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4. ARBITRATION

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4.1 In 2019, Singapore courts continued to deal with a high number of arbitration-related cases. A vast majority dealt with applications to set aside awards in relation to which Singapore was the seat of the arbitration. There were also three applications related to stay of court proceedings and three applications for injunctive relief in favour of arbitration, as well as three applications to review decisions on jurisdiction under s 10(3) of the International Arbitration Act[1] ("IAA"). Whilst the courts continued to demonstrate their stance in support of arbitration, the Court of Appeal nonetheless reviewed some decisions taken in first instance, setting aside two awards under the IAA and refusing the enforcement of a foreign award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[2] ("New York Convention"), indicating that such support was not limitless, and in doing so, the Court of Appeal outlined some boundaries. The year also marked the first arbitration-related cases heard and decided by the Singapore International Commercial Court ("SICC"). These cases, although made as the court of first instance, reflect the views of non-Singapore judges sitting within a Singapore regime. Thus far, all these cases were decided by judges from common law jurisdictions, and generally reflect the approaches of Singapore judges. It would indeed be interesting should non-common law judges be empanelled to contribute to the reservoir of legal jurisprudence in Singapore.

1 Cap 143A, 2002 Rev Ed.
2 330 UNTS 38 (10 June 1958; entry into force 7 June 1959).

I. Stay of court proceedings

A. Case management stay

4.2 The statutory power of the court to order a stay of proceedings in international cases involving arbitration clauses is set out in s 6 of the IAA, which mandates the court to stay the pending proceedings so long as "the proceedings relate to [a matter which is the subject of the agreement], unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed".

4.3 In 2016, the Court of Appeal, in *Tomolugen Holdings Ltd v Silica Investors Ltd*[3] ("*Tomolugen*"), had granted a stay in favour of arbitration even when there was a party before the court who was not a party to the arbitration agreement, on the basis of the court's "effective case management power" in the fair and efficient administration of justice. That decision has since spawned several attempts by parties to seek similar orders, urging that the courts could use their "case management power" to order stays even when it was unclear whether a party before the court was a party to the arbitration agreement. More recent decisions have clarified that a stay granted under the court's case management power is discretionary and must be distinguished from the statutory power under s 6 of the IAA which obliges the court to grant a stay.

4.4 In *Rex International Holding Ltd v Gulf Hibiscus Ltd*,[4] the Court of Appeal clarified the principles set out in *Tomolugen* when it comes to the courts' exercise of their case management powers. In that case, Gulf Hibiscus Ltd ("Gulf") and Rex Middle East Limited ("RME"), together with another, were parties to a shareholders' agreement ("SHA") entered in relation to a joint venture, LIME Petroleum plc ("LIME"). Gulf commenced action against Rex International Holding Limited and Rex International Investments Pte Ltd, two Singapore companies ("the Rex Companies"), the ultimate and intermediate holding companies of RME, for alleged wrongs committed in connection with LIME. The Rex Companies sought a stay on case management grounds, relying on an arbitration clause found in the SHA.

4.5 The stay was granted by the assistant registrar on the basis of case management, relying on the court's discretion as formulated in *Tomolugen*. However, the ordering of the stay was conditional, such that the court would lift the stay if none of the parties to the SHA commenced arbitration within three months from the date of judgment. Neither party

3 [2016] 1 SLR 373.
4 [2019] 2 SLR 682.

commenced arbitration and the stay was subsequently lifted by the High Court judge, which decision was appealed.

4.6 The Court of Appeal dismissed the appeal. However, it observed that the stay should not have been granted in the first place. The Court of Appeal explained that the question of case management arises where there are overlapping issues that will have to be ventilated before different *fora* among different parties, some of whom are bound by an arbitration agreement, while others are not (*Tomolugen*). There must therefore be the existence or at least the imminence of separate legal proceedings giving rise to a real risk of overlapping issues for courts to exercise their case management power and order a stay of proceedings. Before using their case management power, it is therefore critical for the courts to appreciate the nature and extent of the overlaps between the putative arbitration and the court proceedings. In that respect, the Court of Appeal explained that courts ought to consider which are (a) the potential *fora* for the resolution of the dispute; (b) the different parties before each *forum*; and (c) the issues to be determined before each such forum. The sort of overlap that would then attract a case management stay is one where the proper ventilation of the issues in the court proceedings depended on the resolution of the related putative arbitration. Only in that case would a case management stay be needed in order to achieve the efficient and fair resolution of the dispute as a whole:[5]

> The authorities discussed above reveal gradations of response to what is in essence the same problem as that in the situation of overlapping court and arbitral proceedings outlined at [140] above. We alluded to this problem in our introduction to this judgment, namely, that of seeking to uphold the statutory mandate and the strong legislative policy in favour of arbitration in circumstances where the dispute which is covered by the arbitration clause in question forms only part of a larger dispute with a broader horizon. The unifying theme amongst the cases is the recognition that the court, as the final arbiter, should take the lead in ensuring the efficient and fair resolution of the dispute as a whole. The precise measures which the court deploys to achieve that end will turn on the facts and the precise contours of the litigation in each case.

4.7 In the present case, the court held that the judge did not sufficiently consider the shape of the putative arbitration and therefore whether the court proceedings depended on that putative arbitration. He should have seen that the putative arbitration was largely illusory, and a completely artificial scenario. The Rex Companies were not party to the arbitration clause which only applied to disputes between Gulf and RME. In addition, Gulf had no claim against RME and had therefore no

5 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [186].

intention of commencing any proceedings against RME. On the other hand, it had sued the Rex Companies, but there existed no arbitration clause between the Rex Companies and Gulf. It was therefore improper to stay Gulf's claim against the Rex Companies.

4.8 The Rex Companies had also argued that (a) the effect of the condition of the stay was to force them to move their subsidiary RME to commence arbitration in pursuit of a negative case; and (b) Gulf, as claimant in the arbitration, ought to have commenced the arbitration and that, as it did not, it should not be allowed to lift the stay. The Court of Appeal found that these arguments assumed that there were claims against RME to begin with, when the real mischief of the original case management stay was that it had the effect of preventing Gulf from pursuing its claims against the Rex Companies. If the Rex Companies were correct in their position, it would mean that Gulf would be unable to prosecute its claims against them and would instead have to pursue RME in arbitration, despite the fact that Gulf had no wish to pursue RME at all. The Court of Appeal reiterated that courts should not interfere with the parties' right to choose their cause of action and with the parties they wish to sue in whichever forum they want, subject only to any applicable legal constraint such as an arbitration clause. The Court of Appeal therefore lifted the stay.

4.9 In that decision, the Court of Appeal also held that courts may re-open a decision to grant a stay on case management grounds as such decisions are part of the courts' exercise of their inherent jurisdiction to manage their own internal processes. It is an administrative decision. Courts do not therefore become *functus officio* after a stay is granted and they have an independent power to lift the stay. This decision makes clear that the power to grant a stay on case management grounds falls outside the ambit of the statutory provision of the IAA and is purely discretionary and should not be extended to encroach upon a party's right to choose the forum competent to adjudicate the matter.

B. Conflicting dispute resolution clauses

4.10 Parties in international transactions may at times enter into different contractual arrangements with each other in the same or inter-related transactions. Such arrangements may sometimes provide for different laws or jurisdictions or contain contradictory provisions when it comes to dispute resolution. Quite common examples would be where the same contract contains both a choice of jurisdiction and an arbitration clause or where related contracts between the parties contain arbitration clauses pursuant to which the arbitration should be seated in different locations or administered by different institutions. Such drafting is

ill-advised and should be avoided as they have spawned much litigation, with courts adopting different approaches in reconciling or adopting one of the chosen modalities of dispute resolution.

4.11 In *Grains and Industrial Products Trading Pte Ltd v State Bank of India*[6] ("*Grains*"), the parties had entered into two agency agreements in respect of various trading transactions in which Bhasi (the third defendant) had played a role. The first agreement (which covered the period between 2009 and 2015) contained a provision where "[t]he Parties agree to submit to the non-exclusive jurisdiction of the Courts of Singapore" and an arbitration clause stating that "[a]ny dispute shall be referred to the final and binding arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre". In the second agreement (which covered the period between 2016 and 2017), the parties made provision for the exclusive jurisdiction of the courts of Singapore. Hoo Sheau Peng J examined the transactions and came to the view that most of the transactions fell within the period covered by the first agreement. In resisting the continuation of the action, Bhasi mounted various jurisdictional challenges. Among these challenges, Bhasi applied for a stay of the proceedings on the ground that Singapore was not the *forum conveniens* and that proceedings ought to be brought in India instead or, alternatively, for a stay in favour of arbitration.

4.12 The plaintiffs took the position that the dispute resolution clauses read together merely gave the parties the option to mutually agree to refer certain matters to arbitration, without excluding either party's right to elect to bring proceedings in Singapore instead of pursuing arbitration.

4.13 Hoo J refused to stay the proceedings on the ground that Singapore was not the *forum conveniens* but allowed the stay pursuant to ss 6(1) and 6(2) of the IAA. She also rejected the plaintiffs' argument that Bhasi's assertion that the Indian courts were the most appropriate forum should be construed as a waiver or repudiation of the arbitration agreement. In doing so, the learned judge adopted the approach set out in *PT Tri-MG Intra Asia Airlines v Norse Air Charter Ltd*[7] ("*Norse Air*") where the assistant registrar had construed the jurisdiction clause as a reference to the curial law of the arbitration, thereby giving effect to the parties' agreement to arbitrate. In her grounds of decision, the learned judge noted that Vinodh Coomaraswamy J had earlier, in *BXH v BXI*,[8] also affirmed a similar approach that, where the parties have evinced a clear intention to submit their disputes to arbitration, courts have to

6 [2019] SGHC 292.
7 [2009] SGHCR 13.
8 [2020] 3 SLR 1368.

seek to give effect to their intention as far as possible.[9] In *BXH v BXI*, the court too gave meaning to the choice of jurisdiction, construing the jurisdiction clause as the choice of the supervisory court of the arbitration rather than one that overrides the parties' agreement to arbitrate.

