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4. ARBITRATION

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4.1 The year 2023 was a busy one for international arbitration. The major arbitration institutions announced increased case filings in 2023 compared to the previous year: the Singapore International Arbitration Centre ("SIAC") reported a 46% increase in caseload from 2022, with 663 new cases filed;[1] while the International Chamber of Commerce International Court of Arbitration ("ICC") – which celebrated its centenary in 2023 – registered its third busiest year with 890 cases.[2] The Hong Kong International Arbitration Centre ("HKIAC") and the London Court of International Arbitration also saw marked increases in case filings in 2023 compared to the previous year, with 281[3] and 327[4] arbitration filings respectively. The China International Economic and Trade Arbitration Commission ("CIETAC"), which was named – for the

1 The Singapore International Arbitration Centre received 663 new filings in 2023, compared to 357 new filings in 2022. In addition, the proportion of new cases that were international in nature increased from 88% in 2022 to 93% in 2023. See Singapore International Arbitration Centre, "SIAC Announces 2022 Statistics; Q1 2023 Sees High Filing" (4 April 2023) <https://siac.org.sg/wp-content/uploads/2023/04/Press-Release-SIAC-Annual-Report-2022-1.pdf> (accessed 25 September 2024) and Singapore International Arbitration Centre, "SIAC Continues to Grow" (29 April 2024) <https://siac.org.sg/wp-content/uploads/2024/04/Press-Release-SIAC- Annual-Report-2023.pdf> (accessed 25 September 2024).

2 International Chamber of Commerce, *ICC Dispute Resolution 2023 Statistics* (2024) <https://iccwbo.org/wp-content/uploads/sites/3/2024/06/2023-Statistics_ICC_Dispute-Resolution_991.pdf> (accessed 25 September 2024).

3 The Hong Kong International Arbitration Centre recorded 500 matters submitted to the institution in 2023, comprising 281 arbitration filings, 209 domain name disputes and 10 mediations: Hong Kong International Arbitration Centre, "HKIAC Releases Statistics for 2023" (6 March 2024) <https://www.hkiac.org/news/hkiac-releases-statistics-2023> (accessed 25 September 2024). The arbitration filings received in 209 was the institution's third highest since 2017.

4 London Court of International Arbitration, *Annual Casework Report: 2023* (May 2024).

first time – as one of the five most preferred arbitral institutions in the 2021 International Arbitration Survey by the Queen Mary University of London,[5] announced a record 5,237 new arbitration cases filed in 2023, with more cases being international in nature.[6]

4.2 There was an increase in the number of arbitration-related judgments published in Singapore in 2023 compared to the previous year. While the majority of the published judgments once again concerned applications to set aside arbitration awards under the International Arbitration Act 1994[7] ("IAA") (and related appeals), there was an overall decrease in the number of such judgments published by the courts compared to 2022. In addition, the Singapore courts had to consider a number of novel issues relating to transnational issue estoppel, arbitration confidentiality and the separability of arbitration agreement in the context of pending insolvency proceedings.

I. The arbitration agreement

A. Separability of the arbitration agreement

4.3 The doctrine of separability is one of the cornerstones of arbitration. An arbitration clause in a contract is treated as a separate agreement, independent of the other terms of the contract and capable of being upheld even if the rest of the contract is determined to be null and void. This doctrine is expressly incorporated into both the IAA and the Arbitration Act 2001[8] ("AA").[9]

4.4 In *Founder Group (Hong Kong) Limited v Singapore JHC Co Pte Ltd*,[10] the General Division of the High Court ("General Division") had to consider the question of separability of the parties' agreement to arbitrate in the context of pending insolvency proceedings.

5 Queen Mary University of London & School of International Arbitration, "2021 International Arbitration Survey: Adapting Arbitration to a Changing World" <https://www.qmul.ac.uk/arbitration/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf> (accessed 25 September 2024).

6 China International Economic and Trade Arbitration Commission, "CIETAC 2023 Work Report and 2024 Work Plan" <http://www.cietac.org/index.php?m=Article&a=show&id=20112&l=en> (accessed 25 September 2024).

7 2020 Rev Ed.

8 2020 Rev Ed.

9 See First Schedule, Art 16(1) of the International Arbitration Act 1994 (2020 Rev Ed) and s 21(2) of the Arbitration Act 2001 (2020 Rev Ed).

10 [2023] SGHC 159.

4.5 Founder Group (Hong Kong) Ltd ("FGHK") was a Hong Kong-incorporated company that was placed in liquidation in July 2021. Singapore JHC Co Pte Ltd ("JHC") was a Singapore-incorporated company in the business of trading metals and metal productions.

4.6 Peking University Founder Group Ltd ("PUFG") was established in 1986 as the commercial arm of Peking University and the ultimate holding company of the PUFG group of companies ("PUFG Group"). While PUFG was initially established to commercialise certain publishing technologies developed by PUFG researchers, its business expanded and PUFG became a diversified investment holding group with interests in information technology, healthcare, pharmaceuticals, real estate, finance and commodities trading. Both FGHK and JHC were, prior to certain events in 2021, part of the PUFG Group and ultimately owned and controlled by PUFG.

4.7 In 2019, PUFG encountered financial issues. This led, in February 2020, to a creditor of PUFG applying to the Beijing First Intermediate People's Court to reorganise PUFG. A reorganisation plan was eventually approved by PUFG's creditors and sanctioned by the Beijing court in May–June 2021. As a result of the reorganisation, part of the PUFG Group – including JHC – was divested to a consortium of investors. Further, in July 2021, a winding-up order was made in Hong Kong against FGHK. The winding-up application against FGHK had been initiated by PUFG's offshore bondholders who were aggrieved by PUFG's reorganisation. PUFG no longer had control over FGHK after the winding-up order was made; instead, PUFG came under the control of the appointed liquidators.

4.8 FGHK's liquidators subsequently discovered that the sum of US$47.43m due from JHC to FGHK arose from sales of copper cathodes to JHC. The contracts evidencing these sales were governed by Chinese law and provided for Beijing-seated CIETAC arbitration.

4.9 The liquidators therefore issued a statutory demand against JHC for payment of the debt, but no payment was made by JHC. This led the liquidators to apply in Singapore for JHC to be wound up on the basis that it was unable to pay its debts or that it was just and equitable for JHC to be wound up. In support of the winding-up application, the liquidators relied on, amongst other documents, the contracts for copper cathodes between FGHK and JHC, the corresponding invoices issued by FGHK, as well as audit confirmations signed by JHC in 2019 confirming the debt to FGHK as correct as at December 2018.

4.10 JHC resisted the winding-up application, arguing that it disputed FGHK's debt as no copper cathodes had been delivered by FGHK to JHC,

and that the parties never intended for the contracts to be enforced. It was contended that the contracts were consequently null and void under Chinese law and in any event, the parties had agreed to resolve disputes in relation to the contracts through CIETAC arbitration.

