs (as the arbitrator would have familiarity with overlapping facts) and can improve the efficiency of the entire arbitration process. The SICC's decision endorses this practice but also highlights the considerations that arbitrators should bear in mind when adjudicating related disputes.

IV. Enforcement of awards

4.105 Going through an arbitration is an expensive and time-intensive affair. The party who prevails in an arbitration will want the arbitration award to be satisfied by the losing party. While most arbitration awards are satisfied without issue, where the winning party is unable to obtain the sums due to it, there are avenues available to enforce the terms of the award against an unco-operative party.

4.106 Last year, the High Court in *National Oilwell Varco Norway AS v Keppel FELS Ltd*[129] refused enforcement of an arbitration award on the basis that the party seeking enforcement of the award did not have *locus standi* to do so, as it was not a party to the arbitration.

4.107 In 1996, Keppel FELS Ltd ("Keppel") had entered into a contract with Hydralift AS ("Hydralift"). Disputes arose between the parties in 1999, and the parties attempted to resolve these disputes. While these attempts were ongoing, Hydralift went through a series of mergers, the last being a merger with National Oilway Norway AS (the former name

126 *CNQ v CNR* [2022] SGHC 267 at [15], citing *AKN v ALC* [2015] 3 SLR 488.
127 *CNQ v CNR* [2022] SGHC 267 at [29].
128 *CNQ v CNR* [2022] SGHC 267 at [58].
129 [2021] SGHC 124.

of National Oilwell Varco Norway AS ("NOV Norway")), the applicant in the High Court action). Thereafter, in 2004, Hydralift was struck off the Norwegian companies register.

4.108 Therefore, by the time Keppel commenced arbitration against Hydralift in 2007, Hydralift was no longer in existence. However, NOV Norway participated in the arbitration, resisted Keppel's claim and advanced a counterclaim, all in Hydralift's name. A final award was eventually issued in 2019 in favour of Hydralift.

4.109 Although NOV Norway obtained leave to enforce the award, Keppel successfully set aside the leave order before the High Court on the basis that (a) the tribunal had intended to and did issue an award in favour of Hydralift; (b) the use of the name "Hydralift" in the arbitration was not a mere misnomer; and (c) NOV Norway was estopped by its representations in the arbitration from denying that Hydralift was the respondent in the arbitration.

4.110 NOV Norway appealed to the Court of Appeal.[130] The Court of Appeal reversed the lower court's decision, holding that under Norwegian law, NOV Norway was for all intents and purposes the same legal entity as Hydralift, and that the present situation was that of a true misnomer.[131] The effect of the various mergers was that although Hydralift ceased to exist as a separate legal entity, "its legal personality continued to survive and was subsumed in that of NOV Norway".[132]

4.111 In a true misnomer situation, a court is empowered to enforce an arbitration award in favour of or against a party that was not expressly named in the award.[133] The Court of Appeal noted that allowing enforcement of an award in a situation of a misnomer "does not undermine or contradict the mechanical approach to enforcement under s 19 of the IAA. In substance, the court is only accommodating a change of name for a mistakenly named party, albeit at a very late stage".[134] It is not necessary for the misnomer to have been corrected within the framework of the arbitration proceedings itself.[135]

130 *National Oilwell Varco Norway AS v Keppel FELS Ltd* [2022] 2 SLR 115.
131 *National Oilwell Varco Norway AS v Keppel FELS Ltd* [2022] 2 SLR 115 at [6].
132 *National Oilwell Varco Norway AS v Keppel FELS Ltd* [2022] 2 SLR 115 at [53].
133 *National Oilwell Varco Norway AS v Keppel FELS Ltd* [2022] 2 SLR 115 at [96]. The Court of Appeal expressed (at [104]) the test for a misnomer as "whether the name stated in the award, seen objectively against the relevant factual and legal background, is nothing more than the incorrect name of the legal person the award is in fact and in law to be enforced in favour of or against".
134 *National Oilwell Varco Norway AS v Keppel FELS Ltd* [2022] 2 SLR 115 at [96].
135 *National Oilwell Varco Norway AS v Keppel FELS Ltd* [2022] 2 SLR 115 at [115].

