(2021) 33 SAcLJ 786
(Published on e-First 11 May 2021)

DAMAGES FOR BREACH OF AN ARBITRATION AGREEMENT

An Available Remedy under Singapore Law?

Singapore is often widely lauded for its efforts in continually refining its laws and legislation to maintain its status as one of the world's leading centres for international commercial arbitration. The Singapore courts have also repeatedly affirmed a judicial policy of facilitating and promoting arbitration. This article will examine a rarely discussed lacuna under Singapore law in the circumstances where a party has commenced court proceedings in breach of an arbitration agreement: the lack of clear authority providing for damages for the breach of an arbitration agreement, as well as some lessons to be learnt from other jurisdictions.

Elan **KRISHNA**
LLB (Hons) (National University of Singapore),
LLM (International Legal Studies) (New York University);
Advocate and Solicitor (Singapore);
Partner, Cavenagh Law LLP (Clifford Chance Asia).[1]

Yi-Jun **KANG**
LLB (Hons) (London School of Economics and Political Science);
Solicitor (England and Wales), Advocate and Solicitor (Singapore);
Senior Associate, Clifford Chance Asia.

I. Introduction

1 The arbitration process, by its nature, is consensual in that parties must agree to refer their dispute to arbitration. This is usually done by entering into an arbitration agreement. However, despite such agreement, it is not uncommon that a party finds itself having to defend against court proceedings which have been commenced in breach of an arbitration agreement.

2 The traditional remedies available to vindicate such breaches include a stay of proceedings in favour of arbitration and anti-suit

1 Clifford Chance Asia is a formal law alliance in Singapore between Clifford Chance Pte Ltd and Cavenagh Law LLP.

injunctions. For example, with reference to Singapore, where the seat of the arbitration is Singapore, a party would be able to seek recourse from the Singapore courts in the form of an anti-suit injunction. If proceedings are brought in Singapore courts in breach of an arbitration agreement, the principal remedy awarded by the Singapore courts would be an order for a stay of proceedings in favour of arbitration. In either case, the Singapore court also tends to award indemnity costs in favour of the innocent party. These traditional remedies are further discussed in Part II of this article.[2]

3 This article explores the availability of a further and/or additional remedy for breach of an arbitration agreement – a damages claim – where the arbitration agreement is governed by Singapore law. While the Singapore courts have yet to make a definitive pronouncement on the issue, it is submitted that there is no reason a claim for damages should not be available: under Singapore law, a jurisdiction or arbitration agreement is a contractual agreement like any other, and the usual remedy for breach of contract is an award of damages. Part III[3] elaborates on these arguments, and considers the correct forum for such a claim to be heard as well as the issue of *res judicata*.

4 Finally, Part IV[4] explores in further detail the issue of whether a costs order made in a prior litigation precludes recoverability of damages in subsequent arbitration proceedings, especially where there remains a *shortfall* between a party's actual costs incurred following breach of the arbitration agreement and the costs previously awarded to it by the court. In this regard, the authors submit that such a shortfall should, flowing from the usual principles of damages for breach of an agreement, be recoverable under Singapore law.

II. Traditional remedies available for breach of arbitration agreements

5 When two parties agree to refer their dispute to arbitration, usually by entering into an arbitration agreement, such an agreement to arbitrate carries with it both positive and negative obligations. The positive obligation is that the parties are to resolve the disputes within the scope of the arbitration agreement in the forum prescribed. The concomitant negative obligation, which is implied, is that neither party

2 See paras 5–22 below.
3 See paras 23–57 below.
4 See paras 58–76 below.

will seek relief in any other forum. Such an obligation exists even where arbitration proceedings are not ongoing or even proposed.[5]

6 When a party has commenced court proceedings in breach of an arbitration agreement, there are numerous mechanisms available to the innocent counterparty to enforce its contractual right to have the dispute referred exclusively to arbitration. With reference to the Singapore courts, the principal remedies are as follows:

(a) Where a party to an arbitration agreement has initiated proceedings in the Singapore courts in breach of said arbitration agreement, the innocent counterparty may seek a stay of the proceedings in favour of arbitration.

(b) Where Singapore is the seat of the arbitration and court proceedings have been commenced overseas in breach of the arbitration agreement, the innocent counterparty may seek anti-suit injunctive relief from the Singapore courts.

(c) Further, in both types of proceedings before the Singapore courts, the innocent counterparty may seek an award of indemnity costs from the Singapore courts.

7 The judicial policy which underlies these remedies was succinctly stated by the Singapore Court of Appeal in *Tjong Very Sumito v Antig Investments Pte Ltd*[6] ("*Tjong Very Sumito*"):[7]

> An unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore … More fundamentally, the need to respect party autonomy (manifested by their contractual bargain) in deciding both the method of dispute resolution (and the procedural rules to be applied) as well as the substantive law to govern the contract, has been accepted as the cornerstone underlying judicial non-intervention in arbitration. In essence, a court ought to give effect to the parties' contractual choice as to the manner of dispute resolution unless it offends the law.

A. Stay of proceedings

8 Where a party to an arbitration agreement has initiated proceedings in the Singapore courts in breach of said arbitration agreement, the primary relief sought, and granted by the Singapore courts, has typically been a stay of proceedings in favour of arbitration.

---

5 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [53], citing *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] 1 WLR 1889 at [1].

6 [2009] 4 SLR(R) 732.

7 *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [28].

9 This remedy is statutorily enshrined in s 6 of the International Arbitration Act[8] ("IAA") and s 6 of the Arbitration Act[9] ("AA").