4.11 The General Division dismissed FGHK's winding-up application against JHC. In doing so, the judge applied the three-part test established in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)*[11] ("*AnAn*"), finding that (a) the arbitration agreements between FGHK and JHC are *prima facie* valid;[12] (b) the dispute between the parties *prima facie* falls within the scope of the arbitration agreements[13]; (c) the audit confirmations relied upon by FGHK were not conclusive of the debts purportedly owed by JHC to FGHK;[14] and (d) JHC's opposition to the winding-up application did not constitute an abuse of process.[15]

4.12 The High Court also noted that the doctrine of separability is intended to prevent a party from evading an obligation to arbitrate by denying the existence or validity of a contract containing the arbitration agreement, and the arbitration agreement remains *prima facie* valid and enforceable until a duly constituted arbitral tribunal determines that the contract is indeed null and void.[16] As CIETAC had accepted notices of arbitration in a related dispute with identical arbitration clauses and where identical arguments as to the validity of the underlying agreements had been made, this – in the judge's view – indicated that CIETAC *prima facie* accepted the arbitration agreements to be valid and the institution is *prima facie* likely to take the same approach with the present dispute between FGHK and JHC.[17]

4.13 On appeal, the Singapore Court of Appeal reversed the lower court's decision and ordered JHC to be wound up[18]. The Court of Appeal was satisfied that JHC could not invoke the parties' arbitration agreements and there was no real dispute over the debt.

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11 [2020] 1 SLR 1158 at [39] and [40].
12 *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] SGHC 159 at [56] and [59].
13 *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] SGHC 159 at [60] and [61].
14 *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] SGHC 159 at [65].
15 *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] SGHC 159 at [62] and [66]–[71].
16 *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] SGHC 159 at [57].
17 *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] SGHC 159 at [59].
18 *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554.

4.14 The Court of Appeal disagreed with the lower court's application of the doctrine of separability, and made the following observations: First, the arbitration agreements between FGHK and JHC were likely to be governed by Chinese law and there was no evidence that as a matter of Chinese law, the doctrine of separability would operate and allow JHC to invoke the arbitration agreements while at the same time asserting that the underlying contracts were null and void;[19] and second, CIETAC's acceptance of the related notices of arbitration was neither a finding nor evidence of the validity of the arbitration agreements as a matter of Chinese law.[20] Under Singapore law, a party is not entitled to invoke an arbitration agreement while simultaneously asserting the invalidity of the contract in which the arbitration agreement is found; this position was established in the earlier Singapore Court of Appeal decision in *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd*,[21] and is consistent with the approach taken in the House of Lords decision in *Fiona Trust & Holding Corporation v Privalov*.[22]

4.15 The Court of Appeal emphasised that:[23]

> The principle of separability cannot guarantee the survival of the arbitration clause in all circumstances. Instead, where a challenge to the validity of the underlying contract is raised, it will be crucial to determine if this is also an attack on the arbitration agreement. This will necessarily be a fact-sensitive exercise, and much will depend on the nature of the challenge mounted against the underlying contract. … if the allegation is that the entire contract was entered into without authority, this may well be an attack on both the underlying contract and the arbitration agreement, as the implication would be that every clause in the contract including the arbitration agreement was entered into without authority. On the other hand, where the challenge is that the underlying contract is void or voidable for misrepresentation, the arbitration agreement may survive because the parties' intention to arbitrate may not be affected by the misrepresentation.

4.16 The Court of Appeal also referred to its earlier decision in *BWG v BWF*,[24] where it held that an abuse of process may arise where "a debtor adopts an inconsistent position in the same or related proceedings, in

19 *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 at [53].
20 *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 at [53] and [54].
21 [2018] 2 SLR 1207, referred to in *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 at [55].
22 [2007] 4 All ER 951, referred to *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 at [56].
23 *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 at [58].
24 [2020] 1 SLR 1296, referred to in *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 at [61].

the absence of a clear and convincing reason to do so".[25] The Court of Appeal held that JHC's position was "manifestly inconsistent"[26] in that it, on the one hand, claimed that the underlying contracts between FGHK and itself were null and void, but on the other hand, sought to invoke the arbitration agreements in those contracts. The Court of Appeal considered that the "real reason"[27] for JHC's conflicting positions was that it wanted to delay enforcement of a debt owed to FGHK by insisting on arbitrating the debt. This was clearly an abuse of process within the third limb of the *AnAn* test.

4.17 With this decision, the Court of Appeal has placed some markers as regards the boundaries of the doctrine of separability and clarified the need for different approaches depending on the nature of a party's challenge to the arbitration agreement.

B. Scope of the arbitration agreement

4.18 It is trite that arbitration is a consensual process and absent a valid and binding arbitration agreement, parties cannot unilaterally commence arbitration to resolve disputes *inter se*. While arbitration agreements are generally drafted in wide terms so as to encompass all manner of disputes arising out of a particular contractual relationship, parties may sometimes disagree on the scope of the arbitration agreement and whether a dispute is intended to be resolved by arbitration.

4.19 This was the situation faced by the parties in *CYY v CYZ*.[28] Both CYY and CYZ are companies in the marine salvage industry; CYZ was the owner of a crane barge and CYY, a charterer. In December 2019, CYY was engaged to provide urgent salvage services in respect of a vessel that had run aground. CYY appointed Mr X as salvage master to oversee the salvage operation and Mr X approached CYZ to charter its crane barge. A chartering agreement for the crane barge was entered into on 3 January 2020; the contract was based on the Baltic and International Maritime Council Supplytime 2017 Contract for the Time Charter Party for Offshore Support Vessels ("BIMCO Supplytime 2017"), a standard form time charter contract used for the hire of offshore support vessels. The contract was governed by Singapore law and provided for arbitration seated in Singapore. In addition to the standard form contract terms, several additional clauses were incorporated into the contract. In particular, cl 39 was added to provide that:

25 *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 at [61].
26 *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 at [62].
27 *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 at [62].
28 [2023] 5 SLR 1109.

> All consumables, communications and medicine on the Vessel which are used or taken by Charterers shall be charged at Cost + 15%[.]
>
> All procurement services by Owner at the request of the Charterers shall be charged at Cost + 15%[.]

4.20 Both Mr X and Mr Y (CYZ's management director) agreed that CYZ was entrusted with procuring the staff and equipment necessary to enable the crane barge to be used as an offshore command centre. This was because CYZ was established in the region of the salvage operation and had a network of local contacts.

4.21 Throughout the salvage operation, CYY requested various services, personnel, equipment and marine craft which CYZ procured. CYZ issued invoices, incorporating a 15% mark-up, in relation to these procurement requests. CYY did not make payment, which led to CYZ commencing arbitration.

4.22 In the arbitration, CYY took the position that the contract and cl 39 were strictly limited to procurement services rendered only in relation to the charter of the crane barge, and not to services rendered in relation to the salvage operation generally. As the invoiced items related to general salvage operation services, they fell outside of the scope of the chartering contract and the arbitral tribunal had no jurisdiction to determine the claims.