4.112 The Court of Appeal further emphasised that:

> … the role of the court is to uphold the arbitral process and facilitate the enforcement of arbitral awards whenever possible. As observed by Chan J in [*A Consortium Comprising TPL and ICB v AE Ltd* [2021] HKCFI 2341], denying the enforcement of an award in a misnomer situation would obstruct rather than facilitate the arbitral process.

4.113 The Court of Appeal decision represents a much more satisfactory end to this long-running dispute. The entire "name" debacle had started because Keppel commenced the arbitration against Hydralift without checking Hydralift's existence; NOV Norway, as successor-in-title to Hydralift, should not be deprived of the fruits of its litigation. This does not mean that parties should not take care when determining the entity against which arbitration proceedings are being initiated, particularly as the rights of successors-in-title may differ from jurisdiction to jurisdiction.

4.114 While there is express provision in both the IAA[136] and the AA[137] for the enforcement of a Singapore-seated emergency arbitration decision, the position in relation to the enforcement of foreign-seated emergency arbitration decisions is less clear. Guidance on this issue was finally forthcoming in *CVG v CVH*,[138] the first reported decision in Singapore concerning the enforcement of a foreign-seated emergency arbitrator decision.

4.115 CVH was CVG's Singapore franchisee and was authorised to distribute CVG's products in physical stores, over the Internet, as well as operate CVG's website. The parties' relationship was set out in four franchise agreements. Disputes arose between the parties which led to CVG filing an International Centre for Dispute Resolution ("ICDR") arbitration against CVH, together with an application for emergency interim relief. The ICDR arbitration was seated in Pennsylvania, USA.

4.116 An emergency arbitrator was appointed and, after hearing from both parties, issued an emergency interim award ("the EA award") in favour of CVG. CVG then applied to the High Court (General Division) for permission to enforce the EA award, which permission was granted ("the Enforcement Order").

4.117 CVH applied to set aside the Enforcement Order, arguing (amongst other things) that foreign emergency awards could not be

136 See s 19 read with s 2(1) of the International Arbitration Act 1994 (2020 Rev Ed).
137 See s 46 read with s 2(1) of the Arbitration Act 2001 (2020 Rev Ed).
138 [2022] SGHC 249.

enforced in Singapore as the definition of "arbitral tribunal" under s 2(1) of the IAA – which includes an emergency arbitrator – did not apply to Part 3 of the IAA which addressed the enforcement of foreign arbitration awards. CVH contended that, based on the drafting of the IAA provisions, the legislative intention was to exclude foreign emergency awards from enforcement under s 29 of the IAA.

4.118 CVH also argued that the EA award should be refused enforcement under s 31 of the IAA as it had been made in excess of jurisdiction as it was based on matters that were only introduced in post-hearing submissions ("the new case"). As such, a breach of natural justice had occurred as CVH was not afforded the opportunity to respond to the new case, and the emergency arbitrator had failed to address essential issues that had been submitted to arbitration.

4.119 The High Court rejected CVH's arguments in respect of s 29 of the IAA, noting that a purposive interpretation of the term "arbitral award" in s 27(1) of the IAA includes awards by emergency arbitrators; consequently, s 29 of the IAA applies to foreign awards by emergency arbitrators.[139] Applying the three-stage approach to the purposive interpretation of legislation,[140] the court held that:

> (a) Although the term "arbitral tribunal" is not defined in s 27(1) of the IAA, "the text is capable of being interpreted to include emergency arbitrators. Such an interpretation is also consistent with the context of the IAA as a whole given that the definition of 'arbitral tribunal' in s 2(1) [of the IAA] includes emergency arbitrators".[141]
>
> (b) The 2012 amendments to the IAA "speak to an intention to make the IAA applicable to all awards, including foreign interim awards by emergency arbitrators".[142]
>
> (c) To interpret the term "arbitral award" in s 27(1) of the IAA to include emergency awards "was clearly consistent with the legislative purpose of the statute".[143]