(1) Stay of proceedings under the IAA

10 The IAA applies to international arbitrations, as well as non-international arbitrations where parties have a written agreement for Pt II of the IAA or the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") to apply.[10]

11 Section 6 of the IAA mandates a stay of court proceedings in favour of arbitration when the conditions for the grant of a stay are satisfied. Specifically, s 6(2) of the IAA provides that where a party makes an application under s 6(1) of the IAA for a stay of proceedings in respect of "any matter" which is the subject of an arbitration agreement, the court "*shall*" grant an order "staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed". As stated by the Singapore Court of Appeal in *Tomolugen Holdings Ltd v Silica Investors Ltd*[11] ("*Tomolugen*"), the regime set out in the IAA is substantially similar to that found in Art 8(1) of the Model Law.[12]

12 In *Tomolugen*, the Singapore Court of Appeal held that in the context of a stay application made under s 6 of the IAA, a stay will be granted as long as the applicant can establish, on a *prima facie* basis, that: (a) there is a valid arbitration agreement between the parties; (b) the dispute in the court proceedings falls within the scope of the arbitration agreement; and (c) the arbitration agreement is not null, void, inoperative or incapable of being performed.[13]

13 Although this represented a departure from the full merits standard of review adopted by the English courts in stay applications,[14] the approach adopted by the Singapore courts is consistent with the

8 Cap 143A, 2002 Rev Ed.
9 Cap 10, 2002 Rev Ed.
10 International Arbitration Act (Cap 143A, 2002 Rev Ed) s 5(1).
11 [2016] 1 SLR 373.
12 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [27].
13 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [63].
14 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [48], citing *Joint Stock Company "Aeroflot Russian Airlines" v Berezovsky* [2013] EWCA Civ 784.

approach taken in other regional jurisdictions such as Hong Kong,[15] affirming Singapore's credentials as an arbitration-friendly jurisdiction.

(2) Stay of proceedings under the AA

14 The AA applies to domestic arbitrations, *ie*, any arbitration where the place of arbitration is Singapore and where Pt II of the IAA does not apply.[16]

15 Unlike s 6 of the IAA, the court's power to grant a stay in favour of arbitration under s 6 of the Arbitration Act is discretionary rather than mandatory. Specifically, s 6 of the AA states that any party to an arbitration agreement may apply for a stay of proceedings which are instituted in respect of matters subject to the arbitration agreement and that the court *may* stay proceedings if it is satisfied that:

> (a) there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement; and
>
> (b) the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration.

16 Notwithstanding the discretionary nature of the court's power to grant a stay in favour of arbitration under s 6 of the AA, the Singapore courts have held that where the applicant seeking a stay remains ready and willing to arbitrate, the court will only deny a stay in exceptional circumstances.[17] Further, whilst the inquiry under the term "sufficient reason" can be wide-ranging and capture a broad range of factors, the factors invoked should outweigh the considerations that generally point to enforcing the arbitration agreement (*ie*, the fact that the parties had voluntarily bound themselves to arbitrate).[18]

B. Anti-suit injunctions

17 Where an arbitration is seated in Singapore, the Singapore courts may grant an anti-suit injunction to restrain a breach of an arbitration

15 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [50] and [51], citing *Star (Universal) Co Ltd v Private Company "Triple V" Inc* [1995] 2 HKLR 62 and *PCCW Global Ltd v Interactive Communications Service Ltd* [2007] 1 HKLRD 309.

16 Arbitration Act (Cap 10, 2002 Rev Ed) s 3.

17 *Maybank Kim Eng Securities Pte Ltd v Lim Keng Yong* [2016] 3 SLR 431 at [23].

18 *Sim Chay Koon v NTUC Income Insurance Co-operative Ltd* [2016] 2 SLR 871.

agreement.[19] Such anti-suit relief may be prohibitory and/or mandatory in nature.[20] Further, the Singapore courts have the power to issue both interim and permanent anti-suit injunctions.[21]

18 Usually, in deciding whether to grant an anti-suit injunction, the Singapore courts will consider the following factors:

(a) whether the defendant is amenable to the jurisdiction of the Singapore court;

(b) whether Singapore is the natural forum for resolution of the dispute between the parties;

(c) whether the foreign proceedings would be vexatious or oppressive to the plaintiff if they are allowed to continue;

(d) whether the anti-suit injunction would cause any injustice to the defendant by depriving the defendant of legitimate juridical advantages sought in the foreign proceedings; and

(e) whether the institution of foreign proceedings was or would be in breach of any agreement between the parties.[22]

19 However, where proceedings have been brought in breach of an arbitration agreement, the Singapore courts have held that this is a "separate basis" on which an anti-suit injunction may be granted, and anti-suit relief would ordinarily be granted unless there are strong reasons not to. The Court of Appeal in *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd*[23] stated that:[24]

> 67 … a breach of an agreement has been regarded as a separate basis on which an anti-suit injunction may be granted; one that is distinct from vexatious or oppressive conduct …
>
> 68 *… it would suffice to show that there was a breach of such an agreement, and anti-suit relief would ordinarily be granted unless there are strong reasons not to … There will be no need to adduce additional evidence of unconscionable conduct in such cases.* Crucially, however, this approach is subject to an important caveat: there is no requirement for the court to feel any diffidence in granting an anti-suit injunction, '*provided that it is sought promptly and before*

19 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [28] and [38]. Such injunctions may also be sought from and granted by an arbitral tribunal, if one has already been constituted.

20 *CCH v CDB* [2020] 5 SLR 798 at [15]–[25].

21 *R1 International Pte Ltd v Lonstroff AG* [2015] 1 SLR 521.

22 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [56].

23 [2019] 1 SLR 732.

24 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [67]–[68].

> *the foreign proceedings are too far advanced*' [emphasis added]: *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The 'Angelic Grace')* [1995] 1 Lloyd's Rep 87 ('*The Angelic Grace*') at 96.
>
> [emphasis added]

20 The availability of anti-suit injunctions as a remedy for breach of an arbitration agreement, as well as the grounds on which the Singapore courts will grant them, are consistent with the Singapore courts' well-established reputation for according primacy to and upholding arbitration agreements.