4.23 The arbitral tribunal ruled that it had jurisdiction to determine the disputed claims and that cl 39 encompassed all procurement services rendered by CYZ in relation to the entire salvage operation.

4.24 CYY therefore applied under s 10(3)(*a*) of the IAA for a declaration that the tribunal had no jurisdiction to hear the disputed claims. It advanced a number of arguments in support of its application, including: (a) that the contract was a standard form contract for the charter of offshore support vessels and therefore any modifications thereto (including the inclusion of cl 39) should be construed as applying only to procurement services rendered in relation to the crane barge charter; (b) cl 39 should be interpreted in a restricted manner as to do otherwise could impact the predictability and consistency of standard form contracts like the BIMCO Supplytime 2017; (c) there were other standard forms, such as the BIMCO Wreckhire 2010, that would have been more suitable for services relating to the entire salvage operation; and (d) the contract could not have been intended to cover the entire salvage operation as CYY had entered into several other separate contracts with CYZ in relation to the same salvage operation.

4.25 In response to CYY's application, CYZ submitted that cl 39 was not confined to procurement services in relation to the crane barge only and that the use of the BIMCO Supplytime 2017 was not indicative of the parties' intentions. CYZ also highlighted that the contract had been concluded in the context of an emergency and CYY had to rely on CYZ's resources as the local operator. In any event, the purpose of the contract was for the crane barge to be operated as the offshore command centre for the salvage operations and the disputed claims were linked to the charter as they concerned procurement services to equip the crane barge as an offshore command centre.

4.26 The main issue before the General Division was whether the disputed claims fell within the scope of cl 39; and even if they did not, whether a *quantum meruit* claim would fall within the scope of the parties' arbitration clause.

4.27 The High Court dismissed CYY's application, holding that the interpretation of cl 39 was a matter within the merits of the dispute referred to arbitration, and therefore, whether CYZ's claims fell within cl 39 was a matter for the arbitral tribunal to determine.[29] The High Court judge also noted that the interpretation of cl 39 and what the phrase "all procurement services" meant were issues of interpretation of a substantive clause within the contract. Such issues would ordinarily concern the admissibility of the claim made and did not go to the jurisdiction or authority of the arbitral tribunal.[30]

C. Incorporation of arbitration agreement into main contract

4.28 In *Beltran, Julian Moreno v Terraform Labs Pte Ltd*[31] ("*Beltran*") the court had to consider the interesting question of whether an arbitration agreement had been properly incorporated into the parties' contract.

4.29 The claimants are individuals who purchased cryptocurrency tokens named TerraUSD ("UST") issued by Terraform Labs (the first defendant). The claimants – as representatives of themselves and 375 other individuals – commenced proceedings against the defendants in the General Division, alleging that they had been induced by the defendants' various misrepresentatives to purchase UST, stake UST on the Anchor Protocol (a lending and borrowing platform built on top of

29 *CYY v CYZ* [2023] 5 SLR 1109 at [40].
30 *CYY v CYZ* [2023] 5 SLR 1109 at [41] and [42], referring to *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho* [2019] 1 SLR 263.
31 [2024] 4 SLR 674.

the Terra blockchain where users can stake UST), and hold UST while its value plummeted.

4.30 Both the Terra and Anchor Protocol websites contained terms requiring disputes to be resolved by SIAC arbitration. The relevant arbitration clauses were contained in the "Terms of Use" of each website, and accessible by hyperlink.

4.31 Terraform Labs applied to stay the court proceedings under s 6 of the IAA, relying on the arbitration agreements on the websites, while the other defendants sought a stay of the proceedings on case management grounds. The stay applications were dismissed by an assistant registrar. In particular, the assistant registrar took the view that Terraform Labs had failed to make out a *prima facie* case that a valid arbitration agreement existed between it and the claimants.

4.32 On appeal, the High Court upheld the assistant registrar's decision. The court noted that in the context of an application for a stay, the applicable test was whether Terraform Labs could establish a *prima facie* case that the claimants, users of the Terra and Anchor Protocol websites, had notice of the relevant arbitration agreements contained in the websites' Terms of Use.[32] On the facts, the court concluded that "it cannot be said to be clear and obvious that no agreement to arbitrate was concluded"[33] between Terraform Labs and the claimants. In the court's analysis, it was "at least arguable" that contracts on the terms pleaded by the claimants had been formed between the claimants and Terraform Labs.[34] In order to reach a firm conclusion as to whether the Terms of Use had been incorporated in the contracts between the claimants and Terraform Labs, a detailed assessment of the relevant facts, as well as the law governing the incorporation of arbitration clauses in online contracts would be necessary.[35] However, such a detailed inquiry would be inconsistent with a *prima facie* determination of the existence of an arbitration agreement.[36]

4.33 The court accepted that it was "at least arguable" that the claimants' claims in the court action were subject to the Terms of Use, and this case "did not satisfy the threshold of the 'clearest of cases …

32 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [137]. This may be contrasted with the general approach of taking a fact-centric approach to questions of whether a user had actual or constructive notice of the relevant terms, as well as what constitutes constructive notice.

33 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [137].

34 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [139].

35 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [146].

36 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [149].

[where] the court ought to make a ruling on the inapplicability of an arbitration agreement"".[37]

D. Conditions precedent to arbitration

4.34 *CZQ v CZS*[38] concerned a construction project in which CZQ was the contractor, CZR was CZQ's parent company which provided a performance guarantee for its subsidiary, and CZS was the employer. Disputes arose between the parties, which led to CZS commencing arbitration against both CZQ and CZR.

4.35 In the arbitration, CZQ and CZR objected to the arbitral tribunal's jurisdiction on the basis that the amicable settlement procedure in the parties' contract had not been complied with. The tribunal dismissed the application, holding that it had jurisdiction as the amicable settlement procedure was not a condition precedent to the commencement of arbitration, and in any case, it was CZQ and CZR's own conduct that led to non-compliance with the procedure.

4.36 CZQ and CZR, dissatisfied with the arbitral tribunal's ruling, applied to the General Division under s 10 of the IAA for a determination that the tribunal had no jurisdiction.