4.120 However, the court set aside the Enforcement Order for breach of s 31(1)(*c*) of the IAA, holding that the emergency arbitrator had failed to give CVH the opportunity to respond to the new case; if CVH had

139 *CVG v CVH* [2022] SGHC 249 at [28].
140 As set out in *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850.
141 *CVG v CVH* [2022] SGHC 249 at [30].
142 *CVG v CVH* [2022] SGHC 249 at [32].
143 *CVG v CVH* [2022] SGHC 249 at [34].

been able to respond to the new case, it "could have reasonably made a difference" to the emergency arbitrator's decision.[144]

4.121 Another decision relating to the enforcement of arbitration awards was *CNX v CNY*,[145] which examines the interplay between the timelines for setting aside an order granting leave to enforce an award, and s 14(2) of the State Immunity Act 1979[146] ("SIA").

4.122 CNX was a company while CNY, a sovereign state. Following CNY's alleged breaches of a BIT, CNX commenced a Danubia-seated arbitration against CNY pursuant to the arbitration clause in the BIT.

4.123 CNX successfully obtained an award against CNY for a significant sum. On 2 September 2021, CNX obtained leave to enforce the final award against CNY; leave was granted and the order stated on its face that the defendant "may apply to set aside the order to be made herein within 21 days after service of the order on the defendant" ("the leave order").[147]

4.124 The leave order was served on CNY through consular channels on 20 October 2021. Pursuant to the terms of the leave order, the last day for CNY to apply to set aside the leave order was 10 November 2021.

4.125 On 10 November 2021, CNY applied to the High Court (General Division) for an extension of time to set aside the leave order. In particular, CNY sought a declaration that it could apply to set aside the leave order within two months and 21 days from when the leave order was served on it. Its application was predicated on s 14(2) of the SIA, which provides that "[a]ny time for entering an appearance (whether prescribed by Rules of Court or otherwise) shall begin to run 2 months after the date on which the writ or document is so received".

4.126 The High Court agreed with CNY, noting first that the term "entry of appearance" in s 14(2) of the SIA includes "any corresponding procedures" when that section is read together with s 2(2)(*b*) of the SIA.[148] The court considered that the term "any corresponding procedures" as

144 *CVG v CVH* [2022] SGHC 249 at [54]–[55].
145 [2022] 5 SLR 368.
146 2020 Rev Ed.
147 *CNX v CNY* [2022] 5 SLR 368 at [6].
148 *CNX v CNY* [2022] 5 SLR 368 at [28]. It bears note that *CNX v CNY* was decided before the promulgation of the Rules of Court 2021. The term "entry of appearance" is no longer used in s 14(2) of the State Immunity Act 1979 (2020 Rev Ed) and has instead been substituted with "a notice of intention to contest or not to contest". The change in terminology should not, however, affect the substance of this decision.

used in s 2(2)(*b*) of the SIA was a broad and inclusive one and "meant to apply to a range of procedures, some of which may not have stages that are the same in 'texture and terminology' to the steps of entry of appearance and judgment in default".[149] Within the context of an order granting leave to enforce an arbitration award, an application to set aside the leave order was similar in substance to an entry of appearance. Therefore, on a plain reading of s 14(2) of the SIA, CNY had a total of two months and 21 days from the date of service to enter an appearance.[150]

4.127 The last published decision relating to the enforcement of arbitration awards in 2022 was *Re Shanghai Xinan Screenwall Building & Decoration Co, Ltd*.[151] Shanghai Xinan Screenwall Building & Decoration Co Ltd ("Shanghai Xinan") was a company incorporated in the People's Republic of China ("PRC"). By an order of court dated 3 August 2021, Shanghai Xinan obtained leave under s 19 of the IAA to enforce a foreign arbitration award against Great Wall Technology Aluminium Industry Pte Ltd ("Great Wall"), a Singapore-incorporated company.