4.14 The decisions in *Grains* and *BXH v BXI* give primacy to the parties' intention by attempting to give poorly worded dispute resolution clauses a workable solution rather than to nullify them, affirming the approach earlier adopted by the assistant registrar in *Norse Air*.

II. Interim measure in support of arbitration

A. Anti-suit injunctions and comity considerations

4.15 On several occasions, Singapore courts have assisted parties who found themselves being sued in other jurisdictions in breach of binding arbitration agreements, by issuing anti-suit injunctions directing the other parties to desist from pursuing their claims in those jurisdictions. This mode of judicial assistance is consistent with the courts' obligation, under the New York Convention, to uphold the parties' agreement to arbitrate. Although anti-suit injunctions are directed not against the courts of those jurisdictions, but against the parties who have acted in breach by pursuing the litigation instead of arbitration, it still has the indirect interference with the foreign court proceedings. As such, anti-suit injunction orders are normally made while the action in the foreign court is still pending and in the earlier stages of those proceedings.

4.16 A rare situation arose in *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd*[10] where, after Hilton International Manage (Maldives) Pvt Ltd ("Hilton") had obtained awards in its favour for over US$20m against Sun Travels & Tours Pvt Ltd ("Sun Travels"), the latter started two sets of proceedings in the Maldives: one resisting enforcement of the awards, and another civil proceeding in which it claimed over US$16m of damages against Hilton for breach of the hotel management agreement. Sun Travels' claims for damages in the Maldives were the same claims as those already disposed of, and dismissed, in the arbitration. Sun Travels, however, succeeded in its civil claim in March 2017 ("the March Judgment") against which Hilton appealed. Hilton's enforcement action was dismissed on the basis of the March Judgment.

9 *Insigma Technology v Alstom Technology* [2009] 3 SLR(R) 936 at [31].
10 [2018] SGHC 56.

4.17 In November 2017, Hilton applied to the Singapore court for a permanent anti-suit injunction as well as for other declaratory reliefs. Belinda Ang Saw Ean J declined to make the anti-suit injunction but granted a limited permanent injunction order restraining Sun Travels "from taking any steps in reliance on the ruling in the March Judgment by the courts of the Republic of Maldives, or any decision upholding the March Judgment".[11] She also made declaratory orders to the effect that the awards were "final, valid and binding on the parties" and that Sun Travels' claim before the courts in Maldives were "in breach of the arbitration agreement in the Management Agreement".[12] The appeal was made against both Ang J's injunctive order and declaratory relief.

4.18 The Court of Appeal[13] noted that the relief sought was an anti-enforcement injunction, which called for special considerations and greater caution as the grant of such injunction could interfere with ongoing foreign proceedings.

4.19 The court explained that the most common justification to grant an anti-enforcement injunction involved situations where a judgment had been procured by fraud or when the applicant could not have sought relief before the judgment was given because he had no means of knowing that the judgment was being sought until it was served on him. These exceptions stem from the roots of anti-suit relief as a form of equitable relief, and a party's entitlement to such equitable relief could be lost for unconscionable conduct, or on account of unconscionable delay.

4.20 In that regard, the Court of Appeal ruled that applicants seeking anti-suit relief must do so without delay. In that case, while Hilton raised jurisdictional objections in the Maldives, such objections could not excuse its delay in seeking this equitable relief. Hilton could and should have simultaneously sought injunctive relief in Singapore. Its failure to do so allowed the Maldivian proceedings to reach an advanced stage, such that judgment was eventually entered. The Court of Appeal found that Hilton had ample opportunity to apply for an injunction, but that it waited until there were two Maldivian judgments and a pending appeal against it. In addition, the Court of Appeal found that Hilton failed to show exceptional circumstances, and that pointing to some "aberration", "surprise" or to an unexpected outcome was insufficient to obtain an

11 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [4].

12 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [4].

13 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732.

anti-enforcement injunction. For those reasons, the anti-enforcement injunction against relying on the March Judgment was reversed.

4.21 As to the declaratory orders made by Ang J, the Court of Appeal recalled that courts have wide-ranging powers to grant different forms of declaratory relief that are not explicitly mentioned in the IAA. This power is derived from the First Schedule to the Supreme Court of Judicature Act.[14] As to when courts should exercise their discretion to grant such declaratory relief, an important consideration is whether there exists "a real controversy" and whether a declaration will be of value to the parties. In that respect, the Court of Appeal upheld Ang J's declaratory orders holding that they would be a potentially persuasive tool in the Maldives proceedings. Such a declaration would provide a platform to sustain the grounds of *res judicata* and collateral estoppel on which the plaintiffs could rely in the Maldivian proceedings.

4.22 It is interesting to note from that case that the Court of Appeal held that while courts are increasingly reluctant to refuse injunctive relief for solely comity reasons when relief is sought to enforce an exclusive jurisdiction or an arbitration clause, comity considerations can still be engaged when there is undue delay in the application. The Court of Appeal pointed out that comity had to be understood as "respect for the operation of different legal systems" as opposed to the need to avoid offending foreign courts.[15]

4.23 The Court of Appeal also rightly distinguished anti-suit injunctions from anti-enforcement injunctions and insisted that courts must exercise greater caution in deciding on the latter, as they interfere with foreign proceedings in a way that anti-suit injunctions do not. Anti-enforcement injunctions should therefore only be granted in exceptional circumstances, which must be established "over and above" the requirements for anti-suit injunctions and the equities of the case must be in favour of granting the injunction. Parties are also reminded to frame their applications promptly, even if they intend to raise jurisdictional objections before the foreign court. In upholding the declaratory orders made, the Court of Appeal affirmed Ang J's novel approach which effectively threw Hilton a lifeline to sustain its *res judicata* argument before the appellate court of Maldives. How this will be viewed by the Maldivian courts is a matter that has yet to be seen.

14 Cap 322, 2007 Rev Ed.

15 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [78].

B. Injunction and winding-up proceedings

4.24 Winding-up and insolvency proceedings are not adjudicatory actions for the determination of the rights and liabilities of disputing parties. They are generally therefore not actions for which a stay is contemplated under s 6 of the Arbitration Act[16] ("AA") or s 6 of the IAA, except in some cases where a company has a genuine cross-claim or defence against the petitioner, and where no other creditors have any interest in proceedings with the winding up, the same may be ordered to be stayed or an injunction ordered against the process pending resolution of the disputed claims in arbitration.

4.25 In *BWF v BWG*,[17] the seller ("BWG") had sold crude oil to BWF and made a statutory demand under s 254 of the Companies Act[18] for payment of the purchase price by the buyer BWF who disputed the debt. BWF applied to the court, seeking that the dispute be referred to arbitration in accordance with the arbitration clause contained in the contract between the parties. BWF also sought to restrain the seller from bringing winding-up proceedings against it, relying on the obligation to resolve disputes through arbitration.

4.26 Drawing from the decision of *BDG v BDH*,[19] Valerie Thean J held that so long as there is a *prima facie* dispute subject to an arbitration agreement and no indications that the issues were not raised *bona fide*, courts should grant an injunction to restrain winding-up proceedings. While Thean J was conscious that, in *Mohd Zain bin Abdullah v Chimbusco International Petroleum (Singapore) Pte Ltd*,[20] the Court of Appeal had indicated that winding up should not be rejected on weak grounds, and that a company seeking an injunction must show that there were triable issues that required determination, the learned judge found that, where parties agreed to binding arbitration, what was more pressing was to hold them to their agreement to arbitrate. Thean J also preferred the principles set out in *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd*[21] ("*Vinmar*"), a case which marked a departure from a long line of earlier decisions, where it was said that a court deciding on an application for a stay on the basis of an exclusive jurisdiction clause should disregard the merits of the parties' cases and give effect to their agreement. Thean J took the view that the focus on

16 Cap 10, 2002 Rev Ed.
17 [2020] 3 SLR 894.
18 Cap 50, 2006 Rev Ed. The heading to the provision is entitled "Circumstances in which company may be wound up by Court".
19 [2016] 5 SLR 977.
20 [2014] 2 SLR 446.
21 [2018] 2 SLR 1271.

party autonomy ought to be extended to the insolvency context, noting that parties would otherwise be encouraged to bypass the arbitration agreement as a standard tactic by presenting a winding-up petition, thereby pressuring the alleged debtor with liquidation. She ruled that so long as there was a *bona fide prima facie* dispute, the parties ought to be held to their agreement to arbitrate.

4.27 This decision illustrates the extent to which Singapore courts would uphold party autonomy in arbitration, and that parties will be held to their bargain, including in the insolvency context. The court's decision does not detract from the policy that matters arising out of or in relation to the insolvency itself are non-arbitrable as such proceedings engage not the adjudicatory functions of the court but rather the interest of creditors, stakeholders and the company in the insolvency.