4.37 The application was dismissed by a three-judge bench of the Singapore International Commercial Court ("SICC"). The SICC noted that as a general principle, in order to create a condition precedent to the commencement of arbitration, "clear words are necessary".[39] While the parties' arbitration clause, in its opening sentence, expressed that "[u]nless settled amicably, any dispute shall be finally settled by international arbitration", the clause did not expressly refer to the amicable settlement procedure (which was found in another clause of the parties' contract).[40] However, the term "settled amicably" was not specifically defined in the contract and a dispute may be "settled amicably" in various ways, including the parties' amicable settlement procedure,[41] and parties were not contractually constrained to settle any disputes between them using only the amicable settlement procedure.[42] On the text of the

37 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [147] and [148].
38 [2024] 3 SLR 111.
39 *CZQ v CZS* [2024] 3 SLR 111 at [13].
40 *CZQ v CZS* [2024] 3 SLR 111 at [19] and [20].
41 *CZQ v CZS* [2024] 3 SLR 111 at [21] and [22].
42 *CZQ v CZS* [2024] 3 SLR 111 at [29].

parties' arbitration clause, the only restriction to the commencement of arbitration was that the dispute must not have been settled amicably.[43]

4.38 This case emphasises the need for careful and clear drafting when parties wish to establish conditions before arbitration (or court action) may be initiated. As noted by the SICC in *CZQ v CZS*, clarity in the crafting of any condition precedent to the commencement of arbitration "promotes the efficacy of the agreement to arbitrate", and "[i]t would not be desirable for parties to be embroiled in a dispute over whether something was or was not a condition precedent to the commencement of arbitration, on top of having to resolve the disputes they submitted to arbitration".[44]

II. Stay of court proceedings

4.39 Several cases relating to stay of court proceedings in favour of arbitration were reported in 2023. Under Singapore law, a stay may be granted pursuant to statute,[45] or by the court's exercise of its inherent powers.

A. Case management stay

4.40 As observed in the Court of Appeal's *ex tempore* judgment in *Rex International Holding Ltd v Gulf Hibiscus Ltd*,[46] "[t]he question of a case management stay 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".[47] In appropriate cases, the court may order that the forum court proceedings be stayed while the dispute is resolved in the other fora, so as to ensure a fair and efficient resolution of the dispute.

4.41 In *Parastate Labs Inc v Wang Li*,[48] Parastate Labs had invested in a fund managed by a cryptocurrency financial services provider trading as "Babel Finance". The actual Babel entity contracting with Parastate Labs was Babel Asia, which was a company wholly owned by Babel Holding.

43 *CZQ v CZS* [2024] 3 SLR 111 at [25].
44 *CZQ v CZS* [2024] 3 SLR 111 at [17].
45 The court has the power to grant a stay of proceedings in favour of arbitration under both s 6(2) of the International Arbitration Act 1994 (2020 Rev Ed) and s 6(2) of the Arbitration Act 2001 (2020 Rev Ed).
46 [2019] 2 SLR 682.
47 *Rex International Holding Ltd v Gulf Hibiscus Ltd* [2019] 2 SLR 682 at [11].
48 [2023] SGHC 48.

4.42 Parastate Labs commenced proceedings in the General Division against Babel Asia, Babel Holding, as well as two co-founders of Babel Holding alleging, amongst other things, breach of trust, fraudulent misrepresentation and conspiracy. As there was an arbitration clause in the contract between Parastate Labs and Babel Asia, Babel Asia successfully obtained a stay of the court proceedings against it on the basis of s 6(2) of the IAA.

4.43 The first defendant applied for a case management stay of the court proceedings pending the resolution of the arbitration between Parastate Labs and Babel Asia. The application was granted as the court considered that the dispute between Parastate Labs and Babel Asia was "foundational"[49] to all of Parastate Labs' claims against all the defendants in the court proceedings. Further, in view of the issues that Parastate Labs had agreed to resolve in arbitration with Babel Asia, it was "logical to have all those issues as between Parastate [Labs] and Babel Asia determined first in arbitration", before Parastate Labs proceeded with its claims against the remaining defendants in court.[50] The court also considered that an award in the arbitration could well determine the disputes in court entirely; even if it did not, the court would have the benefit of the arbitral tribunal's decision on the issues between Parastate Labs and Babel Asia when it heard Parastate Labs' claims against the remaining defendants.[51]

4.44 In *JE Synergy Engineering Pte Ltd v Niu Ji Wei*,[52] the General Division had to consider whether a case management stay ought to be granted in respect of concurrent court and arbitration proceedings relating to the same underlying facts, but involving different causes of action and defendants.

4.45 JE Synergy Engineering Pte Ltd ("JE Synergy") was the main contractor for building works for a sewage treatment plant project. A part of the project works had been subcontracted to Sinohydro Corp Ltd ("Sinohydro"), which in turn engaged Vico Construction Pte Ltd. In October 2020, JE Synergy commenced court proceedings against the project director and senior project manager, both employees of JE Synergy, alleging breaches of employment contracts and/or breaches of fiduciary duties owed to the company. The employees were alleged to have obtained bribes and kickbacks from Sinohydro to ensure that the subcontract works would be awarded to Sinohydro. The employees also allegedly

49 *Parastate Labs Inc v Wang Li* [2023] SGHC 48 at [27].
50 *Parastate Labs Inc v Wang Li* [2023] SGHC 48 at [29] and [30].
51 *Parastate Labs Inc v Wang Li* [2023] SGHC 48 at [52] and [53].
52 [2023] SGHC 281.

allowed payments to be made to Sinohydro without proper verification, leading to over-certification of the value of the subcontract works.

4.46 In July 2022, more than 18 months after the court proceedings against the employees had been commenced, JS Synergy initiated arbitration against Sinohydro pursuant to the arbitration clause in the subcontract. JE Synergy asserted in the arbitration that Sinohydro had procured the subcontract by bribery.

4.47 Sinohydro, in the capacity as a third party to the court proceedings, applied for the High Court suit between JE Synergy and its employees to be stayed pending the final determination in the arbitration. The stay application was granted by an assistant registrar, who ordered that all further proceedings in the High Court suit be stayed under the inherent jurisdiction of the court and pursuant to its case management powers.

4.48 JE Synergy appealed against the assistant registrar's decision. The appeal was dismissed by the High Court. In coming to its decision, the High Court judge noted that a fundamental prerequisite to the grant of a case management stay is the existence of, or at least the imminence of arbitration proceedings giving rise to a real risk of overlapping issues between the parties.[53]

4.49 In deciding whether to exercise its discretion to stay the court proceedings, the court has to strike a balance between a plaintiff's right to choose whom he wants to sue and when, the court's desire to prevent a plaintiff from circumventing the operation of an arbitration clause, and the court's inherent power to manage its processes to prevent an abuse of process and ensure the efficient and fair resolution of disputes.[54]

4.50 In the present case, there was significant overlap in (a) the issues before the court and in arbitration; (b) some of the parties to both proceedings (a complete overlap of parties being unnecessary); and (c) the remedies sought in both proceedings.[55] There was also "a clear element of dependency"[56] in relation to the allegations of over-certification of the subcontract works made by JE Synergy against its employees in the court action, and against Sinohydro in arbitration. In these circumstances, if a case management stay was refused, there would be parallel proceedings

53 *JE Synergy Engineering Pte Ltd v Niu Ji Wei* [2023] SGHC 281 at [14], citing *Rex International Holding Ltd and another v Gulf Hibiscus Ltd* [2019] 2 SLR 682 at [11].
54 *JE Synergy Engineering Pte Ltd v Niu Ji Wei* [2023] SGHC 281 at [15], citing *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [188].
55 *JE Synergy Engineering Pte Ltd v Niu Ji Wei* [2023] SGHC 281 at [19].
56 *JE Synergy Engineering Pte Ltd v Niu Ji Wei* [2023] SGHC 281 at [52].

in arbitration and in court, with the risk of conflicting decisions by the two fora.