C. Award of indemnity costs

21 Additionally, the Singapore courts have confirmed that where it can be established by a successful application for a stay or an anti-suit injunction *vis-à-vis* a breach of an arbitration clause that the breach has caused the innocent party to incur costs in defending these court proceedings, such costs are ordinarily recoverable on an indemnity basis.[25] This is because, as stated by the Singapore Court of Appeal in *Tjong Very Sumito*:[26]

> The conduct of a party who deliberately ignores an arbitration or a jurisdiction clause so as to derive from its own breach of contract an unjustifiable procedural advantage is in substance acting in a manner which not only constitutes a breach of contract but which misuses the judicial facilities offered by the … courts. *In the ordinary way it can therefore normally be characterised as so serious a departure from 'the norm' as to require judicial discouragement*. [emphasis added]

22 Notwithstanding the above, party-to-party costs awarded by the Singapore courts, even on an indemnity basis, rarely (or almost never) result in the innocent party recovering all of its legal costs from the counterparty. This recoverability gap almost always exists because costs awarded on an indemnity basis merely means that costs would be taxed on the basis that any doubts as to their reasonableness are to be resolved in favour of the receiving party.[27] The availability of damages as a remedy for breach of an arbitration agreement under Singapore law, including whether such a remedy can be used to bridge the aforementioned recoverability gap, will be discussed below.

---

25 *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732.

26 *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [19], citing *A v B (No 2)* [2007] 1 Lloyd's Rep 358.

27 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 59 r 27(3).

III. Damages as a remedy for breach of an arbitration agreement

23 The remedies discussed above are the typical remedies that a party who has been confronted with court proceedings initiated in breach of an arbitration agreement can avail itself of.

24 A less explored avenue is whether the innocent party also has a substantive right to claim compensatory damages in respect of the losses suffered arising from the breach of the arbitration agreement (for example, a party's own costs in the parallel proceedings), in the usual way that one would seek damages for a breach of contract.

25 As a starting point, it is submitted that the availability and applicability of this remedy would necessarily depend on the governing law of the relevant arbitration agreement. This is because the remedy of damages is a substantive, as opposed to a jurisdictional (or court-prescribed), remedy;[28] one must therefore look to the law of the contract (*ie*, the arbitration agreement) itself to determine the substantive consequences of breach.

26 Where the arbitration agreement is governed by Singapore law, it is further submitted that the innocent party, whose right to have the dispute resolved exclusively by arbitration has been violated, should also be entitled to make a claim for damages against the party who has initiated court proceedings.

A. Availability of such remedy under Singapore law

27 The Singapore courts have not had a chance to consider the question of whether damages may be recovered for breach of an arbitration agreement in any detail and/or made any distinctive pronouncement on the availability of such cause of action or remedy.

28 However, it is submitted that there is at least indirect support for this position – in *Tjong Very Sumito*, the Singapore Court of Appeal cited with approval the English decision of *A v B (No 2)*,[29] which stated that the consequence of one party's breach of an arbitration agreement "ought to be that the innocent party recovers by a costs order *and/or by an award of damages* the whole, and not merely part, of its reasonable legal costs"[30] [emphasis added].

---

28 Julio César Betancourt, "Damages for Breach of an International Arbitration Agreement under English Arbitration Law" (2018) 34 Arb Int'l 511 at 515–517.

29 [2007] 1 Lloyd's Rep 358.

30 *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [19].

29 The fact that the breach of an arbitration agreement is capable of giving rise to a distinct cause of action for damages under Singapore law would be consistent with the position under English law, where the English courts have expressly recognised that the breach of an arbitration agreement can give rise to such a distinct cause of action.

30 In *National Westminster Bank plc v Rabobank Nederland*[31] ("*Rabobank No 1*"), the English court held that an action for damages founded on breach of an anti-claim clause would be "*as distinct a cause of action as in the case of breach of* an exclusive jurisdiction clause or of *an arbitration agreement*" [emphasis added].[32]

31 In *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd*,[33] the English court reviewed an arbitral award issued by a tribunal in an arbitration seated in London, wherein the arbitral tribunal had awarded damages for breach of the arbitration agreement. CMA CGM SA ("CMA") originally commenced proceedings against the Hyundai Mipo Dockyard ("HMD") in tort in the Marseilles Commercial Court, alleging that HMD had unreasonably refused to agree to novate four shipping contracts to CMA. The French court upheld CMA's claim and found HMD liable for US$3,646,125 and €10,000 in damages, and €30,000 in costs. HMD then commenced arbitration in London against CMA pursuant to the arbitration clauses found in the four shipping contracts, claiming that the French proceedings were commenced in breach of the agreement to arbitrate. It therefore sought damages equal to the value of the French judgment obtained in breach of contract. The tribunal granted HMD's claim and awarded the damages sought. The English court confirmed that the tribunal was entitled to award damages for breach of the arbitration agreement notwithstanding the existence of a conflicting judgment from the French court.

32 It is submitted that the availability of such a remedy should flow from ordinary contractual principles under Singapore law. Accordingly, there is no reason in principle why, under Singapore law, an innocent party who has had to defend against court proceedings which have been commenced in breach of an arbitration agreement should not be entitled to bring a substantive damages claim before an arbitral tribunal against the party in breach to recover the costs it incurred in defending against such proceedings.

---

31 [2007] EWHC 1056 (Comm).

32 *National Westminster Bank plc v Rabobank Nederland* [2007] EWHC 1056 (Comm) at [439].

33 [2008] EWHC 2791 (Comm).

33 Leading commentators have suggested that the availability of damages as a remedy to vindicate breaches of arbitration agreements is grounded in the substantive law of contract.

34 David Joseph QC, in particular, suggests that the availability of such remedy flows from general contractual principles. He observes that "[i]t is open in principle to an innocent party who has incurred costs and expenses in dealing with actions brought in breach of contract to recover those costs and expenses in the contractual forum. The innocent party is entitled to make such recovery by way of an independent claim for breach of contract".[34]

35 Jeffrey Waincymer has also stated that "[w]hile costs powers will largely depend upon an analysis of the *lex arbitri*, arbitral rules and any agreement between the parties, a claimant might also look to the substantive law of damages for breach as an alternative ground for seeking indirect compensation for costs".[35]

36 In the same vein, Adrian Briggs QC also takes the view that "[i]f the dispute resolution agreement is a contract enforceable in the way any other contract is enforceable, there is no reason to doubt the proposition that damages are available for its breach against the party who has broken it".[36]

37 As detailed above, the Singapore courts have held that an arbitration agreement carries with it both positive and negative obligations, including a negative obligation that neither party will seek relief in any other forum.[37] The commencement of court proceedings notwithstanding an arbitration agreement amounts to a breach of the parties' contract to arbitrate.[38] Therefore, on the basis that an award of

---

34 David Joseph QC, *Jurisdiction and Arbitration Agreements and Their Enforcement* (Sweet & Maxwell, 2015) at para 14.10.