C. Interim measures in domestic arbitration under the AA

4.28 A tribunal constituted in the context of an international arbitration has the power to grant interim relief including injunctions under s 12 of the IAA. Unlike the IAA, s 28 of the AA deliberately omits the power to grant injunctions in domestic arbitrations. Unless such a power is contractually given whether by agreement of the parties or through the arbitration rules adopted, a party seeking interim measures must necessarily go to court.

4.29 In *BWN v BWO*,[22] the claimant in the arbitration was in financial difficulties and sought, under s 211B(1) of the Companies Act,[23] for a moratorium for 90 days to restrain all proceedings against it while it pursued plans to propose a scheme of arrangement under s 210 of the Companies Act in relation to the amounts it owed to its creditors. The moratorium was granted save that the arbitration between the parties was allowed to continue as the applicant was said to have a substantial claim against the respondent. However, three days before the hearing of the s 211B application, the respondent called on the full amount of the performance bonds issued on behalf of the claimant. The applicant only learnt of the call on the bonds on the third day of the Chinese New Year and immediately applied, on 11 February 2019, for an *ex parte* interim injunction to restrain the respondent from calling on and/or receiving payment under the bonds. The application was served on the respondent who appeared by counsel. The court heard the matter *ex parte* albeit in the presence of the respondent's counsel. The respondent filed an appeal instead of seeking to set aside the *ex parte* injunction.

22 [2019] 5 SLR 215.
23 Cap 50, 2006 Rev Ed.

4.30 Ang Cheng Hock JC granted the *ex parte* injunction, relying on unconscionable conduct as a distinct ground from fraud, to restrain a demand of payment under the bonds. The learned judge explained that unconscionability describes unsatisfactory conduct tainted with bad faith and encompasses elements of abuse, unfairness or dishonesty. It has a broader scope than fraud and acknowledges that a conduct may be sufficiently reprehensible to justify the court's intervention by way of equitable relief. In this case, Ang JC found that the respondent's call on the bonds was not in accordance with the terms of the contracts and that the respondent's conduct and the timing of the call lacked good faith and was unfair. The learned judicial commissioner held that the applicant demonstrated a strong *prima facie* case that the call on the bonds was unconscionable and should be restrained by way of an injunction until such time that the issue could be properly considered by the arbitral tribunal. In making its decision to grant the injunction, the court recognised that the decision for its continuation should lie with the tribunal. Such a position is recognised in s 31 of the AA, which stipulates that an order made by the court "shall cease to have effect in whole or in part (as the case may be) if the arbitral tribunal, … makes an order which expressly relates to the whole or part of that order of the Court". It makes clear that while a tribunal in a domestic arbitration under the AA may not have statutory power to grant injunctive relief in the first instance, it is nevertheless able to make such orders to continue, or to vary or discharge the injunctive order made by the court. The respondent in that case quite wisely withdrew its appeal.

III. Judicial review of the arbitral tribunal's ruling on jurisdiction

4.31 Article 16(3) of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law of International Commercial Arbitration[24] ("MAL") provides that an arbitral tribunal's positive ruling on a preliminary question that it has jurisdiction may be reviewed and decided by the court of the seat within 30 days of such a ruling. This provision has been expanded in Singapore by s 10(3) of the IAA, such that any party may apply to the High Court to review the tribunal's decision within 30 days after having received notice of a tribunal's ruling on jurisdiction, be it a positive or a negative ruling on its jurisdiction.

24 UN Doc A/40/17, annex I; UN Doc A/61/17, annex I (21 June 1985; amended 7 July 2006) (hereinafter "MAL").

A. Late application to seek review of tribunal's ruling on jurisdiction

4.32 One of first few cases heard by the SICC concerned a late application for review of a tribunal's decision on jurisdiction. In *BXY v BXX*,[25] Roger Giles IJ had to consider an application to review an arbitral tribunal's positive ruling on jurisdiction over the first defendant (first claimant in the arbitration), which the plaintiffs (respondents in the arbitration) had argued should not be a party to the arbitration. The substantive argument advanced to challenge jurisdiction was that, although that defendant was a signatory to the contract, it had earlier nominated the second defendant (second claimant in the arbitration) to hold all of its shares vesting in it "all of our rights, title and interest" in, under and pursuant to the shares sale contract ("SSA") and thereby relinquished all its rights under the agreement and the arbitration agreement therein. The court rejected the plaintiffs' argument and upheld the tribunal's finding that the first defendant remained a party. In considering the application, the court also noted that it was filed more than 30 days after the tribunal's ruling. The plaintiffs therefore sought a declaration that it had been filed within the time prescribed under Art 16(3) of the MAL and/or s 10(3) of the IAA, or that an extension of time and/or leave to file the application out of time be granted.

4.33 The tribunal's ruling was issued on 8 January 2019, but the plaintiffs said that they never received the e-mail containing the ruling. In support, the plaintiffs submitted correspondence to show that, on 8 February 2019, they had informed the tribunal that they were unaware that the decision had been made, and it was only on 9 February 2019 that the tribunal re-sent its decision to the parties. The plaintiffs therefore submitted that they only received the tribunal's decision on that date. Giles IJ was not convinced by the plaintiffs' assertions and found that the tribunal's decision was received on 8 January 2019 and that the plaintiffs' application was therefore not brought within time.

4.34 Turning to the question whether courts have the power to extend time under Art 16(3) of the MAL and/or s 10(3) of the IAA, Giles IJ found that they did not. The learned judge referred to Art 5 of the MAL which provides that "in matters governed by [the MAL], no court shall intervene except where so provided in [the MAL]" and observed that Art 16(3) of the MAL does not allow for any extension of the 30 days delay, a situation akin to that of the three-month time limit for an application for setting aside an award under Art 34(3) of the MAL, which states that an application "may not be made" after three months. In the

25 [2019] 4 SLR 413.

circumstances, Giles IJ held that the courts derive their jurisdiction from timely applications and when the time has passed, no application can be made, and the right is lost.

4.35 Giles IJ further explained that an application to review a decision on jurisdiction is not an appeal within the curial system, which would then be open to the courts' procedural control. He took this opportunity to observe that the *word "appeal" used* in *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd*[26] ("*Rakna (CA)*") was only used as a convenient shorthand, and that the ability to apply to set aside the award in that case was limited and confined to a non-participating party.

4.36 The time limits set out in Art 16(3) of the MAL and s 10(3) of the IAA are provisions relating to limitation, and Giles IJ therefore held that courts are also not permitted to extent the 30-day timeline pursuant to *the "Additional powers of the High Court" under* para 7 of the First Schedule to the Supreme Court of Judicature Act which provides as follows:

> **ADDITIONAL POWERS OF THE HIGH COURT**
>
> …
>
> **Time**
>
> 7. Power to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, whether the application therefor is made before or after the expiration of the time prescribed, but this provision shall be without prejudice to any written law relating to limitation

4.37 As discussed below, this same approach was also adopted in *BXS v BXT*,[27] where another SICC judge had to rule on a late application to set aside the arbitral award.[28]

B. Determining the seat and the proper law of the arbitration agreement

4.38 The short designation of a location using "arbitration in [location]" has often spawned debate between opposing parties as to whether the reference to the location is a reference to the place/seat of arbitration or merely a venue for the physical hearing.

26 [2019] 2 SLR 131.
27 [2019] 4 SLR 390.
28 See para 4.63 below.

4.39 In *BNA v BNB*,[29] an arbitration clause providing that "disputes shall be finally submitted to the Singapore International Arbitration Centre (SIAC) for arbitration in Shanghai" was in contention. The arbitration was commenced under the auspices of the Singapore International Arbitration Centre ("SIAC") and a tribunal was then appointed. The respondent challenged the tribunal's jurisdiction on the grounds that the proper law of the arbitration clause was the law of the People's Republic of China ("PRC"), and that PRC law rendered the arbitration clause invalid and entailed that the dispute had to be litigated in the PRC courts. It was not disputed that PRC law does not allow a foreign arbitral institution such as the SIAC to administer a PRC-seated arbitration, and to administer a purely domestic dispute such as this. The majority of the tribunal decided that it had jurisdiction as it would have made no commercial or logical sense for the parties to have intentionally selected a law to govern the arbitration clause which would invalidate it. It reached this view by holding that Shanghai was not the seat, but merely the venue, of the hearing. The dissenting arbitrator, on the other hand, maintained that Shanghai was the seat and that, as PRC law was the law of the seat and PRC law was also the law of the substantive contract, PRC law was the proper law of the arbitration agreement. In the dissenting arbitrator's view, therefore, the reference to arbitration under the auspices of the SIAC with Shanghai as its seat would fail and the tribunal therefore lacked jurisdiction.

4.40 In the High Court, Coomaraswamy J approached the determination of the proper law of the parties' arbitration agreement by applying Singapore's conflict of law rules and the three-stage enquiry set out in *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA*[30], *BCY v BCZ*[31] and *BMO v BMP*[32]. He further noted that the natural consequence of the doctrine of separability was that the parties' choice of law for the substantive contract, although a strong factor, was not necessarily the same for the arbitration agreement, and that a factor going against the law of the main contract at the second-stage enquiry could arise from the terms of the arbitration agreement itself, or from the fact that the arbitration agreement would be ineffective under the proper law which the parties have expressly chosen for their main contract. The learned judge referred to the principles of contractual construction set out in *Insigma Technology Co Ltd v Alstom Technology Ltd*,[33] which held that the fundamental objective was to give effect to the parties' intention

29 [2020] 1 SLR 456.
30 [2013] 1 WLR 102.
31 [2017] 3 SLR 357.
32 [2017] SGHC 127.
33 [2009] 3 SLR(R) 936.

as objectively manifested in that agreement. As such, courts should, as far as possible, construe an arbitration agreement so as to give effect to a clear intention evinced by the parties to settle their disputes by arbitration:[34]

> … even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars … so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party …

such that "where a clause can be interpreted in two different ways, the interpretation enabling the clause to be effective should be adopted in preference to that which prevents the clause from being effective".