4.51 This decision is, at first blush, surprising given that the court proceedings were likely to have been at an advanced stage, and a late-stage stay could be seen to be unfair to the employee-defendants. However, the over-certification allegations against the employees clearly depend on the value of the subcontract works performed by Sinohydro, which was one of the issues to be determined in the arbitration. If the court action and the arbitration were to proceed concurrently, there would likely be overlapping (if not duplicative) evidence presented in each forum and a real risk of conflicting decisions.

4.52 It is worth noting that this is not a case where a claimant elected to pursue claims in different fora for strategic reasons. JE Synergy was constrained to commence court proceedings against the employees because there was no arbitration agreement between these parties; on the other hand, there was an arbitration clause in the subcontract between JE Synergy and Sinohydro, which meant that JE Synergy could not have brought a court claim against Sinohydro for claims arising out of the subcontract.

4.53 While *JE Synergy Engineering Pte Ltd v Niu Ji Wei* did not involve true "related" contracts (in that the employment contracts and the subcontract were not part of the same transaction or series of transactions), it nonetheless illustrates the importance of having consistent dispute resolution clauses in contracts that have some nexus with each other. For example, in back-to-back or upstream/downstream contracting structures, consistent dispute resolution clauses would give the claimant/plaintiff the option of commencing one action against multiple parties under multiple contracts, instead of having to sue in different fora.

B. Statutory stay in the context of insolvency proceedings

4.54 *Gulf International Holding Pte Ltd v Delta Offshore Energy Pte Ltd*[57] was a case illustrating the interplay between a statutory stay and the insolvency regime. In 2020, Gulf International Holding Pte Ltd ("Gulf") entered into discussions with certain sponsors in relation to the financing and development of a gas-to-power facility project in Vietnam. Gulf eventually entered into, amongst other things, a convertible loan agreement with Delta Offshore Energy Pte Ltd ("Delta") and the

57 [2023] 5 SLR 1455.

sponsors (who were shareholder-directors of Delta) under which Gulf would disburse loans to Delta upon the achievement of certain project milestones; the loans were to be applied to the financing, development, construction, operation and maintenance of the project. The loans were secured by a share charge over 75% of the shares in Delta.

4.55 Delta was unable to make payments on the loans. This led to Gulf applying to the General Division for Delta to be placed under judicial management and interim judicial management. Delta, however, applied for the two judicial management applications to be dismissed or stayed pursuant to s 91(7) of the Insolvency, Restructuring and Dissolution Act 2018,[58] or pursuant to s 6 of the IAA. In respect of the application under the IAA, Delta argued that the dispute over debt allegedly owed by Delta to Gulf was subject to the arbitration clause in the convertible loan agreement.

4.56 The IAA stay application was dismissed by an assistant registrar, on the basis that there was no dispute to be submitted to arbitration as Delta had clearly and unequivocally admitted to the debt through its numerous requests for time to repay the loans. Delta appealed, and pending the hearing of the appeal, Delta commenced arbitration against Gulf and its parent company, Gulf Energy Development Public Co Ltd.

4.57 The High Court judge dismissed the appeal and allowed judicial managers to be appointed over Delta. In coming to its decision, the court accepted that Delta's conduct in seeking and obtaining various extensions of time to pay the loans constituted an unequivocal acknowledgment and admission that it owed Gulf the principal sum of US$10m and interest.[59] The court noted that in each of Delta's extension requests, it "clearly and unequivocally acknowledged that the various tranches were due to be repaid by a specified date and was asking for more time to repay the same",[60] and in these circumstances, there was no disputed debt between Delta and Gulf.[61] While a debtor may genuinely dispute a debt which it had previously admitted, the debtor must furnish a clear and convincing reason for the change of position. In the present case, as Delta had failed

58 2020 Rev Ed.

59 *Gulf International Holding Pte Ltd v Delta Offshore Energy Pte Ltd* [2023] 5 SLR 1455 at [30].

60 *Gulf International Holding Pte Ltd v Delta Offshore Energy Pte Ltd* [2023] 5 SLR 1455 at [32].

61 *Gulf International Holding Pte Ltd v Delta Offshore Energy Pte Ltd* [2023] 5 SLR 1455 at [35].

to show clear and convincing reasons for its change of position, its denial of the debt constituted an abuse of process.[62]

C. Meaning of "step in the proceedings"

4.58 A party seeking a statutory stay under both the IAA and the AA must make its application for stay "before delivering any pleading (other than a pleading asserting that the court does not have jurisdiction in the proceedings) or taking any other step in the proceedings".[63]

4.59 In *Beltran*, the court had the opportunity to consider the meaning of "step in the proceedings" for the purposes of s 6(1) of the IAA in the context of the Rules of Court 2021 ("ROC 2021").

4.60 After the case was commenced, Terraform Labs completed the pre-case conference questionnaire and indicated its intention to challenge the court's jurisdiction on the basis of the arbitration agreements between it and the claimants. Shortly thereafter, Terraform Labs filed its defence, which included its jurisdictional challenge, a defence on the merits, as well as a counterclaim for various declarations. The defence contained a reservation that it was filed "without prejudice" to Terraform Labs' jurisdictional challenge, and that the filing was "not to be construed as submission to the jurisdiction of the Court".

4.61 The second and fourth defendants, who were represented by the same solicitors as Terraform Labs, filed similar defences addressing both the jurisdiction and merits, with similar reservations. The third defendant filed a defence addressing only the jurisdictional challenge, without prejudice to his right to file a defence on the merits should the jurisdictional challenge fail.

4.62 Timelines were subsequently given by the court for the defendants to file and serve their respective jurisdictional challenges. While the third defendant filed its jurisdictional challenge as directed (seeking a case management stay of the suit), the remaining defendants eventually filed an application for permission to file an "omnibus application" seeking a number of reliefs including further and better particulars, document production and the striking out or stay of the suit on various grounds. The court did not grant permission for the filing of the omnibus application, and Terraform Labs and the second and fourth

62 *Gulf International Holding Pte Ltd v Delta Offshore Energy Pte Ltd* [2023] 5 SLR 1455 at [36]–[55].

63 See s 6(1) of the International Arbitration Act 1994 (2020 Rev Ed) and s 6(1) of the Arbitration Act 2001 (2020 Rev Ed).

defendants eventually filed their jurisdictional challenge, with Terraform Labs seeking a statutory stay of the suit while the second and fourth defendants sought a case management stay.

4.63 The stay applications were dismissed by an assistant registrar who took the view that even if there was *prima facie* a valid arbitration agreement between Terraform Labs and the claimants, Terraform Labs had taken multiple steps in the proceedings and therefore had submitted to the jurisdiction of the court. The case management stays sought by the other defendants were also dismissed as these applications were premised on Terraform Labs obtaining the statutory stay.