4.128 The award related to claims under two contracts between Shanghai Xinan and Great Wall, both of which contained identical arbitration agreements providing for arbitration by the "China International Arbitration Center." The China International Economic and Trade Arbitration Commission ("CIETAC") accepted administration of the arbitration under the CIETAC domestic arbitration rules despite the reference to a different (non-existent) arbitration centre.

4.129 Great Wall did not participate in the arbitration. Instead, it applied to the High Court (General Division) to set aside the order granting leave to enforce the award. One of the arguments advanced by Great Wall was that the arbitration agreement was not valid under Chinese law because there was no arbitral institution named "China International Arbitration Center".[152]

4.130 This argument was rejected by the High Court judge, who observed at the outset that "rational commercial parties would not deliberately choose a non-existent institution any more than they might invent a fictitious country as the seat" and the parties' "objective

149 *CNX v CNY* [2022] 5 SLR 368 at [29].
150 *CNX v CNY* [2022] 5 SLR 368 at [50] and [53].
151 [2022] 5 SLR 393.
152 *Re Shanghai Xinan Screenwall Building & Decoration Co, Ltd* [2022] 5 SLR 393 at [17(b)(i)].

intention … must be that an existing arbitral institution administer the potential arbitration".[153]

4.131 While the parties did not refer to "CIETAC" in the arbitration agreements, the court held that the parties had a common intention that CIETAC would be the administering arbitral institution.[154] Following the approach adopted previously in Singapore, as well as in other jurisdictions, "inaccuracy in the name used in the arbitration agreements does not nullify the parties' consent to arbitration or their choice of CIETAC".[155] As the parties had selected an arbitral institution to administer their dispute, the arbitration agreement was valid under Chinese law.

4.132 Great Wall also argued that the leave order ought to be set aside as it neither had notice of the arbitration proceedings nor received a copy of the award. Both arguments were also rejected by the court. In so far as notice of the arbitration proceedings was concerned, the court noted that, as a Singapore-incorporated company, Great Wall was subject to s 387 of the Companies Act,[156] which allows service of documents on a Singapore company by leaving it at or sending it by registered post to the registered office of the company. In addition, not only were the arbitration documents served in a manner that satisfied Art 3(1) of the MAL, but the address to which the documents had been delivered was also an address indicated in the parties' contracts.[157]

4.133 In so far as delivery of the award was concerned, s 19B of the IAA provided that an award is binding once it is made. While the award was not delivered to Great Wall's registered address (the company had moved), Great Wall had failed to inform Shanghai Xinan of its change of address. In these circumstances, while Shanghai Xinan could not rely on s 387 of the Companies Act to effect service, there was still proper service pursuant to Art 3(1) of the MAL and the terms of the contracts.[158]

4.134 The mis-naming of arbitral institutions happens fairly often, especially in relation to PRC arbitration institutions. The error typically

153 *Re Shanghai Xinan Screenwall Building & Decoration Co, Ltd* [2022] 5 SLR 393 at [48].
154 *Re Shanghai Xinan Screenwall Building & Decoration Co, Ltd* [2022] 5 SLR 393 at [48], [49] and [51].
155 *Re Shanghai Xinan Screenwall Building & Decoration Co, Ltd* [2022] 5 SLR 393 at [51] and [54].
156 Cap 2006 Rev Ed,
157 *Re Shanghai Xinan Screenwall Building & Decoration Co, Ltd* [2022] 5 SLR 393 at [27].
158 *Re Shanghai Xinan Screenwall Building & Decoration Co, Ltd* [2022] 5 SLR 393 at [37].

arises due to translation issues; while non-Chinese institutions often have "Centre" in their English names, PRC institutions use the term "Commission" instead. While Shanghai Xinan was able to enforce its award in this case, risks remain where errors are made in the naming of arbitral institutions, particularly where there are many such institutions with similar sounding names. Parties should therefore take care when drafting dispute resolution clauses to ensure that the correct institution is identified.