4.41 The learned judge found that, as the parties did not expressly choose a proper law for their arbitration agreement although they expressly chose PRC law as the governing law of their substantive contract, PRC law would therefore be the starting point of the second stage enquiry (implied choice). This "starting point" was, however, displaceable as the arbitration clause gave two possible geographical locations: (a) "in Shanghai"; and (b) r 18.1 of the Arbitration Rules of the Singapore International Arbitration Centre[35] ("SIAC Rules") (as it were then in force), which provided that, in the absence of a contrary agreement by the parties or a contrary determination by the tribunal, the seat of any arbitration is to be Singapore.[36] He reasoned that, given that the arbitration agreement would likely be invalid if PRC law was its proper law, which would in turn defeat the parties' manifest intention to resolve their disputes through arbitration, PRC law should be displaced as the proper law of the arbitration agreement and Singapore law should be the parties' implied choice at the second stage enquiry.

4.42 The Court of Appeal, however, ruled that the natural meaning of the phrase "arbitration in Shanghai" was that Shanghai was to be the seat of the arbitration. When parties specify only one geographical location in their arbitration agreement, especially when the choice is expressed as "arbitration in [that location]", such a phrase ought most naturally to be construed as a reference to the parties' choice of seat. The court noted that this approach was confirmed by several English cases and academic commentaries. It had also recently confirmed this same position in its decision in *ST Group Co Ltd v Sanum Investments Ltd*[37] ("*Sanum (CA)*").

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34 *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936 at [31].

35 5th Ed, 1 April 2013.

36 This position was changed in a later version, namely, r 21.1 of the Arbitration Rules of the Singapore International Arbitration Centre (6th Ed, 1 August 2016).

37 [2020] 1 SLR 1.

While the Court of Appeal was prepared to accept that *contrary indicia* could displace the natural reading that "arbitration in Shanghai" meant that the seat of arbitration was Shanghai, it found that there was no *contrary indicia* in this case to point away from its natural reading. This, in turn, meant that the law of the seat and the parties' implied choice of the proper law of the arbitration clause were one and the same and it followed that PRC law was the proper law of the arbitration clause. The appeal was therefore allowed on the basis that Singapore was not the seat.

4.43 Given its finding on the seat, the Court of Appeal refrained from taking a position on the tribunal's decision on jurisdiction as it would not be the proper forum to hear any challenge to the tribunal's decision on jurisdiction over the arbitration as any decision made would therefore not be binding on the tribunal.

4.44 The approach taken by the Court of Appeal is logical and fully supportable. The High Court learned judge, in his attempt to uphold the majority's decision, took a winding and circuitous route to suggest that there were two suitors for the place of arbitration when there was always only one. Rule 18.1 of the SIAC Rules could not have been invoked as this was not a situation where one could justifiably say the parties had made no mention of a place to which the arbitration should be anchored as the parties had specifically said "in Shanghai". The message to practitioners must be that the court will not take "the cart before the horse" approach to justify sustaining arbitral jurisdiction. The parties' express choice will be given effect. If parties' formulation fails to work in the manner contemplated, the consequences of their decision must necessarily follow. After all, even the New York Convention provides for the possibility that arbitration clauses may be "null and void, inoperative or incapable of being performed".

4.45 *BNA v BNB*[38] serves to highlight another interesting procedural point in that while it ruled that Shanghai was the seat and thereby disqualified the Singapore court from deciding further the substantive challenge to the tribunal's decision on jurisdiction, it nonetheless affirmed that the procedural challenge against the tribunal ruling was properly brought before the Singapore court. This position must also be right, as the decision of the tribunal was made with Singapore as its putative place of arbitration and as such no other court other than Singapore could have exercised jurisdiction over the decision. In any event, the Singapore court did nothing more than say that the tribunal made a wrong decision as regards the place of arbitration and accordingly directed the parties to the Shanghai courts. The importance of establishing the correct

38 See para 4.39 above.

place of arbitration cannot be underemphasised as it determines the *lex arbitri*, the proper supervisory court, the court to which recourse could be resorted and one that give the award its nationality and reciprocal enforcement privileges. An award made with a wrong seat/place may render it unenforceable under the New York Convention.[39]

C. Differentiating a decision on jurisdiction and an award on the merits

4.46 Article 16(3) of the MAL and s 10(3) of the IAA provide for judicial review of a tribunal's ruling on a preliminary question or a plea on jurisdiction during the course of the ongoing arbitration. This process provides parties with an early determination by the court of issues of jurisdiction decided by an arbitral tribunal before any award on the merits is rendered. Where parties have not raised any jurisdictional issue, it is not open to them to subsequently label an award made on the merits as jurisdictional and seek the court's intervention under these specific provisions.

4.47 *BTN v BTP*[40] concerns another sale and acquisition of shares in a private company in Malaysia ("the Company") by a publicly listed company incorporated in Mauritius. The two sellers had entered into the sale and purchase agreement ("the SPA") with the buyers under which a guaranteed sale price of US$25m ("the guaranteed sum"), plus a further amount capped at US$10m ("the earned consideration") pegged to the certain earning indicators of the Company for the three years ensuing the sale during which the two sellers would continue to manage the Company. Each of the sellers remained to manage the Company under a Promoter Employment Agreement ("PEA") with the Company, the terms of which were annexed to the SPA. Both the SPA and PEAs contained materially identical provisions as to the sellers' "With Cause" and "Without Cause" termination of employment. The effect of these would be that if the sellers' employment, as employees, were terminated "Without Cause", they would be entitled to the further earned consideration and if they were terminated "With Cause" the earned consideration would no longer be payable. The PEAs set out the grounds for termination "With Cause" and defined "Without Cause" as termination for reasons other than "With Cause".

4.48 The SPA and PEAs contained SIAC arbitration clauses and designated the place of arbitration as Singapore. The SPA was governed

39 See further the discussion on *ST Group Co Ltd v Sanum Investments Ltd* [2020] 1 SLR 1 at paras 4.88–4.96 below.

40 [2019] SGHC 212.

by the laws of Mauritius, while the PEAs provided for the laws of Malaysia and for "the courts of Malaysia [to] have exclusive jurisdiction in relation to all matters arising out of the Agreement". On 8 January 2014, the employees were dismissed summarily pursuant to the "With Cause" provision of the PEAs citing the Company's failure to achieve the earnings before interest, taxes, depreciation and amortisation target in the first year and their failure to properly manage the Company's cash flows, misrepresentation to the board of directors in respect of accurate reporting on the quantum of fraud costs, and the taking of excessive, abrupt and/or inappropriately timed holiday leaves. The employees challenged their dismissals and commenced proceedings under s 20 of the Malaysian Industrial Relations Act 1967,[41] which required parties to attend a mandatory conciliation at which no resolution was reached. The matter was then referred to the Malaysian Industrial Court ("MIC") which is empowered to do "all such things as are necessary or expedient for the expeditious determination of the matter". The MIC adjourned the hearing multiple times, and, despite notices having been sent to the Company, the Company did not participate in the MIC hearings. Eventually, the MIC ruled in favour of each of the sellers, holding that they had been dismissed "without just cause", and it ordered the Company to pay compensation for lost salaries. The employees commenced proceedings to enforce payment and eventually the Company made compensation in full.

4.49 In July 2016, the employees commenced SIAC arbitration under the SPA, seeking the payment of the full purchase consideration. The parties, having settled a list of legal issues, asked the tribunal to decide, and the tribunal issued a partial award on these issues after two days of hearing. The list of issues included questions as to what the MIC had decided, what were the issues in the arbitration that could be said to be *res judicata* and whether the MIC findings were binding on the tribunal. In its partial award, the tribunal ruled that the MIC's finding that the employees were terminated without just cause or excuse was binding and conclusive for the purposes of termination "Without Cause" under the SPA and the PEAs, and that the buyers and the Company would be prevented from arguing that the employees were terminated "With Cause" by the doctrine of issue estoppel under Singapore law.

4.50 The buyers applied under s 3(*b*) of the IAA based on the argument that the partial award was a negative ruling on jurisdiction or, alternatively, under s 24(*b*) of the IAA and Art 34 of the MAL that the partial award be set aside on the basis that the tribunal made decisions on matters not pleaded or argued.

41 No 177 of 1967.

4.51 Belinda Ang Saw Ean J upheld the partial award and rejected all the buyers' requests. The learned judge's logical and structured reasoning is refreshing and illuminating. She dealt with the first issue swiftly, pointing out that s 10(3) of the IAA would avail only if the tribunal had ruled that it had no jurisdiction. Describing the challenge as a "clever argument to mask a challenge on the substantive decision by the Tribunal on the questions submitted by the parties for decision",[42] her Honour found that the partial award was a decision on the merits of the parties' legal questions which formed the foundation for the final decision as to whether the employees would be entitled to the full payment under the SPA. In her analysis, the learned judge observed that the questions as framed by the parties required the tribunal to decide the substantive merits of the legal dispute between the parties.