4.64 The defendants' appeals were dismissed by the High Court. The High Court judge noted that while an act which goes towards the advancement of a jurisdictional challenge will not constitute a "step in the proceedings", a defendant who "employs court procedures to *enable* him to defeat or defend [the] proceedings on their merits" [emphasis in original] is deemed to have taken a "step in the proceedings".[64]

4.65 The ROC 2021 regime allows defendants to file a defence objecting to jurisdiction alone, and such defence does not amount to a submission to the court's jurisdiction.[65] Order 6 r 7(4) of the ROC 2021 expressly provides that a defendant challenging the court's jurisdiction "need not file and serve a defence on the merits but must file and serve a defence stating the ground on which the defendant is challenging the jurisdiction of the Court". The High Court judge emphasised that the words "need not" in O 6 r 7(4) of the ROC 2021 does not mean that a defendant has an option to file a defence on jurisdiction and a defence on the merits; the defendant should file a defence on jurisdiction only.[66]

4.66 The reservations included in the defences were not determinative of whether an act constituted a step in the proceedings. The court still had to consider whether the reservation was disingenuous, and whether the party's conduct clearly and unequivocally signified a submission to jurisdiction.[67]

4.67 In the present case, the defence filed by Terraform Labs not only included its jurisdictional challenge, but also included a substantive defence to the merits of the claim, as well as a counterclaim. This

64 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [39] and [44], citing *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460.

65 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 340 at [50]. See also O 2 r 5(4) and O 6 r 7(6) of the Rules of Court 2021.

66 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [54].

67 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [60].

constituted a "step in the proceedings" and demonstrated Terraform Labs' willingness to accept the court's jurisdiction.[68] The request to file the omnibus application (even though the filing was rejected by the court registry) also showed that Terraform Labs had accepted that the court had jurisdiction.[69]

4.68 The decision in *Beltran* provides clarity as to the meaning of "step in the proceedings" under the ROC 2021 regime, and the relevance of cases pre-dating the new Rules of Court. Under the old Rules of Court, defendants were often under pressure to quickly file applications for stay of proceedings before the timelines for filing their defences expired, so as to avoid default judgment being entered. This is no longer necessary under the ROC 2021 regime, which should translate to less costs and better use of resources for both disputing parties and the court.

D. Other cases relating to stay of proceedings

4.69 *DAY v DAZ*[70] concerns a dispute between a litigation funder and its client, and is the first of such disputes reported since third party funding was permitted in Singapore. In this case, the parties had entered into a funding agreement under which DAY would provide funding and project support services to DAZ and DAZ's related company for claims to be made against two companies, Co1 and Co2.

4.70 DAZ commenced arbitration against Co1 and obtained a final award in its favour on 16 September 2021. Co1 tried to set aside the award before the English High Court but failed. DAY funded the costs incurred by DAZ in defending against Co1's setting-aside application.

4.71 Subsequently, Co1 and DAZ agreed on a draft settlement agreement pursuant to which Co1 would pay an agreed sum to DAZ in installments; DAY also agreed that the terms of the draft settlement agreement were acceptable and appropriate. However, DAZ subsequently informed DAY that it would not execute the draft settlement agreement unless DAY was prepared to agree that the first instalment payment be made to DAZ. DAY did not agree.

4.72 DAY informed DAZ that its failure to promptly execute the draft settlement agreement constituted a breach of the parties' funding agreement, and stipulated a deadline by which the breach was to be remedied. DAZ refused on the basis it was no longer commercially

68 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [71].
69 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [81] and [83].
70 [2023] SGHC 185.

feasible to accept Co1's proposed instalment plan, and that it was particularly concerned that DAZ would not recover anything from Co1 until the final tranche payment and that the risk of Co1 defaulting on that tranche was high.

4.73 The funding agreement contained a mechanism – at Specific Term 3.3 – for resolving disagreements between the parties over whether to agree to a settlement. However, DAZ, on advice from its lawyers, took the position that it was not obliged to comply with the mechanism.

4.74 DAY therefore commenced proceedings in the General Division against DAZ. DAZ applied to stay the suit in favour of arbitration pursuant to s 6 of the IAA or the court's inherent powers of case management. In support of its application for a stay, DAZ relied on the arbitration clause in the funding agreement, which provided that any dispute arising out of the funding agreement "which is not subject to Specific Term 3.3 and 3.4"[71] must be resolved in accordance with the arbitration agreement.

4.75 The stay application was dismissed by an assistant registrar at first instance. On appeal, the High Court allowed the appeal and ordered a stay of proceedings pursuant to s 6 of the IAA. The High Court judge noted that the relevant question before the court was whether the dispute as to whether Specific Term 3.3 applied to the draft settlement agreement fell within the scope of the arbitration clause in the funding agreement.

4.76 The court held that a dispute that is "subject to Specific Term 3.3 and 3.4" referred to a dispute over whether to settle claims or proceedings, and presupposes that Specific Term 3.3 (and 3.4) was applicable in the first place.[72] However, as the parties' dispute concerned whether Specific Term 3.3 was even engaged, this was not a dispute that was "subject to Specific Term 3.3" and thus not carved out from the arbitration clause. Instead, the dispute fell within the scope of the arbitration clause and the court proceedings should be stayed.[73]

4.77 In *Marchand Navigation Co v Olam Global Agri Pte Ltd*,[74] Marchand Navigation Co ("Marchand") was the owner of a vessel which was time-chartered to the second defendant, Sinco Shipping Pte Ltd ("Sinco"), and which was then subchartered on a voyage basis to Olam Global Agri Pte Ltd ("Olam"). The charterparty between Marchand

71 *DAY v DAZ* [2023] SGHC 185 at [25].
72 *DAY v DAZ* [2023] SGHC 185 at [36].
73 *DAY v DAZ* [2023] SGHC 185 at [48].
74 [2024] 3 SLR 1695.

and Sinco contained a term allowing Marchand to have a lien "upon all cargoes, and all sub-freights or hire or sub-hires or demurrages and time for detention, if any for any amounts due under this Charter".

4.78 After the voyage charter was completed, Sinco and Olam agreed that Olam owed Sinco demurrage of about US$190,000. As between Marchand and Sinco, Marchand alleged that Sinco was in breach of the charterparty because of its failure to pay hire to Marchand.

4.79 On 11 January 2023, Marchand informed Olam that Sinco was in breach of the charterparty and pursuant to its rights under the charterparty, Marchand was exercising a lien over the sum of US$190,000 due from Olam to Sinco. Sinco subsequently informed Olam that it objected to Marchand's exercise of the lien and that there were no sums due and owing under the charterparty.

4.80 Because of the competing positions taken by Marchand and Sinco, Olam did not make payment to Marchand and instead offered to hold the sum of US$190,000 until an agreement was reached between them. However, Marchand commenced proceedings in the Singapore courts against Olam for payment of US$190,000; Sinco was subsequently added as a party to the court action.