35 Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) at para 15.2.2. See also Pablo Jaroslavsky, "Damages for the Breach of an Arbitration Agreement: Is It a Viable Remedy?" (3 August 2015) <https://ssrn.com/abstract=2676449> (accessed 11 November 2020), which states that since arbitration agreements "contain a mutual substantive obligation between the parties not to initiate proceedings in a non-contractual forum … being such promise substantive in nature, the appropriate remedy to repair its breach should be an award of damages governed by substantive law".

36 Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) at para 12.52, citing *Ellerman Lines Ltd v Read* [1928] 2 KB 144.

37 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [53], citing *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] 1 WLR 1889 at [1].

38 *CCH v CDB* [2020] 5 SLR 798.

damages is the usual remedy for breach of contract under Singapore law[39] and the proposition that "what is true for contracts generally is also true for the contract to arbitrate",[40] under Singapore law, the victim of the breach of an arbitration agreement should accordingly be entitled to make a claim for damages against the party who has initiated court proceedings.

B. The correct forum for a claim for damages for breach of an arbitration agreement

38 Assuming that damages are available under Singapore law as a remedy for breach of an arbitration agreement, what then is the correct forum for such a claim to be brought?

39 As a preliminary point, it seems self-evident that the best forum for filing such a claim would *not* be the one in which the claim was brought in breach of the arbitration agreement. This is irrespective of whether the court seised decides or refuses to stay the proceedings in favour of arbitration. This is because the pursuit of such a claim in the Singapore courts, for example, is inherently inconsistent as it is likely to constitute a submission to jurisdiction.[41]

40 It is therefore submitted that the most appropriate forum to hear such a claim is the contractual forum, *ie*, the arbitral tribunal. The fact that the arbitral tribunal has both the ability and authority to hear such a claim would, it is submitted, flow from the scope of the arbitration agreement itself.

41 The typical wording of arbitration agreements (for example, that "all disputes between the parties arising out of or in connection with this contract" shall be submitted to arbitration) is arguably broad enough to encompass claims for damages caused by reason of a breach of the agreement. [42]

---

39 *Ng Bok Eng Holdings Pte Ltd v Wong Ser Wan* [2005] 4 SLR(R) 561.

40 Jan Paulsson, *The Idea of Arbitration* (Oxford University Press, 2013) at p 4.

41 *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [19], citing *A v B (No 2)* [2007] 1 Lloyd's Rep 358. ("Where the defendant who had been improperly impleaded in the English courts was outside the jurisdiction, no claim for damages could be brought in the English courts without submitting to the jurisdiction.")

42 See David Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement* (Sweet & Maxwell, 2015) at paras 14.10–14.11 ("it is open in principle to an innocent party who has incurred costs and expenses in dealing with actions brought in breach of contract to recover those costs and expenses in the contractual forum … *The major consideration, however, is whether the arbitration agreement is wide enough to embrace claims for damages caused by reason of a breach of the agreement. This*

(cont'd on the next page)

42 Indeed, in practice, arbitral tribunals commonly assume that they *do* have the ability and authority to award such damages.

43 In an International Chamber of Commerce ("ICC") case, *ICC Case No 8887*, Final Award (April 1997),[43] the claimant commenced arbitration proceedings seeking payment for certain civil engineering works done for the respondent. The respondent simultaneously commenced court proceedings in Turkey for a ruling that the claimant had no valid claim against it. The arbitrator held that the respondent, in commencing court proceedings, was in breach of the arbitration agreement and ordered the respondent to pay to the claimant its costs of defending the Turkish court proceedings (*ie*, the cost of hiring counsel to defend it in the proceedings).

44 In another ICC arbitration,[44] the respondent had initiated proceedings before a Greek court seeking a declaration that the claimant's termination of a distribution agreement between the parties was unlawful and an order that the claimant was liable to it for certain payments. The claimant subsequently commenced the arbitration claiming payment of certain sums under the distribution agreement and also damages incurred in respect of the Greek proceedings commenced by the respondent in purported breach of the arbitration agreement. The ICC tribunal considered the issue of whether the claimant was entitled to damages under English law, and found that the claimant's claims fell within the scope of the arbitration agreement on the basis that the arbitration clause also encompassed the disputes arising from its very breach. It therefore accepted jurisdiction and treated the claim based on the breach of the arbitration agreement as a contractual claim within the meaning of English law, and, *inter alia*, ordered the respondent to pay to the claimant any amounts the claimant could be ordered to pay to the respondent in the Greek proceedings, and/or any legal and procedural costs that the Greek court might order the claimant to make.

---

is a matter of construction of the arbitration agreement and … it is suggested that in most cases the arbitration agreement would be broad enough to capture such claims for damages" [emphasis added]). See also Pablo Jaroslavsky, "Damages for the Breach of an Arbitration Agreement: Is It a Viable Remedy?" (3 August 2015) <https://ssrn.com/abstract=2676449> (accessed 11 November 2020) at paras 80–81.

43 *ICC Case No 8887*, Final Award (April 1997) (extract), 2000, 11(1) ICC IC Arb Bull 91.

44 See *X SA v Z Ltd* 4A_232/2013, a decision of the Swiss Federal Supreme Court in respect of a petition from the respondent to annul the arbitral award issued in this arbitration on the basis that the tribunal lacked jurisdiction. The Swiss Federal Supreme Court rejected the respondent's petition.

C. Concerns of res judicata

45 Because a claim in damages for breach of the arbitration agreement will inevitably intersect with court proceedings, it is pertinent to consider whether a decision made by a national court in related proceedings will preclude a claim in damages before the arbitral tribunal on grounds of *res judicata*. It is submitted that this issue necessarily has to be considered with reference to the decision of the court in the related proceedings, *ie*, whether the national court agrees that there has been a breach of the arbitration agreement and grants a stay of proceedings and/or an anti-suit injunction accordingly ("Category 1 Cases"), or whether the national court proceeds to hear the case on the merits notwithstanding the innocent party's contention that the proceedings have been commenced in breach of an arbitration agreement ("Category 2 Cases").