4.52 Counsel for the buyers also submitted that the tribunal's decision that the MIC decisions were "binding on the tribunal" was indicative of the tribunal deciding that it was *res judicata* and thereby lacked jurisdiction. The court, however, pointed out that the doctrine of *res judicata* does not go to the issue of jurisdiction of the tribunal as it had been established in *The Royal Bank of Scotland NV v TT International Ltd*.[43] The doctrine of *res judicata* operates against litigants and not against the court, and it does not have any effect on the court's authority to hear the dispute before it. The learned judge also referred to her decision in *BAZ v BBA*[44] where she explained the difference between the concepts of admissibility and jurisdiction. The doctrine of *res judicata* and the concept of jurisdiction were distinct and could not be conflated. While jurisdiction commonly referred to "the power of the tribunal to hear a case", admissibility referred to "whether it is appropriate for the tribunal to hear it". The main distinguishing point between the two concepts is whether the objecting party took aim at the tribunal or at the claim. The doctrine of *res judicata* fell within the concept of admissibility of claim: it took aim at the claim, and not at the defect of the improper forum.

4.53 *BTN v BTP* is clearly an attempt by an unsuccessful party in arbitration to seek recourse by way of a *de novo* appeal against a tribunal's award on the merits, by labelling it as a decision on jurisdiction. It appears that the courts' earlier exhortations that parties should refrain from doing so have not dissuaded counsel from yielding to this temptation. To a large extent, this is the unfortunate consequence of meddling with the text of Art 16(3) of the MAL by enacting s 10(3) of the IAA (in 2012) which, apart from extending the right to seek a *de novo* review of a tribunal's

42 *BTN v BTP* [2019] SGHC 212 at [45].
43 [2015] 5 SLR 1104.
44 [2018] SGHC 275.

decision on a negative ruling on a preliminary question of jurisdiction, has unintentionally thrown the doors wide open to permit applications for review of any decision of a tribunal "at any stage of the arbitral proceedings" whenever such an issue arises. This liberty has enabled and encouraged dissatisfied parties to attempt to re-frame decisions of tribunals (even when they are not decisions made on a preliminary question of jurisdiction) to seek the court's intervention to reopen it for review under s 10(3) of the IAA. The only way to address and stem such attempts is to remove s 10(3) of the IAA and revert to the text of Art 16(3) of the MAL, and if it is still so desired, to extend review to negative rulings on jurisdiction. The same could be easily made in the text of that article.

IV. Setting aside awards

A. Whether failure to challenge a tribunal's decision on jurisdiction precludes a challenge in setting aside proceedings under Article 34(2)(a)(iii) of the MAL

4.54 In *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd*,[45] the High Court had rejected the application to set aside an award on the ground that, as the issue of jurisdiction had been decided as a preliminary issue by the arbitral tribunal, it would preclude the objecting party from seeking to set aside the subsequent award on the merits under Art 34(2)(a)(iii) of the MAL.

4.55 Rakna Arakshaka Lanka Ltd ("RALL") and Avant Garde Maritime Services ("AGMS") had entered into various agreements, including the establishment of a floating armoury on a vessel which was operated by AGMS off the coast of Sri Lanka. After the 2015 Sri Lankan presidential elections, the vessel was detained and ceased operation. AGMS commenced an SIAC arbitration against RALL for alleged failure to provide assistance to obtain the release of the vessel. The parties thereafter negotiated and signed a memorandum of understanding ("MOU") settling the matters in dispute, but the settlement fell through and the tribunal was asked to revive the arbitration. The tribunal made an interim order on 19 December 2015, holding that RALL had failed to ensure continuity of the agreement between the parties, which went to the root of the MOU, and that, therefore, the dispute remained alive. The case then proceeded to the substantive hearing and the tribunal issued its final award in AGMS's favour in November 2016. One of the arbitrators, however, issued a dissenting opinion, taking the view that the settlement under the MOU remained in place and that there was "no longer any

45 [2019] 4 SLR 995.

dispute before the Tribunal to arbitrate". RALL did not participate in the proceedings (including in the preliminary hearing on jurisdiction and in the substantive hearing) and it did not file any submission despite having been invited to do so repeatedly. In February 2017, RALL applied to set aside the tribunal's award pursuant to Art 34(2)(a)(iii) of the MAL on the ground that the tribunal lacked jurisdiction as the MOU terminated the arbitration and the tribunal's mandate. The High Court found that all considerations of finality, certainty, practicality, cost, preventing dilatory tactics and settling the position at an early stage at the seat militate against allowing a dissatisfied party to reserve its objections to the last minute and indulge in tactics which could then result in immense delays and cost. RALL, having decided to stay away from the arbitration proceedings, could not be allowed to challenge the tribunal's jurisdiction at the seat in disregard of Art 16(3) of the MAL.

4.56 The Court of Appeal[46] reversed the High Court's decision holding that, while Art 16(2) of the MAL was aimed at ensuring that any objections to jurisdiction were raised without delay, and that the non-utilisation of the procedure provided under Art 16(2) of the MAL would preclude the ability to thereafter raise a challenge at the setting aside stage pursuant to Art 34(2)(a)(iii) of the MAL, such preclusive effect should not operate in all circumstances.

4.57 The Court of Appeal pointed out that, in *PT First Media TBK v Astro Nusantara International BV*,[47] a party who had unsuccessfully brought a jurisdictional challenge against the tribunal and had not thereafter sought recourse either under s 10(3) of the IAA (in challenging the jurisdiction decision) or to set aside the award under Art 34 of the MAL, was not precluded from subsequently raising an objection to jurisdiction as a defence to enforcement. In its view, there are exceptions to the preclusive effect of not seeking recourse under the available provisions.

4.58 The court observed that the requirement under Art 16 of the MAL for parties to bring out their jurisdictional challenges early presupposed that a party who is served with a notice of arbitration has no option but to participate in the ensuing proceedings. In the court's view, there exists no such duty for the respondents. If a respondent believes that the tribunal has no jurisdiction, it is perfectly entitled not to participate in the arbitration. Therefore, the court found it difficult to conclude that a non-participating respondent ought to be bound by an award no matter

46 *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131.

47 [2014] 1 SLR 372.

the validity of his reasons for believing that the arbitration was unduly undertaken, and it found that the preclusive effect of Art 16(3) of the MAL did not extend to a respondent who justifiably stayed away from the arbitration proceedings and had not contributed to any additional costs.

4.59 In the present case, before the signing of the MOU, RALL participated to some extent in the proceedings. However, after the MOU was concluded, RALL fundamentally changed its position and took a clear stand that the arbitration should stop because the dispute had been resolved. Thus, if RALL was correct, and the execution of the MOU meant that the dispute before the tribunal had been resolved, the tribunal thereafter acted without jurisdiction. In the court's view, the MOU settled the dispute between the parties and there was no longer any dispute for the tribunal to decide on. The MOU was operative immediately upon its execution, and the award resulting from the tribunal's continuation of the arbitration therefore contained "decisions on matters beyond the scope of the submission to arbitration" within the meaning of the second limb of Art 34(2)(a)(iii) of the MAL. In the circumstances, the court concluded that, from the date of the MOU, the mandate given to the tribunal to decide the dispute between the parties had ended. The tribunal's decision to continue with the arbitration was an error and the award therefore contained decisions on matters that were beyond the scope of the submission to arbitration and had to be set aside.

4.60 In this case, the Court of Appeal identified a new exception to the preclusion from raising an objection to jurisdiction as a defence to enforcement, such that the preclusion will not extend to (a) a party who has unsuccessfully brought a jurisdictional challenge to the tribunal, and has not thereafter made use of court recourse under s 10(3) of the IAA; and (b) a party who justifiably stayed away from the arbitration proceedings and had not contributed to any additional costs. As such, respondents who dispute a tribunal's finding of jurisdiction can either (i) challenge the tribunal's preliminary ruling within 30 days under Art 16(3) of the MAL; or (ii) ignore the ruling, refuse to participate in the arbitration, and subsequently challenge the tribunal's jurisdiction in an application to set aside the award pursuant to Art 34(2)(a)(iii) of the MAL.

4.61 It should also be noted that the High Court had found that Rakna had failed to comply with r 25.3 of the SIAC Rules, pursuant to which a plea of no jurisdiction had to be raised promptly after the tribunal indicated its intention to proceed with the merits. The Court of Appeal addressed this question preliminarily, and found that Rakna's objection, made *via* its letter to the SIAC, was equivalent to an objection to the tribunal's jurisdiction. It held that the "plea" or objection to jurisdiction under Art 16(3) of the MAL does not need to be in any specific form or worded in any specific manner. The course of action taken by Rakna

might have been "unorthodox", but it was no less a challenge to the tribunal's jurisdiction and the tribunal treated it as such. The court therefore concluded that Art 16(3) of the MAL was engaged.

4.62 The Court of Appeal's ruling that no formal requirement for a plea would be required was quickly picked up and followed by Ang J in her decision in *BTN v BTP*[48] which was discussed earlier.