V. Subject matter arbitrability at the pre-award stage

4.135 In *Anupam Mittal v Westbridge Ventures II Investment Holdings*,[159] the Court of Appeal devised a new approach towards the determination of subject matter arbitrability at the pre-award stage. This decision has ramifications on how dispute resolution clauses should be crafted and, in particular, on the need to expressly set out the governing law of an arbitration agreement.

4.136 Westbridge Ventures II Investment Holdings ("Westbridge") was a private equity fund that had invested in People's Interactive (India) Private Limited ("PII"), a company which owned and operated an online and offline matchmaking service. Mittal was one of the founders of PII. Westbridge and Mittal were, subsequent to Westbridge's investment in PII, parties to a shareholders' agreement and a supplementary subscription-cum-shareholders' agreement which contained identical governing law and arbitration clauses.

4.137 Disputes subsequently arose between the parties and Westbridge sought to exit its investment. Mittal alleged corporate oppression and mismanagement of PII and commenced proceedings in the National Company Law Tribunal ("NCLT").

4.138 Westbridge applied to the High Court (General Division) seeking a permanent anti-suit injunction against Mittal to restrain him from, *inter alia*, pursuing any action in the NCLT and commencing proceedings in relation to PII or the agreements, other than before an arbitral tribunal constituted pursuant to the applicable arbitration clauses. In response, Mittal argued that the NCLT was the proper and exclusive forum for matters concerning corporate oppression and corporate mismanagement under Indian law.

159 [2023] 1 SLR 349.

4.139 At first instance, the High Court granted the permanent anti-suit injunction, holding that Mittal had breached the parties' arbitration agreements by commencing the NCLT proceedings, and there were no good reasons to withhold the injunction.[160] In arriving at its decision, the High Court held that the law of the seat (Singapore law) applied to determine the issue of subject matter arbitrability at both the pre- and post-award stage. As a consequence, the dispute between the parties in respect of corporate oppression was arbitrable under Singapore law. This approach of applying the law of the seat "avoids potential anomalies that would otherwise arise from applying the proper law of the arbitration agreement to the question of pre-award subject matter arbitrability".[161]

4.140 Mittal appealed against the High Court decision. The central issue before the Court of Appeal was whether Mittal had acted in breach of the parties' arbitration agreements by commencing the NCLT proceedings. Mittal argued at the appeal that (a) if oppression and mismanagement disputes were covered by the arbitration agreements, the arbitration agreements would be null and void as Indian law does not allow such disputes to be resolved by arbitration; and (b) the disputes referred to the NCLT were objectively non-arbitrable based on the law of the arbitration agreement, which was Indian law.[162]

4.141 The Court of Appeal reached the same outcome as the High Court and upheld the grant of a permanent anti-suit injunction. However, in arriving at its decision, the Court of Appeal adopted a new, "composite" approach towards determining subject matter arbitrability at the pre-award stage. The starting point of the court's analysis was the arbitration agreement. The Court of Appeal observed that:[163]

> An arbitration agreement derives its authority from the consensus of the parties. Therefore, it is in our view unarguable that the arbitration agreement together with the law that governs it must determine exactly what the parties have agreed to arbitrate. The arbitration agreement is the fount of the tribunal's jurisdiction. The law of the seat deals with matters of procedure but the law of the arbitration agreement deals with matters of the validity of the agreement and is, in that sense, anterior to the actual conduct of the arbitration. If in an arbitration agreement the parties agree to arbitrate a range of questions that includes, for example, the question of custody of a minor, and they also agree

160 *Westbridge Ventures II Investment Holdings v Anupam Mittal* [2021] SGHC 244. See also the Court of Appeal decision: *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349 at [24]–[26].

161 *Westbridge Ventures II Investment Holdings v Anupam Mittal* [2021] SGHC 244 at [48].

162 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349 at [2].

163 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349 at [53].

> that the arbitration agreement is governed by a law under which custody would not be arbitrable, surely the question of custody simply cannot be arbitrated regardless of what the seat law or any other law provides. This is because the agreement from which the jurisdiction of the arbitrators is derived is governed by a law that provides that those parties cannot arbitrate the question of custody. Consequently, the tribunal would not have jurisdiction to decide a custody dispute. And the Singapore court must recognise this want of jurisdiction and given effect to it.