(1) Category 1 Cases

46 In Category 1 Cases, if a national court finds that (a) the action was brought in breach of an arbitration agreement and dismisses the case or stays the proceedings, or (b) grants an anti-suit injunction to restrain a breach of an arbitration agreement, it may or may not issue an order on costs allowing the injured party to recover all or part of its costs from the breaching party.

47 As a starting point, if the costs awarded by the national court fully compensate the innocent party, a claim for damages before an arbitral tribunal will necessarily be precluded. This seems self-evident since although there is liability arising from the breach of the arbitration agreement, the innocent party has not suffered any loss.[45]

48 However, in circumstances where the costs awarded do not fully compensate the innocent party, it is submitted that unlike in circumstances where a court is asked to revisit a costs order made in prior litigation before a court of the same forum,[46] issues of *res judicata* arguably do not arise to preclude a claim for damages because the doctrine of *res judicata* is simply not engaged.

49 Both Singapore and English law recognise that the doctrine of *res judicata* comprises, *inter alia*, the rules of cause of action and issue

45 Pablo Jaroslavsky, "Damages for the Breach of an Arbitration Agreement: Is It a Viable Remedy?" (3 August 2015) <https://ssrn.com/abstract=2676449> (accessed 11 November 2020) at para 46.

46 *Then Khek Koon v Arjun Permanend Samtani* [2014] 1 SLR 245 ; *Maryani Sadeli v Arjun Permanand Samtani* [2015] 1 SLR 496 – see further paras 61–66 below.

estoppel.[47] The rules of cause of action and issue estoppel prevent parties from bringing an identical cause of action, or denying or rearguing an issue of fact or law that was previously determined by a competent court.[48] It is submitted that cause of action estoppel is not engaged, because the issue of the proper contractual forum (*ie*, the arbitral tribunal) making a substantive award of damages for breach of an arbitration agreement is distinct from a national court awarding costs in proceedings commenced before it, even if the national court proceedings were necessitated by and/or related to the same breach of an arbitration agreement. It is further submitted that issue estoppel is also not engaged because a costs award made in a forum which (self-admittedly) does not have jurisdiction over the issue of damages for breach of an arbitration agreement[49] should not operate to preclude the innocent party from bringing such a claim in the rightful contractual forum.[50] Therefore, the fact that a foreign court, applying its own procedural rules, has only awarded the innocent party a fixed amount of compensation in respect of costs, should not bar a substantive claim for damages in respect of the amount of costs which had not been recovered in the prior forum.

50 Quite apart from questions of *res judicata*, as will be elaborated at Part IV below, there are additional reasons which militate in favour of an innocent party being able to recover costs for the breach of an arbitration agreement by way of damages before the contractual forum (*ie*, the arbitral tribunal), as long as the previous costs order continues to leave the innocent party out of pocket.

(2) Category 2 Cases

51 In Category 2 Cases, the national court decides to hear the case on the merits notwithstanding the innocent party's contention that the proceedings have been commenced in breach of an arbitration agreement. In most of these cases, the court reaches that decision by finding, first and foremost, that there has not been a breach of the arbitration agreement. Consequently, it will likely not award costs to the innocent party at all. Further, the court could also decide the merits of the dispute in favour of

47 *The Royal Bank of Scotland NV v TT International Ltd* [2015] 5 SLR 1104 at [98], citing *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 at [17].

48 *Tracomin SA v Sudan Oil Seeds Co Ltd* [1983] 1 Lloyd's Rep 560 at 566, *per* Staughton J; *Cheong Soh Chin v Eng Chiet Shoong* [2019] 4 SLR 714 at [28], citing *Zhang Run Zi v Koh Kim Seng* [2015] SGHC 175 at [40] and [54].

49 See paras 25 and 38–44 above, wherein it is submitted that the issue of damages for breach of an arbitration is purely a matter to be resolved by the contractual forum in accordance with the law applicable to the arbitration agreement.

50 Koji Takahashi, "Damages for Breach of a Choice-of-Court Agreement" (2008) 10 *Yearbook of Private International Law* 57 at 76.

the party in breach and compel the injured party to pay sums of money and even some of the breaching party's costs.

52 Here, the key question is therefore whether the costs order which has compelled the injured party to pay some of the breaching party's costs will have *res judicata* effect and preclude the claim for damages to recover that sum, and whether the national court's judgment rendered against the injured party that there has not been a breach of the arbitration agreement also acquired binding force of *res judicata* precluding any further claim for damages to recover the sums it has been compelled to pay.[51]

53 As a starting point, it is submitted that, notwithstanding a prior decision of a national court that there has not been a breach of an arbitration agreement, the arbitral tribunal will first be entitled to consider this issue independently, without being bound to recognise a prior judgment of another court. Some support for this suggestion can be found in the decision of the Singapore High Court in *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka*[52] ("*WSG Nimbus*") and the English case of *Ellerman Lines Ltd v Read*[53] ("*Ellerman Lines*").[54]

54 *WSG Nimbus* was a case involving anti-suit relief sought before the Singapore courts. In this case, the defendant had commenced proceedings against the plaintiff in the Colombo High Court notwithstanding an arbitration agreement between the parties. The plaintiff filed a notice of motion to object to the Colombo High Court exercising jurisdiction over the claims, having regard to the arbitration agreement. The Colombo High Court dismissed the plaintiff's objection and accepted jurisdiction over the claims brought by the defendant. Notwithstanding the decision of the Colombo High Court, the Singapore High Court dismissed the defendant's application to set aside the anti-suit injunction. Lee Seiu Kin JC (as he then was) held that the anti-suit injunction should be continued, because once the Singapore court is satisfied that there is an

51 Pablo Jaroslavsky, "Damages for the Breach of an Arbitration Agreement: Is It a Viable Remedy?" (3 August 2015) at para 105 <https://ssrn.com/abstract=2676449> (accessed 11 November 2020), citing Koji Takahashi, "Damages for Breach of a Choice-of-Court Agreement" (2008) 10 *Yearbook of Private International Law* 57 at 80.

52 [2002] 1 SLR(R) 1088.