B. Late applications to set aside under Article 34(3) of the MAL

4.63 The time within which parties could seek recourse against awards have been strictly applied by the courts. Applications made out of time have regularly been rejected. In *BXS v BXT*,[49] the SICC adopted a similar stance which involved an application to set aside an award filed after the expiry of the three-month time limit contained in Art 34(3) of the MAL and against which the defendant applied to strike out the application. Anselmo Reyes IJ, however, first considered the plaintiff's grounds and, having found them to be unmeritorious, he then decided to deny the request for extension of time to set aside the award. He did so as a submission was made that the court has the power under para 7 of the First Schedule to the Supreme Court of Judicature Act which provides that courts have the "[p]ower to enlarge or abridge the time … but this provision shall be without prejudice to any written law relating to limitation".[50]

4.64 Reyes IJ accepted the views expressed in *ABC Co v XYZ Co Ltd*[51] ("*ABC Co*") where the court held that the strict interpretation of Art 34(3) of the MAL was supported by the discussions amongst the MAL drafters who clearly intended to limit the time during which an award could be challenged, and the decision in *T Pukuafu Indah v Newmont Indonesia Ltd*.[52] He agreed with Judith Prakash J in *ABC Co* when she distinguished an application to set aside an award from an appeal: while an appeal is a "process designed to impugn a pre-existing judicial decision"[53] with a reassessment of the facts, in a setting aside application, new facts are considered and their relevance established. On that basis, Reyes IJ found that Art 34(3) of the MAL was a written law "relating to limitation" and that the power to extend time under the First Schedule to the Supreme Court Judicature Act would therefore not apply to the three-month

48 See paras 4.47–4.52 above.
49 See para 4.37 above.
50 The full text is cited at para 4.36 above.
51 [2003] 3 SLR(R) 546.
52 [2012] 4 SLR 1157.
53 *ABC Co v XYZ Co Ltd* [2003] 3 SLR(R) 546 at [19].

limitation. The three-month limitation having expired, there could be no further scope for the court to intervene by extending the time through the invocation of a power which was extraneous to the MAL.

4.65 The decision in *BXS v BXT* and in *BXY v BXX*[54] made it abundantly clear that the time within which recourse may be had against awards whether under Art 16(3) of the MAL or s 10(3) of the IAA or Art 34(3) of the MAL are prescriptive and cannot be extended even under the "Additional powers of the High Court" under para 7 of the First Schedule to the Supreme Court of Judicature Act.

4.66 The High Court heard yet another case concerning the timing under Art 34(3) of the MAL, but this time it had to consider when the three-month timeline started to run as Art 34(3) provides that it is either on (a) the date on which the parties received the award; or (b) the date on which the tribunal disposed of a request for correction under Art 33 of the MAL.

4.67 In *BRQ v BRS*,[55] both parties filed applications to set aside different parts of the award which was made on 24 January 2018 and which the parties received on 31 January 2018. On 1 March 2018, the respondent applied to the tribunal under Art 33 of the MAL for a correction to the award. The tribunal dismissed the application for correction on 23 March 2018 and the respondent filed its application to set aside the award under Art 34(3) of the MAL on 22 June 2018. The claimants argued that the respondent's application to set aside was filed too late, stating that the respondent's request under Art 33 of the MAL did not come within the second limb of Art 34(3) of the MAL which would only apply if the request under Art 33 of the MAL was genuinely made for one of the purposes set out in Art 33 of the MAL, and if it was material to the setting aside application which the aggrieved party ultimately brought. Vinodh Coomaraswamy J disagreed. He held that, while the concern that the right to seek the correction of an award for clerical or computational errors under Art 33 of the MAL could be abused was legitimate, requiring a qualitative test would introduce a subjective test creating uncertainty as to whether the three-month time limit under Art 34(3) of the MAL had commenced, continued to run or had been halted until and unless that qualitative determination was made. In his view, this would be inimical to the fundamental principle of finality of awards. He also disagreed with the claimants that the second limb of Art 34(3) of the MAL only applied where the request under Art 33 of the MAL was "material" to the setting aside application. Accordingly, the court ruled that the respondent's

54 See para 4.32 above.
55 [2019] SGHC 260.

application to set aside the award was brought within time as the time would start running only after the tribunal's decision on the correction was made.

C. Remission under Article 34(4) of the MAL as an alternative to setting aside

4.68 *BSM v BSN*[56] gave the High Court the opportunity to remind parties of the provision of Art 34(4) of the MAL, pursuant to which:

> … [t]he court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

4.69 An order to remit under Art 34(4) of the MAL is an alternative to setting aside. In 2016, the Court of Appeal had explained in *AKN v ALC*[57] that Art 34(4) of the MAL was a curative option available in circumstances where the omission or defect in the award could be cured to avoid setting aside the award and, as observed in the Commentary on the Model Law,[58] in such cases, the jurisdiction of the same arbitral tribunal is thereby confirmed.

4.70 In *BSM v BSN*, the plaintiffs applied to set aside two awards, stating that the awards had been made in breach of natural justice[59] and that they had been unable to present their case.[60] They pointed out that the tribunal had reserved an issue related to wasted costs claimed by the plaintiffs for later consideration but never dealt with it in the award. Belinda Ang Saw Ean J agreed that such an omission could be considered under Art 34(4) of the MAL and ordered that the issue of wasted costs be remitted to the tribunal.

4.71 Ang J explained that the purpose of the remission is for the tribunal to consider whether it is necessary or desirable to receive further evidence or submissions. Once the tribunal has taken steps to eliminate the ground for the setting aside application, the court then resumes the setting aside proceedings and decides whether to grant or dismiss the

56 [2019] SGHC 185.
57 [2016] 1 SLR 966.
58 UNCITRAL, *Analytical Commentary on the Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary General* (UN Doc A/CN.9/264) (25 March 1985).
59 International Arbitration Act (Cap 143A, 2002 Rev Ed) s 24(*b*).
60 MAL, Art 34(2)(a)(ii).

application. Following the remission, the tribunal issued two additional awards wherein it considered and decided on the issue of wasted costs, and Ang J therefore dismissed the applications to set aside the awards on that ground.

4.72 It should be borne in mind that the power of remission of awards to the tribunal is intended to enable the tribunal to take steps to eliminate the procedural lapses that may otherwise be a basis for the award to be set aside. Such powers do not extend to empower the court to order the tribunal to consider the merits of the case nor is a tribunal so bound by any views expressed in that regard.

D. Breach of natural justice

(1) Domestic awards under the AA

4.73 The IAA and the AA contain provisions which extend the ground for a dissatisfied party to seek recourse on the basis that there was a breach of natural justice in the making of the award.[61]

4.74 In *Ng Tze Chew Diana v Aikco Construction Pte Ltd*,[62] Ang Cheng Hock J, in dealing with a matter under the AA, was asked to set aside the award on the allegations that (a) the arbitrator appeared to be biased; and (b) he had not given the owner adequate notice and opportunity to be heard, including a fair hearing and a fair opportunity to present her case.

4.75 The disputes arose from a construction contract which was referred to arbitration and an award made in favour of the contractor, who then sought and obtained leave to enforce the award. The owner applied to set aside (a) parts of the findings of the award; and (b) the order of court granting leave to enforce. The grounds relied upon by the owner in both applications were that the arbitrator failed to decide certain issues that had been submitted for his determination and that he committed various breaches of natural justice. Ang J reiterated that, in this regard, parties "are entitled to expect from an arbitrator complete impartiality and indifference" and that "an arbitrator must always act judicially with a detached mind and patience".[63] While parties have a general right to be heard on every issue that may be relevant to the resolution of their dispute

61 International Arbitration Act (Cap 143A, 2002 Rev Ed) s 24(*b*); Arbitration Act (Cap 10, 2002 Rev Ed) s 48(1)(*a*)(vii).

62 [2019] SGHC 258.

63 *Kempinski Hotels SA v PT Prima International Development* [2011] 4 SLR 633 at [67], citing *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd* [1988] 1 SLR(R) 483 at [65] and [78].

and ought to be given a reasonable opportunity to present their cases as well as to respond to the other side's case, a party who alleges a breach of natural justice must show that a reasonable litigant in his shoes could not have foreseen the possibility of a reasoning of the type revealed in the award. As for the arbitrator, he is not expected to inexorably adopt the parties' submissions or to consult parties on his thinking and reasoning process "unless [his award] involves a dramatic departure from what has been presented to him". The learned judge further emphasised that a party alleging a breach of natural justice must also show how its rights "at the very least, have actually altered the final outcome of the arbitral proceedings in some meaningful way".[64]

4.76 In rejecting all the allegations made, the learned judge said that the issues complained of were either not brought up at all before the arbitral tribunal, or that he was satisfied that the owner had been given a proper opportunity to present her case. On the complaint regarding the way in which the arbitrator had dealt with the evidence given by the owner's expert, the court looked at the transcript and found that there was no apparent bias on the part of the arbitrator as the questions posed by the arbitrator were open ended in nature and the expert was not prevented from elaborating on his explanations. The learned judge pointed out that the arbitrator was not bound to accept the owner's expert opinion just because the contractor had not called any expert, reasoning that arbitrators, just like judges, are entitled to rely on their own common sense when analysing and determining the issues of a case.

(2) International awards under the IAA

4.77 Belinda Ang Saw Ean J had several occasions to consider complaints that arbitral tribunals had failed to grant the unsuccessful parties a reasonable opportunity to be heard.

4.78 In *BSM v BSN*,[65] the plaintiffs complained that the tribunal failed to consider its submissions on the limitation of liability provisions contained in the parties' contracts. The tribunal thereby breached the plaintiffs' right to be heard, being an aspect of the rules of natural justice under s 24(*b*) of the IAA, and/or their right to present their case within the meaning of Art 34(2)(a)(ii) of the MAL. These were rejected by Ang J who found that both sides had the opportunity to make arguments on the issue of limitation, which the tribunal had considered and decided upon. There was therefore no permissible recourse against the tribunal's findings, even if the court disagreed with the tribunal's reasoning. Ang J

64 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] SGCA 28 at [91].
65 See para 4.68 above.

reminded the parties that tribunals did not have a duty to deal with every argument presented to them so long as they ensured that the essential issues are dealt with. Issues can also be resolved impliedly or without going through all the arguments and evidence. Indeed, while tribunals have a duty to apply their mind to the critical issues and arguments made before them, if they do but get it wrong, no recourse is available: the right to be heard cannot be elevated to a duty to attempt to understand a party's submissions.