4.81 Marchand's claim against Sinco was in respect of unpaid bunkers due from Sinco under the charterparty. While Marchand accepted that the charterparty contained a London arbitration clause, it argued that the clause did not apply because there was no dispute referrable to arbitration. Sinco took the position that there were no sums due and owing to Marchand. In any event, the terms of the charterparty did not permit the exercise of the lien for the payment of bunkers.

4.82 The High Court held that there was arguably a "dispute" between Marchand and Sinco for the purposes of the arbitration clause.[75] However, the presence of a dispute did not prevent Marchand's exercise of the lien. This was because the arbitration clause only obliged the parties to the charterparty, *ie*, Marchand and Sinco, to submit their dispute to arbitration. There was also nothing in the language of the arbitration clause that would constrain the operation of the lien against Olam, a subcharterer.[76] Consequently, Marchand's exercise of the lien was valid in so far as Olam was concerned.[77]

75 *Marchand Navigation Co v Olam Global Agri Pte Ltd* [2024] 3 SLR 1695 at [32] and [36].
76 *Marchand Navigation Co v Olam Global Agri Pte Ltd* [2024] 3 SLR 1695 at [39].
77 *Marchand Navigation Co v Olam Global Agri Pte Ltd* [2024] 3 SLR 1695 at [40].

4.83 In the circumstances, the High Court ordered Olam to pay the sum of US$190,000 to Marchand, with the final outcome of the arbitration (if any) being determinative of the rights to this sum as between Marchand and Sinco *inter se*.[78]

III. Recourse against awards

A. Setting aside awards

4.84 A party who is dissatisfied with the outcome of an arbitration has limited recourse. In an arbitration seated in Singapore, that party may seek to set aside the award under Art 34 of the Model Law on International Commercial Arbitration[79] ("MAL"), s 24 of the IAA or s 48 of the AA. If the arbitration is a domestic arbitration, the unhappy party may also appeal to the court on a question of law arising out of the award under s 49 of the AA.

4.85 The grounds upon which a setting-aside application may be made are limited, although it is open to the applicant to rely on multiple grounds in one application. The most commonly relied upon grounds for setting aside is breach of natural justice,[80] followed by inability of the applicant to present its case[81] and the award exceeding the scope of submission to arbitration.[82]

4.86 Of the arbitration-related judgments published in 2023, 14 related to setting-aside applications. This represents a small decline from 2022 when 18 such judgments were published. It is also noteworthy that none of the setting-aside applications reported in 2023 were successful.

4.87 In *COT v COU*,[83] the applicant COT was a producer and supplier of high-tech and high-value components for infrastructure. The respondents (COU, COV and COW) were, at the material time, members of the same international group of companies: COU was

78 *Marchand Navigation Co v Olam Global Agri Pte Ltd* [2024] 3 SLR 1695 at [42].

79 United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration (UN Doc A/40/17, annex I; UN Doc A/61/17, annex I) (21 July 1985, amended 7 July 2006).

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

81 Model Law on International Commercial Arbitration Art 34(2)(*a*)(ii); Arbitration Act 2001 (2020 Rev Ed) s 48(1)(*a*)(iii).

82 Model Law on International Commercial Arbitration Art 34(2)(*a*)(iii); Arbitration Act 2001 (2020 Rev Ed) s 48(1)(*a*)(iv).

83 [2023] SGHC 69.

a holding company for the group's regional business, COV was an engineering, procurement and construction contractor, and COW was a special-purpose vehicle incorporated for a particular infrastructure project ("Project").

4.88 In August 2014, COT entered into a supply agreement with the group's procurement company ("ProCo"). Under the supply agreement, COT agreed to sell technology modules to ProCo to be used in the group's various projects. As between the group companies, ProCo would sell technology modules to COV, and COV would on-sell the modules to COW.

4.89 There was no written contract between ProCo and COV. However, COV accepted that it was obliged to pay on the invoices issued to it by ProCo for the modules. As between COV and COW, an equipment and material supply contract ("EMS Contract") was entered into for the supply of modules.

4.90 Technology modules which were intended to be used for the Project were delivered by COT directly to COV to be used for the Project. COV would then supply the modules to COW under the EMS Contract.

4.91 Between August 2015 to March 2016, COT issued 13 invoices amounting to ₴29.4m[84] to ProCo for technology modules which had been, or were due to be delivered to COV for the Project. Due to ProCo's failure to make payment, COT suspended delivery of modules for the Project entirely.

4.92 Through negotiations at the senior management level, COT agreed to resume deliveries of the modules for the Project on 18 March 2016. Further, as a result of certain transactions in April and May 2016, the total sum owed by ProCo to COT was reduced to ₴7.35m.

4.93 In April 2016, the group's ultimate holding company, as well as certain other companies within the group (including ProCo), sought protection from creditors under Chapter 11 of the US Bankruptcy Code. In June 2016, it became publicly known that the Sauron Group was to acquire some of the group's assets, including all the shares in COW.

4.94 In October 2016, representatives of the Sauron Group and COT attempted to resolve COT's outstanding claim of ₴7.35m. The negotiations were unsuccessful due to, among other things, disagreements as to the quantum of the outstanding sum, and the applicable forex laws which

84 "₴" is the fictitious currency symbol used in *COT v COU* [2023] SGHC 69.

prohibited COV from directly making payment to COT, with whom it had no contractual relationship.

4.95 COT subsequently commenced arbitration against COU, COV and COW in April 2017. The arbitration was administered by the SIAC under the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("ICC Rules"), and a final award was issued in February 2017 with the tribunal holding the respondents jointly and severally liable to pay COT the principal sum of ₴27.35m. In coming to its decision, the arbitral tribunal found that COT had resumed delivery of the technology modules to COV on 18 March 2016 pursuant to a contract with the respondents. The tribunal referred to this contract as "the … Modules Delivery Agreement".[85]

4.96 COU, COV and COW applied to set aside the award on the basis that (a) there was no valid arbitration agreement between the parties, whether by way of a "Modules Delivery Agreement" (as found by the arbitral tribunal) or otherwise; (b) the tribunal had exceeded the scope of submission to arbitration or failed to decide on matters submitted to arbitration; and (c) there was a breach of natural justice because the respondents were unable to present their case on COT's change of case.