53 [1928] 2 KB 144.

54 See also para 44 above on the decision of the Swiss Federal Supreme Court in *X SA v Z Ltd* 4A_232/2013, involving an underlying International Chamber of Commerce ("ICC") arbitration in which the ICC tribunal found, as a matter of English law, that there was a breach of the arbitration agreement, and, *inter alia*, ordered the respondent to pay to the claimant any amounts the claimant could be ordered to pay to the respondent in proceedings before a Greek court which had been initiated by the respondent in breach of the arbitration agreement.

arbitration agreement, it has a duty to uphold that agreement and prevent any breach of it.[55]

55 *Ellerman Lines* involved an agreement for the salvage of a vessel and cargo, wherein the parties had agreed that (a) the contractor's remuneration, if disputed, was to be fixed by arbitration in London and (b) the vessel shall not be arrested or detained unless there was an attempt to remove it before security for the contractor's claim was provided. Notwithstanding such agreement and the provision of security by the owners, the contractor arrested the vessel in Constantinople and commenced proceedings for damages before the Turkish courts with respect to the remuneration due to him under the salvage agreement. The Turkish court gave judgment for the sum claimed and the ship was sold in partial satisfaction of the Turkish judgment. The owners of the ship then applied to the English court for an injunction to restrain the contractor from enforcing the Turkish judgment and for damages for the contractor's breach of the salvage agreement. The English Court of Appeal held, *inter alia*, that the Turkish proceedings were brought in breach of contract and in fraud, and further that the owners were entitled to all damages flowing from such breach, including the costs incurred in rescuing the vessel and the crew from Turkey, and for the value of the ship which had been lost. The fact that the damages ordered had the effect of reversing a Turkish judgment which had been partially enforced was of no consequence.[56]

56 *A fortiori*, an arbitral tribunal should likewise be entitled to consider the question of breach of an arbitration agreement independently.

57 Should the arbitral tribunal then determine that the court proceedings were brought in breach of the applicable arbitration agreement, the authors further submit that the doctrine of *res judicata* is simply not engaged. As stated above,[57] both Singapore and English law recognise that the doctrine of *res judicata* comprises, *inter alia*, the rules of cause of action and issue estoppel,[58] which prevent parties from bringing an *identical* cause of action, or denying or rearguing an issue

55 *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088 at [91].

56 Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) at para 8.05.

57 See para 49 above.

58 *The Royal Bank of Scotland NV v TT International Ltd* [2015] 5 SLR 1104 at [98], citing *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2014] AC 160 at [17].

of fact or law that was previously determined by a *competent* court.[59] Therefore, when considering whether it should be precluded from determining the issue of a breach of an arbitration agreement due to an earlier decision of a national court on grounds of *res judicata*, the arbitral tribunal has to consider, as part of its analysis, whether the same cause of action or issue has already been determined by a court of *competent* jurisdiction. If the arbitral tribunal finds that the court proceedings were brought in breach of the applicable arbitration agreement, it flows from such finding, that the national court which issued the earlier contrary decision is, in the eyes of the arbitral tribunal, *not* a court of competent jurisdiction. Consequently, the national court's judgment on the issue of whether the arbitration agreement has been breached can neither bind the arbitral tribunal nor have the force of *res judicata vis-à-vis* an arbitral tribunal's consideration of this issue.

IV. Recovery of damages where a prior costs award continues to leave the innocent party out of pocket

58 As explained above,[60] it is submitted that as a threshold issue, where the costs awarded by a national court in related stay and/or anti-suit proceedings do not fully compensate the innocent party, issues of *res judicata* do not arise to preclude a claim for damages in circumstances where a prior costs order continues to leave the innocent party out of pocket.

59 In this part, it is further submitted that such shortfall should be recoverable under Singapore law.

A. Present position under Singapore law

60 The current position under Singapore law is not straightforward. However, it is submitted that the Singapore courts have contemplated (or at least left open) the possibility that the innocent party may separately pursue a claim for the unrecovered costs as damages.

61 Whilst this question has not come up specifically for consideration, certain comments made by the Singapore High Court in

59 *Tracomin SA v Sudan Oil Seeds Co Ltd* [1983] 1 Lloyd's Rep 560 at 566, *per* Staughton J; *Cheong Soh Chin v Eng Chiet Shoong* [2019] 4 SLR 714 at [28], citing *Zhang Run Zi v Koh Kim Seng* [2015] SGHC 175 at [40] and [54].

60 See para 49 above.

Then Khek Koon v Arjun Permanend Samtani[61] ("*Then Khek Koon (HC)*") are germane.

62 In this case, the plaintiff subsidiary proprietors had, in previous proceedings before the Singapore Court of Appeal, successfully set aside a collective sale of a condominium by establishing, *inter alia*, the defendant sale committee members' breach of fiduciary duty in the sale process. However, the plaintiffs failed to recover the full legal costs that they thereby incurred. The plaintiffs therefore started fresh proceedings before the Singapore High Court seeking their unrecovered legal costs as equitable compensation for breach of fiduciary duty.

63 The Singapore High Court rejected such attempt, and held that as a general principle, unrecovered costs of previous litigation proceedings could not subsequently be recovered by the plaintiff as damages in separate proceedings. This is because allowing such claims would undermine the policy of finality of litigation, amongst others. *However*, the High Court set out two exceptions where the aforementioned rule would not apply:

> (a) *Exception 1*: Where the court in the prior litigation did not make an order as to costs of that litigation, and the party now seeking to recover compensation for those costs had no reasonable opportunity to seek such an order; and
>
> (b) *Exception 2*: Where the court in the prior litigation made an order as to costs of that litigation, but the costs so awarded were not awarded under the indemnity principle as an actual indemnity. Conversely, this would mean that where the court in the prior litigation awarded costs to a party on an "indemnity basis", the party would be prevented from recovering any unrecovered costs as damages in separate proceedings. This is because bringing a claim for unrecovered costs as damages may raise issues of *res judicata*, where the original court which granted the stay of proceedings also made an order of indemnity costs in favour of the innocent party. While such claims may not amount to a *dollar for dollar* indemnity against the plaintiff's full legal costs, such an award is nonetheless "*deemed*" under Singapore law to be an actual indemnity.