4.79 In *BTN v BTP*,[66] Ang J again had to deal with various allegations of breach of natural justice pursuant to s 24(*b*) of the IAA and Art 34(2) of the MAL. Again, Ang J refused to entertain these grounds, seeing them as the applicant's attempts to challenge the tribunal's substantive decision, which was not permissible. She again reminded the parties that "courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration".[67]

4.80 Arguments of breach of natural justice were also heard by Coomaraswamy J in *BRQ v BRS*[68] where both parties alleged that the tribunal had breached the fair hearing rule as it failed to consider parts of the parties' respective arguments and evidence. In that respect, and just like Ang J, Coomaraswamy J explained that the fundamental duty of an adjudicator was to apply his mind to the arguments put before him. However, establishing that a tribunal wholly failed to consider an issue was a difficult task as silence was often equivocal, and the tribunal's failure would have to be "clear and virtually inescapable".[69] With respect to some of the claimants' arguments that the tribunal failed to consider some expert reports it submitted, the learned judge held that it was clear from the tribunal's chain of reasoning that it found unnecessary to address or analyse these reports. He added that, in any event, the claimants had failed to establish any prejudice, as there was no possibility that the chain of reasoning which the tribunal adopted could have permitted it to accept the claimants' submissions as stated in these reports.

4.81 The court observed that there was a delicate balance between upholding a party's right to have a reasonable opportunity to respond to the case against it and affording enough latitude to a tribunal to reach decisions without being unduly hindered by the need to refer every

66 See para 4.47 above.
67 *AKN v ALC* [2015] 3 SLR 488.
68 See para 4.67 above.
69 *AKN v ALC* [2015] 3 SLR 488 at [46].

point to the parties for argument. However, he held that the arbitrator was not "expected to consult the parties on his thinking process before finalising his award unless it involves a dramatic departure from what has been presented to him".[70] A tribunal's failure to solicit submissions from the parties on each and every point for decision was therefore not a ground for setting aside the award. A tribunal was also not required to acknowledge expressly all of the arguments which a party had made, especially in complex arbitrations, and it was entitled to implicitly reject arguments.

4.82 The common thread in all these cases is that a high threshold is required to be met before a party's crying foul over any allegations of breach of natural justice could succeed under s 48(1)(*a*)(vii) of the AA for the former[71] and under s 24(*b*) of the IAA and/or Art 34(2)(a)(ii) of the MAL. Judges will not entertain attempts to review the merits of an award when they are masked as failure to be heard.

E. Setting aside and public policy

4.83 The public policy ground is one that is often raised by parties attempting to challenge arbitral awards. 2019 was no exception, and the courts heard several applications in which parties argued that the awards ought to be set aside as they were against Singapore's public policy.

4.84 In *Rakna (CA)*,[72] for instance, RALL articulated a second ground of challenge in addition to the breach of natural justice. It stated that the award was against Singapore's public policy because it was induced or affected by fraud or corruption.[73] The Court of Appeal, however, agreed with Quentin Loh J that s 24(*a*) of the IAA contemplated a situation where the award itself (rather than the contract between the parties) was tainted or induced by fraud or corruption. In addition, the court held that the tribunal had found that the underlying contract did not present any sign of illegality, which finding was binding on the courts.

4.85 In *BTN v BTP*,[74] Ang J also reminded parties that the public policy ground for setting aside or refusing the recognition/enforcement of awards was very narrow in scope. She stated that such an application

70 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] SGCA 28 at [65].
71 *Ng Tze Chew Diana v Aikco Construction Pte Ltd* [2019] SGHC 258.
72 See para 4.35 above.
73 Section 24(*a*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) states:
… the High Court may … set aside the award of the arbitral tribunal if …
(*a*) the making of the award was induced or affected by fraud or corruption.
74 See para 4.47 above.

should only succeed in cases where upholding or enforcing the award would "shock the conscience", or be "clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public", or violate "the forum's most basic notion of morality and justice".[75]

4.86 In another rather unusual case, the supplier under a supply contract for food products, who sought to set aside the award in *BVU v BVX*,[76] had obtained an affidavit from an employee of the purchaser in support of its setting aside application. Its application to set aside the award was made on the grounds that (a) the award was contrary to the public policy of Singapore under Art 34(2)(b)(ii) of the MAL; and that (b) it was procured by fraud and was therefore contrary to s 24(*a*) of the IAA. The grounds were premised on the purchaser's withholding or non-disclosure of evidence (the purchaser's employee's evidence). The supplier then subpoenaed the purchaser's employee to attend court to produce some of the purchaser's internal documents concerning the public tender requirements. The supplier alleged that the purchaser breached the contract because, *inter alia*, it failed to treat the supplier as its most preferred supplier and it did not use its "best commercially reasonable effort to order and purchase" the products in accordance with the contractual forecasts and had instead put out a public tender. The majority of the tribunal found for the purchaser, ruling that it was obliged and not exempted from calling such a tender, to which the supplier had also been invited.

4.87 In rejecting the application, Ang Cheng Hock J stressed on the high threshold that the supplier must meet in order to set aside an award for fraud or contravention of public policy. Fraud will not be inferred, and cogent and strong evidence must be produced by the applicant. In the case of non-disclosure or suppression of evidence, to warrant the setting aside of an award, three requirements would need to be satisfied: (a) a deliberate concealment aimed at deceiving the tribunal; (b) a causative link between the alleged concealment and the decision in favour of the concealing party; and (c) no good reason for the non-disclosure. Ang J found that the purchaser did not deliberately conceal its employee's evidence in order to deceive the tribunal. He was also not convinced that the employee's personal and subjective views on the interpretation of the contract would have had any impact on the tribunal's decision. Ang J found that the purchaser's conduct did not therefore breach public policy or amount to fraud. In all, he saw the supplier's application as an abuse of

75 *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597.
76 [2019] SGHC 69.

process in that the supplier was seeking to reopen the arbitrated dispute through a backdoor appeal on the merits.

V. Enforcement of foreign award under the New York Convention

A. Award made under the wrong seat

4.88 The Court of Appeal had another occasion to deal with the issue related to the parties' choice of the place of arbitration ("seat") when Belinda Ang Saw Ean J's decision in *Sanum Investments Ltd v ST Group Co Ltd*[77] went on appeal. The learned judge had earlier granted enforcement of the award despite finding that the award suffered from a number of procedural irregularities, including the tribunal's choice of Singapore as the seat, when the arbitration clause relied upon mentioned "in Macau, SAR PRC". Ang J did so on the basis that the award-debtors had not shown any prejudice they had suffered due to such procedural irregularities.[78]

4.89 The Court of Appeal in *Sanum (CA)*[79] was concerned with the validity of the arbitration clause, which provided for multi-tiered arbitration clause pursuant to which the parties were to solve their disputes first before the People's Democratic Republic of Lao's courts and, if dissatisfied, to arbitrate "using an internationally recognized mediation/arbitration company in Macau, SAR PRC". This question was not placed before the High Court but was posed by the Court of Appeal to the parties. The court asked the parties about the validity of an agreement pursuant to which a party who was dissatisfied with the Lao court's decision could then refer the same dispute to arbitration, with the arbitral tribunal in effect hearing an appeal against the Lao court's decision. The arbitration clause was governed by Lao law. However, no expert opinion had been adduced by the parties on the above question. The Lao disputants, who had the burden of proving that the clause was invalid under Lao law, did not do so, and only relied on Singapore and/or common law principles to argue its invalidity. In that the circumstances, the Court of Appeal held that such principles could not be taken *ipso facto* to represent Lao law. It recalled the principles in *Pacific Recreation Pte Ltd v S Y Technology Inc*,[80] and cautioned against the use of the presumption of similarity of foreign

77 [2020] 3 SLR 225.
78 See (2018) 19 SAL Ann Rev 42 at 65–67, paras 4.72–4.78.
79 See para 4.42 above.
80 [2008] 2 SLR(R) 491.

law where it may have the effect of depriving a party of the right to be heard on a decisive issue.

4.90 Given that the Lao disputants could have objected to the jurisdiction of the tribunal on the ground of the invalidity of the arbitration clause, but that they did not, the court left the question open and concluded that the arbitration clause provided for arbitration in certain circumstances and that those circumstances arose, allowing Sanum to invoke its right to arbitration.

4.91 The Court of Appeal held that in interpreting an arbitration clause, the court should adopt an interpretation that would do the least violence to the arbitration clause and the most natural interpretation. In that regard, it affirmed that the words "arbitration in [place]" should usually be interpreted to identify the named place as the seat of the arbitration.

4.92 On the issue of the tribunal's wrong choice of seat, the Court of Appeal reiterated the distinction between jurisdictional challenges and procedural challenges. While the lack of prejudice is not relevant to the former, it would be relevant to the latter as not every term of an arbitration clause is so fundamental that a breach would automatically render an award issued pursuant to that clause invalid. Such approach is consistent with the pro-enforcement bias inherent in the New York Convention.

4.93 While the seat is a procedural issue, the court held that the choice of seat is nonetheless one of the most important matters for parties to consider because it carries with it the national law under which auspices the arbitration will be conducted. The seat is the legal or juridical home of the arbitration and represents a choice of forum for remedies, including the setting aside of any award. In addition, the court emphasised the importance of party autonomy and free choice of seat, as recognised by Art 20(1) of the MAL. It held that party autonomy is of central importance to the legitimacy and binding nature of arbitral awards, such that when parties chose a seat, courts must give full effect to their choice.