4.142 Whether a dispute is arbitrable at the pre-award stage depends, at first instance, on the law that governs the arbitration agreement. If it is a foreign governing law and that law provides that the subject matter is not arbitrable, the Singapore courts would not allow the arbitration to proceed because it would be contrary to foreign public policy to enforce such an arbitration agreement.[164] Thereafter, the analysis shifts to considering whether the subject matter of the dispute is arbitrable under the law of the seat. If it is arbitrable under the (foreign) law of the arbitration but not arbitrable under the law of the seat (Singapore law), then the arbitration would also not be able to go ahead.[165]

4.143 The Court of Appeal considered that this "composite" approach of applying the non-arbitrability rules under both the law of the arbitration agreement as well as the law of the seat was not only consistent with the unrestricted definition of "public policy" under s 11 of the IAA[166] but also in line with the principles of international comity.[167]

4.144 Therefore, applying the three-stage test as set out in *BCY v BCZ*[168] ("*BCY*") to determine the law of the arbitration agreement, the Court

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164 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349 at [55].

165 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349 at [55].

166 Section 11(1) of the International Arbitration Act 1994 (2020 Rev Ed) ("IAA") provides: "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." This section does not limit "public policy" to that of Singapore only; this position may be contrasted with that under s 31(4)(*b*) of the IAA and Arts 34(2)(b)(ii) and 36(1)(b)(ii) of the MAL, which limit the consideration of public policy to Singapore public policy only: see *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349 at [48].

167 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349 at [60].

168 [2017] 3 SLR 357. The three-stage test involves considering the following: *first*, whether the parties expressly chose the proper law of the arbitration agreement; *second*, in the absence of an express choice, whether parties made an implied choice of the proper law to govern the arbitration agreement, with the starting point for determining the implied choice of law being the law of the contract; and *third*, if

(cont'd on the next page)

of Appeal concluded that Singapore law was the law of the arbitration agreement.[169] The Court of Appeal considered that while the parties had chosen Indian law as the governing law "in all respects" of the agreements and their performance, this was not to be construed as an express choice that Indian law also governed the arbitration agreements.[170] Further, having regard to the nationality of PII and its shareholders, the parties' express choice of Singapore as the arbitral seat and the selection of the ICC arbitration rules as the applicable procedural rules, the Court of Appeal held that "the intention of the parties was that their disputes should be settled by arbitration" and "this intention is not consistent with an implied choice of Indian law as the proper law of the arbitration agreement".[171] Finally, as the parties had chosen Singapore as the seat of the arbitration, Singapore law had the most real and substantial connection with the arbitration.[172]

4.145 The "composite" approach represents a departure from the more commonly taken position of considering only the law of the seat when determining subject matter arbitrability. It is, however, a very attractive and contemporary approach towards dispute resolution, particularly where disputes (and the underlying contracts) cross different jurisdictional borders, legal traditions and cultural norms.

4.146 That said, the Court of Appeal's analysis in respect of the second limb of *BCY* appears less robust than desired. The court placed significant emphasis on the parties "specifically" incorporating a provision for all disputes – including disputes relating to the management of PII – to be resolved in arbitration, and stated that it was "impossible to contend that as shareholders they were not aware that disputes arising under the [agreements] and also in connection with the management of [PII] would give rise to questions of Indian company law that would generally fall to be determined by the Indian courts".[173] This analysis relies on speculation as to the parties' knowledge and intentions, and may well give the parties more credit than they are due.

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neither an express nor implied choice can be discerned, which is the system of law with which the arbitration agreement has its closest and most real connection.

169 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349 at [63]–[75].

170 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349 at [66].

171 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349 at [73].

172 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349 at [75].

173 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349 at [72].

4.147 From a practical standpoint, this case emphasises the importance of choosing a law to govern the arbitration agreement. Where there are risks of public policy differences that may impact subject matter arbitrability, it would be sensible to choose the same set of laws to govern both the arbitration agreement and the seat.