64 Exception 2 is particularly relevant – this is because, as stated above,[62] if the court finds in applications for a stay of proceedings in favour of arbitration and/or anti-suit injunctions that a party has brought court proceedings in breach of an arbitration agreement, costs of the

61 [2014] 1 SLR 245.
62 See paras 21 and 22 above.

Singapore proceedings would be awarded to the successful party on an indemnity basis. Would such an order for indemnity costs issued by the Singapore courts thereby preclude the innocent party from pursuing a claim to recover the shortfall between the costs recovered and the total costs reasonably incurred in arbitration?

65 Although the aforementioned principles laid down by the Singapore High Court, upon first reading, would appear to preclude such a claim, it bears noting that Coomaraswamy J also observed that the aforementioned general rules against recovery of costs as damages *would not apply* where there was a breach of an exclusive jurisdiction clause or an arbitration clause. In particular, he held that:[63]

> [T]here is undoubtedly a class of cases where a different rule might apply because the plaintiff who seeks to recover costs as damages could not have asserted a cause of action against the defendant in the earlier proceedings. That class of cases would include cases where the plaintiff had no cause of action against the defendant at the time of the earlier litigation … *Another class of cases is where the costs were incurred in proceedings in a forum other than the forum considering the claim for those costs as damages. That can arise where a party seeks to litigate in an inappropriate forum in breach of an exclusive jurisdiction clause or in breach of an arbitration clause.* [emphasis added]

66 The matter was subsequently brought on appeal. On appeal, the Court of Appeal affirmed the High Court's decision, again rejecting the plaintiffs' claim in damages for the unrecovered costs of the previous proceedings. It nonetheless acknowledged that there could be situations where the unrecovered costs of previous proceedings could be recovered in a subsequent claim for damages, but declined to lay down any specific situations.[64]

B. Reasons to allow recovery where the innocent party remains out of pocket

67 *First*, recognising that the innocent party retains an entitlement to recover costs for the breach of an arbitration agreement by way of damages before the contractual forum (*ie*, the arbitral tribunal) as long as the previous costs order continues to leave the innocent party out of pocket would bring Singapore arbitration law in line with English arbitration law.

68 Under English law, it is well established in cases involving the breach of an exclusive jurisdiction clause and/or an anti-claim clause

63 *Then Khek Koon v Arjun Permanend Samtani* [2014] 1 SLR 245 at [228].
64 *Maryani Sadeli v Arjun Permanand Samtani* [2015] 1 SLR 496 at [59].

that the fact that a party (a) failed to seek a costs order or (b) sought and recovered some of its costs in prior litigation proceedings does not preclude its ability to seek damages for unrecovered costs in subsequent proceedings.

69 In *Union Discount Co Ltd v Zoller*[65] ("*Union Discount*"), the plaintiff and the defendant entered into a contract with an English exclusive jurisdiction clause. The plaintiff sued the defendant in England on the contract. The defendant reacted by suing the plaintiff in New York on the same contract. The plaintiff relied on the exclusive jurisdiction clause and succeeded in striking out the New York proceedings. The plaintiff did not, however, ask the New York court for an award of the costs of the New York action. The plaintiff then added, in the English proceedings, a claim for the costs it had incurred in striking out the New York proceedings. That claim was itself struck out at first instance in the English proceedings as disclosing no reasonable cause of action. However, the decision at first instance was overturned by the English Court of Appeal. The Court of Appeal held that the plaintiff's failure to ask for costs in New York was no bar to its claim in England to recover those costs because an application for costs in the New York proceedings could not possibly have yielded any award of costs, whether on the indemnity principle or otherwise. In particular, the English Court of Appeal stated:[66]

> [I]n a case such as the present, where there was in the earlier action no prospect of obtaining costs although there had been no fault on behalf of the successful party, there was no policy inhibition on granting him the amount of those costs as damages in a later action if he had available to him an appropriate cause of action.

70 *Rabobank No 1* and *National Westminster Bank plc v Rabobank Nederland*[67] ("*Rabobank No 3*") were a series of cases which involved a deed governed by English law, under which the defendant had covenanted not to sue the plaintiff. In breach of the aforementioned covenant, the defendant commenced proceedings against the plaintiff in California. The plaintiff eventually secured the dismissal of the entirety of the California action.[68] However, Californian civil procedure was such that the costs which the Californian courts were empowered to award to the plaintiff were in the form of certain limited disbursements only.[69] The plaintiff thereafter sued the defendant in England and sought to

65 [2001] EWCA Civ 1755.
66 *Union Discount Co Ltd v Zoller* [2001] EWCA Civ 1755 at [11].
67 [2007] EWHC 3163 (Comm).
68 *National Westminster Bank plc v Rabobank Nederland* [2007] EWHC 1056 (Comm) at [19].
69 *National Westminster Bank plc v Rabobank Nederland* [2007] EWHC 3163 (Comm) at [24].

recover the costs it had incurred in defending the California proceedings as damages for breach of the covenant not to sue. The English court held that the plaintiff was entitled to recover the costs of the California proceedings as damages. Further, in determining the measure of the plaintiff's damages arising from the wrongfully brought California action, the English court concluded that the costs of the California proceedings should be assessed on the indemnity basis. Specifically, the English court held that it did not matter that (a) the plaintiff had sought an order for costs in California and failed because the Californian court did not, in any event, have the power to award costs on the indemnity principle, and (b) that the Californian court could, in future, make a limited costs order because appropriate steps could be taken to prevent double recovery. In *Rabobank No 1*, Colman J held:[70]

> I find nothing inconsistent between this conclusion and anything that was said in *Berry v British Transport Commission* [1962] 1 QB 306 … for in this case there is no question of duplication of a cause of action in order to recover by way of damages in one set of proceedings or jurisdiction what could not be or has not been recovered as costs in a previous set of proceedings founded on the same cause of action.

71 While the aforementioned English cases involved breaches of exclusive jurisdiction clauses and/or anti-claim clauses, it has been contended (and the authors concur) that these cases and the principles and/or rights established within should apply by analogy to breaches of arbitration agreements.[71]

72 *Second*, this is arguably a corollary of the proposition that damages as an available remedy to vindicate breaches of arbitration agreements flows from ordinary contractual principles under Singapore law.