4.94 The Court of Appeal concluded that, once an arbitration is wrongly seated, and in the absence of waiver of the wrong seat by the parties, any award that ensues should not be recognised and enforced by other jurisdictions because such award was not obtained in accordance with the parties' agreement. It held that it is thus not necessary for a party who is resisting enforcement of an award arising out of a wrongly seated arbitration to demonstrate actual prejudice. It is sufficient that, had the arbitration been correctly seated, a different supervisory court would have been available to the parties during the proceedings and in

relation to issues pertaining to the final award. The court further added that the availability and the suitability of the procedures and remedies administered by the court of the "wrong" seat are irrelevant. In the present case, the parties had chosen to seat their arbitration in Macau; the Lao disputants never waived that choice; and the court therefore refused to give leave to Sanum to enforce the award against ST Group, Sithat and ST Vegas Co.

4.95 While an enforcement court has some discretion to enforce an award even if grounds exist to justify refusal, the court should nevertheless do so judiciously. The Court of Appeal's decision in *Sanum (CA)* strikes the proper balance between the courts' obligation imposed by the State's obligation under the New York Convention to enforce an award and its duty to ensure procedural correctness and observation of due process. The role of the place of arbitration cannot be understated. It is the place which gives the award its nationality, that provides the supportive arbitral procedure and the remedies available to parties, and as such if an arbitration is conducted in the "wrong seat", the legitimacy of the entire proceedings is seriously undermined.

4.96 It is interesting that while the Court of Appeal may have a certain view on a clause which appears to give parties a right to appeal from a foreign state court's judgment to an arbitral tribunal, it refrained from expressing it on the ground that such an issue was never raised before the High Court below. In the authors' view, the question posed would involve the consideration of whether the autonomy of parties to refer matters to arbitration could extend to empowering the arbitral tribunal to sit in judgment as the appellate tribunal over that of a national court. Such a question would necessarily impinge on matters of state sovereignty and public policy which a court before which the award is sought to be enforced could on its own motion raise under Art V(2) of the New York Convention.

4.97 Just like *BNA v BNB*, *Sanum (CA)* highlights the awkward situation of a party contesting an award on the basis that the award was made in the "wrong seat" and making that application before the courts of that same seat, as doing so appears to be a submission or could be interpreted as an acceptance that these courts have supervisory jurisdiction over the arbitration. Such a situation is, however, not different from the challenge of a tribunal's jurisdiction before that same tribunal. The doctrine of competence-competence should perhaps extend to courts sitting when asked to consider setting aside and enforcements of arbitral awards.

B. Improper constitution of the tribunal

4.98 In *Sanum (CA)*, there was also an issue raised with regard to the wrong constitution of the tribunal. Although the Court of Appeal did not decide this matter because it was difficult in that case to disentangle the effect of the wrong composition of the tribunal from the adverse impact of the wrong choice of seat, it nevertheless observed that theoretically it is arguable that a tribunal made up of three persons could come to a totally different view from that of a single-member tribunal resulting in a different outcome.

4.99 This specific issue of a wrongly constituted tribunal also arose in *BXH v BXI*,[81] in an application to set aside an award under Art 34(2)(a)(iv) of the MAL. The contract in issue provided for SIAC arbitration and for a three-member tribunal, but that if one of the parties failed to nominate an arbitrator within 30 days, the arbitrator nominated by the other party would then be appointed as sole arbitrator. The respondent in the arbitration objected to the claimant's commencement of arbitration asserting that the tribunal lacked jurisdiction. When invited by the SIAC Registrar to nominate an arbitration, it failed to do so. In the event, the SIAC Registrar, adhering to the appointing process set out in the arbitration clause, confirmed and appointed the claimant's nominated candidate as the sole arbitrator.

4.100 Coomaraswamy J rejected the respondent's argument that a departure from the parties' agreed procedure was not a ground for setting aside an award if the departure was the result of the applicant's own conduct, failures or strategic choices[82] As the respondent had not responded to the SIAC Registrar's invitation to nominate its candidate, it could no longer argue that it was deprived of the opportunity to nominate its arbitrator, resulting in the appointment of a sole instead of a three-member tribunal. A more interesting issue in *BXH v BXI* relates to whether an assignor which had assigned its right to a factor under a financing arrangement could commence arbitration in its own right prior to any reassignment. The Court of Appeal's decision on this should be enlightening.

4.101 The SICC also had an occasion to deal with an allegedly wrongly constituted tribunal in an application to set aside an award under Art 34(2)(a)(iv) of the MAL in *BXS v BXT*.[83] In that case, the plaintiff argued that a sole arbitrator had been appointed instead of three

81 See para 4.13 above.
82 Citing *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 in support.
83 See para 4.37 above.

arbitrators, as required in the arbitration agreement. Anselmo Reyes IJ, however, explained that the parties had incorporated the SIAC Rules by reference into their agreement, and that, pursuant to r 5.2, the president of the SIAC Court could direct that a sole arbitrator be appointed even in cases where the arbitration agreement contained contrary terms. Reyes IJ ruled that a reference to a three-member tribunal was insufficient to override r 5.3 and that, if parties wish to insist on having three arbitrators, they ought to signal such intention very clearly and in a mandatory manner.

VI. Appeal against an award in domestic arbitration under the AA

4.102 Unlike an award made under the IAA, an award made in a domestic arbitration under the AA could be appealed against to the High Court on a question of law arising out of the award under s 49. Section 50(3) of the AA provides that such an appeal must be "brought within 28 days of the date of the award".

4.103 In *Ng Tze Chew Diana v Aikco Construction Pte Ltd*,[84] the arbitrator had, in an *ad hoc* arbitration arising out of a construction dispute, informed the parties that his award was ready for collection from 25 July 2017. The award was also dated 25 July 2017. The parties, however, failed to pay the arbitrator's fees and expenses and the arbitrator refused to release the award. He, however, eventually did so on 17 May 2018, even though he had still not been fully paid. Twenty-eight days after she received the award, the respondent in the arbitration commenced proceedings and sought leave to appeal against certain questions of law arising from the award.

4.104 The learned judge referred to the *Review of Arbitration Laws*[85] ("the AGC Report"), which explained the basis for the use of the term "date of the award" in s 50(3) as providing:[86]

> … a certain and incontrovertible date for reckoning of time set for appeal. To compensate for any time loss [*sic*] in the making and collection of the award, the time limit for appealing against an award is increased from the present 21 days to 28 days after the date of the award.

84 [2020] 3 SLR 1196.

85 Law Reform and Revision Division, Attorney-General's Chambers *Review of Arbitration Laws: Final Report* (LRRD No 3/2001, 2001).

86 See *Ng Tze Chew Diana v Aikco Construction Pte Ltd* [2020] 3 SLR 1196 at [31].

Hence, the court ruled that the "date of the award" refers literally to the date which the arbitrator had dated the award. The appeal was therefore made some 9.5 months after the date of the award and was out of time.

4.105 Although the appellant did not seek any prayer for extension of time, the learned judge went on to consider whether an extension of time should be granted under s 49(3) of the AA. Making references to the decisions in *Pearson Judith Rosemary v Chen Chien Wen Edwin*,[87] which was followed in *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd*,[88] he held that (a) the delay of over 9.5 months for the owner to file her application was substantial; (b) the reason given by the owner for the delay (that it was unreasonable to expect her to pay the entirety of the costs of the arbitration) was untenable as she was obliged to pay under Art 16.1 of the Singapore Institute of Architects Arbitration Rules;[89] (c) looking at the questions raised, the application for leave to appeal was itself hopeless; and (d) the contractor would be prejudiced if the appeal was allowed as the matter had already suffered much delay and the contractor had still not been paid the amounts it had been awarded under the award.

4.106 Ang J observed that when courts consider whether to grant an extension of time for a party to apply for leave to appeal, they must always bear in mind that the parties agreed to arbitration as the mode of settlement of their disputes. As such, any attempt by the unsuccessful party to challenge the merits of the award ought to be carefully scrutinised because it would delay the successful party's rights to the fruits of its success in the agreed mode of dispute resolution, which would be inconsistent with the expeditious resolution of arbitrated disputes and the need for finality.

4.107 It is interesting that the learned judge had decided to consider a time extension for the filing of the appeal under s 49(3) of the AA, which speaks merely of the preconditions for appeal as encompassing only the following circumstances: "(a) with the agreement of all the other parties to the proceedings; or (b) with the leave of the Court". As the respondent in the application had not so agreed, the learned judge was probably considering if leave could be granted. It should, however, be noted that leave under s 49(3)(*b*) of the AA is specifically permitted "only if" the appellant satisfies the court of the conditions set out in s 50(5) of the AA, and none of which suggest that the court has any discretion to extend time to file the appeal out of time. In this regard, the court could

87 [1991] 2 SLR(R) 260.
88 [2000] 1 SLR(R) 510.
89 2nd Ed, 2009.

perhaps consider if it would be more appropriate to adopt the approach on the issue of extension of time under its discretionary powers given in para 7 of the Supreme Court of Judicature Act's First Schedule. In this regard, references could be made to the decisions of *BXY v BXX*,[90] *BXS v BXT*,[91] *ABC Co v XYZ Co Ltd*[92] and *PT Pukuafu Indah v Newmont Indonesia Ltd*.[93]

90 See para 4.32 above.
91 See para 4.37 above.
92 See para 4.64 above.
93 See para 4.64 above.