73 Indeed, the same leading commentators cited above,[72] who have suggested that the availability of damages as a remedy for breaches of arbitration agreements is grounded in the substantive law of contract, also advocate for the proposition that a partial costs order made in favour of the innocent party in a different forum does not preclude a party's entitlement to recover costs for the breach of an arbitration agreement by way of damages, as long as the previous costs order continues to leave the innocent party out of pocket:

---

70 *National Westminster Bank plc v Rabobank Nederland* [2007] EWHC 1056 (Comm) at [439].

71 Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) at para 12.58. See also Pablo Jaroslavsky, "Damages for the Breach of an Arbitration Agreement: Is It a Viable Remedy?" (3 August 2015) at para 120 <https://ssrn.com/abstract=2676449> (accessed 11 November 2020).

72 See paras 34 and 35 above.

(a) David Joseph QC has observed that:[73]

> … the ability of a party to recover reasonable costs by way of damages would not appear in principle to be restricted to cases where the innocent party is unable to apply for an order for costs. Thus, applying this analysis, *the remedy ought to be available where a party has applied for and been awarded costs but on a basis that still leaves the innocent party bearing a shortfall in recovery* [emphasis added];

and

> *… it is open in principle to an innocent party who has incurred costs and expenses in dealing with actions brought in breach of contract to recover those costs and expenses in the contractual forum. The innocent party is entitled to make such recovery by way of an independent claim for breach of contract … even if the innocent party has made partial recovery of costs from the foreign court but seeks the difference between costs recovered and the total costs reasonably incurred.* [emphasis added]

(b) Similarly, Waincymer also notes that:[74]

> One suggestion is that [damages for breach as a ground for seeking indirect compensation for costs] may at least arise in circumstances where procedural law does not allow for redress. *It is not clear why the entitlement should be limited to these circumstances alone as a damages right is an independent right if made out, although double compensation should obviously not be permissible.* Furthermore, while parties might sensibly be more inclined to consider claims for consequential damages where there are procedural limits on costs awards, there is no guarantee that this would be effective … *The better view should be that each claim is treated on its merits.*
>
> *Examples of circumstances where costs might be properly characterised as damages include claims for breach of the arbitration agreement itself if a party subject to it nevertheless attempts to commence court proceedings. Each adjudicator would again need to ensure that there is no double dipping between a costs claim in the arbitration and any costs sought from the court in an application to bar the litigation.*
>
> [emphasis added]

74 Further, some support for the proposition that a costs order made in favour of the innocent party in a prior forum should not preclude a party's entitlement to recover costs for the breach of an arbitration agreement by way of damages under Singapore law, as long as the

73 David Joseph QC, *Jurisdiction and Arbitration Agreements and Their Enforcement* (Sweet & Maxwell, 2015) at paras 14.06 and 14.10.

74 Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) at para 15.2.2.

previous costs order continues to leave the innocent party out of pocket, can arguably be derived from certain *obiter* comments of the Singapore High Court in *Then Khek Koon (HC)*:

(a) When examining the English decision of *Union Discount*,[75] Coomaraswamy J observed that while the English Court of Appeal in *Union Discount* did not have to consider the *quantum* of the plaintiff's recovery of costs since the matter came before the Court of Appeal on a question of liability alone:[76]

> … *it is likely that the damages would be quantified by way of an assessment of damages under the substantive law, not by taxation under the procedural law.* This makes sense. The recoverability in English proceedings of costs incurred in New York proceedings does not engage any aspect of policy arising from English procedural law. So it would be reasonable to expect that the specialised procedure established for quantifying costs incurred in English proceedings has no role to play in quantifying costs arising from litigation in another forum. [emphasis added]

(b) On *Rabobank No 1* and *Rabobank No 3*,[77] Coomaraswamy J noted that "[t]he only curiosity is that an English taxation of costs was adopted as the procedure to quantify costs incurred in a foreign forum rather than the usual assessment of damages".[78]

75 The above *dicta* suggests that in the event that the Singapore court is asked to decide this issue, it will view the issue of quantification of damages through the lens of the substantive law of damages for breach, *ie*, with reference to all losses flowing from the breach of the arbitration agreement. Consequently, the relevance of any costs order made in favour of the innocent party in a prior forum will be limited to the calculation of the delta/shortfall in recovery which the innocent party should be entitled to; on the contrary, the substantive principles of taxation of costs applied by the prior forum should have no place in the analysis. Therefore, so long as the innocent party has not been fully compensated by a previous costs order for *all* its losses flowing from the breach of the arbitration agreement, it should be entitled under Singapore law to recover its shortfall in separate/subsequent proceedings as damages for breach of an arbitration agreement.

76 *Third*, the Singapore courts have frequently stressed that the primacy of party autonomy requires them to give effect to the parties'

75 See para 69 above for a summary of this case.
76 *Then Khek Koon v Arjun Permanend Samtani* [2014] 1 SLR 245 at [237].
77 See para 70 above for a summary of this case.
78 *Then Khek Koon v Arjun Permanend Samtani* [2014] 1 SLR 245 at [244].

contractual choice as to the manner of dispute resolution unless it offends the law.[79] The availability of a remedy in damages which will enable the innocent party to be made whole in respect of the unrecovered costs in prior court proceedings would therefore be in consonance with Singapore's public policy towards upholding parties' express choice of forum for dispute resolution.

V. Conclusion

77 It remains to be seen what position the Singapore courts will take when the issue of damages as an available remedy for breach of arbitration agreements arises specifically for consideration. The foregoing analysis has demonstrated that the issue involves many considerations specific to the Singapore legal system, including the proper interpretation of the costs-shifting and indemnity costs rules, and the courts' general intolerance of conduct in breach of an arbitration agreement. However, in the absence of a definitive pronouncement by the Singapore courts, it is submitted that where breach of an arbitration agreement is concerned, Singapore legal principles and judicial opinion leans in favour of allowing the innocent party to make a claim for damages flowing from such breach before an arbitral tribunal.

79 *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [28].