4.97 The setting-aside application failed before the General Division. The court took the view that none of the grounds relied upon by the respondents was established and the allegations that the tribunal had failed to decide or failed to determine the issues was "nothing more than a disguised attempt to challenge the merits of the tribunal's decision".[86] A "holistic assessment" of the March 2016 negotiations showed that the parties had concluded a contract on "basic or essential terms" on 17 March 2016 and a contract on full terms on 18 March 2016[87] and that contract included an arbitration agreement between COT and each of COU, COV and COW.[88]

4.98 It was also clear from the arbitration record that COT's case was consistent from the initiation of the arbitration to closing submissions, namely whether the March 2016 negotiations resulted in a concluded contract and whether/where the contractual obligations were crystallised.[89] The arbitral tribunal's finding that a Modules Delivery Agreement had been concluded in March 2016 was therefore well

85 *COT v COU* [2023] SGHC 69 at [32(a)].
86 *COT v COU* [2023] SGHC 69 at [144].
87 *COT v COU* [2023] SGHC 69 at [112] and [117]–[133].
88 *COT v COU* [2023] SGHC 69 at [136] and [155].
89 *COT v COU* [2023] SGHC 69 at [206].

within the terms and scope of the submission to arbitration.[90] Further, the respondents had reasonable notice of the case that they had to meet but "took a tactical decision to press on with their closing submissions without addressing" this issue.[91]

4.99 The court also noted that it was not necessary for an arbitral tribunal to decide every point raised by a party in resolve the dispute before it, and "[w]hat matters is that the award gives sufficient reasons to inform the parties as to the bases which the tribunal has reached its decision".[92]

4.100 The respondents' appeal was dismissed by the Court of Appeal.[93] The Court of Appeal agreed with the lower court's decision, but criticised the detailed factual analysis adopted by the lower court. The Court of Appeal noted that when a seat court was called upon to consider a setting-aside application premised on the absence of a binding contract, it was only necessary to consider whether such a contract existed:[94]

> In answering this question, the court may consider whether the parties conducted themselves in a manner which shows they considered themselves bound. The court need not engage in a comprehensive interpretation exercise as to the terms of the contract and the parties' liability under those terms – that is a question of the merits and a task for the arbitral tribunal. While some analysis of the terms may be necessary to determine which parties were parties to the contract, the court hearing the setting aside application only needs to determine such terms on a *prima facie* basis for this precise purpose. Questions of authority to enter into the contract (which is distinct from the authority to enter into an arbitration agreement which is a term of the contract) are likewise circumscribed and do not require the seat court's substantive examination of the parties' obligations under those contracts. In short, the seat court does not need to identify the full scope of the terms and obligations contained in the contract and the parties' liability under those terms; those are questions reserved for the tribunal.

4.101 The Court of Appeal agreed that the arbitral tribunal's findings regarding the conclusion of a Modules Delivery Agreement were "eminently correct".[95] The purpose of the March 2016 negotiations was to arrive at an agreement for COT to release the remaining technology modules in return for improved payment terms, and this purpose was achieved with the partly oral and partly written Modules Delivery

90 *COT v COU* [2023] SGHC 69 at [210].
91 *COT v COU* [2023] SGHC 69 at [226]–[228].
92 *COT v COU* [2023] SGHC 69 at [236].
93 [2023] SGCA 31.
94 *COT v COU* [2023] SGCA 31 at [39].
95 *COT v COU* [2023] SGCA 31 at [52].

Agreement.[96] It was unnecessary, however, for the lower court judge to "draw [a] fine line between the basic/essential terms and full terms of the contract", and a finding that a binding contract was concluded on 18 March 2016 would have sufficed for the tribunal to have jurisdiction.[97]

4.102 Unless parties agree otherwise, an arbitral tribunal has a general duty to give reasons for its decision. This duty is set out in Art 31(2) of the MAL and s 38(2) of the AA. The Court of Appeal had the opportunity to consider the content and extent of this duty in *CVV v CWB*.[98]

4.103 CVQ (the fourth appellant) was a fund management company incorporate in Singapore; it managed two Singapore-incorporated funds, "Fund 1" and "Fund 2". Each fund had various subsidiaries incorporated in Ruritania. CVR (the seventh appellant) was a subsidiary of Fund 2 while the remaining nine appellants (there being 11 appellants altogether) were subsidiaries of Fund 1. CWB was an advisory firm focused on real estate investments. It had been engaged by CVQ as an asset advisor for Fund 1 and Fund 2. The advisory agreements provided for Singapore-seated arbitration administered by SIAC.

4.104 Disputes arose between CVQ and CWB which led CWB to issue notices to terminate the advisory agreements. CVQ (together with its subsidiaries) subsequently commenced arbitration against CWB, alleging that CWB had breached the advisory agreements; CWB counterclaimed for outstanding fees under the agreements.

4.105 By a final award dated 20 June 2022, the tribunal issued an award dismissing the appellants' claims and allowing CWB's counterclaims. In determining the amounts due to CWB, the arbitral tribunal adopted the calculations presented at the evidentiary hearing by CWB's Head of Finance, Mr B.

4.106 The appellants applied to set aside the award, alleging that the arbitral tribunal had breached the rule against bias and the fair hearing rule, and that it had acted irrationally and capriciously as evidenced by the use of contradictory dates at various points in the award.

4.107 The SICC dismissed the application, holding that there was no basis for the allegations of bias, that the arbitral tribunal did not adopt a chain of reasoning which the parties had no reasonable notice of, and that it was "relatively clear" that the tribunal had applied its mind to

96 *COT v COU* [2023] SGCA 31 at [53] and [56]–[60].
97 *COT v COU* [2023] SGCA 31 at [67].
98 [2024] 1 SLR 32.

the appellants' submissions on the performance fee.[99] In addition, the SICC accepted that it was open to the arbitral tribunal to adopt Mr B's unchallenged calculations of the pre- and post-termination management fee. Further, any consistency in the dates used by the arbitral tribunal in its award did not necessarily mean that the tribunal had failed to apply its mind to the issues before it, or that it had somehow breached the fair hearing rule.

4.108 The Court of Appeal agreed with the SICC, holding that the alleged breaches of natural justice invoked by the appellants were "in essence a challenge based on the merits of the award".[100] In the course of its analysis, the Court of Appeal acknowledged that while an arbitral tribunal was under a general duty to give reasons for its decision under Art 31(2) of the MAL, it was not settled whether the failure to give adequate reasons was in itself a reason to set aside an award.[101] The content of a tribunal's duty to give reasons was also not entirely settled.[102]

4.109 While the Court of Appeal did not consider it necessary to pronounce on a tribunal's duty to give reasons (because the appellants' setting-aside application was premised on a breach of the rules of natural justice rather than the failure to give reasons), the Court of Appeal accepted that arbitrators were not required to give reasons to a judicial standard, and what is required of a tribunal in a case would depend on the nature of the dispute and the particular circumstances of that case.[103]

4.110 In addition, the inadequacy of a tribunal's reasons or reasoning is "without more, a mere error of law" and "therefore incapable of sustaining a challenge against an award".[104] Where a party relies on a failure to give reasons to assert that a tribunal failed to apply its mind, "the tribunal's omission to give reasons must logically be so grave or so glaring as to point to the inescapable inference that the tribunal did not even attempt to comprehend the essential issues in the arbitration".[105]

4.111 An arbitrator's role is to resolve disputes between parties and a critical part of this role is to explain to the parties why one is successful and the other is not. Guidance on the scope of the duty to give reasons

99 *CVV v CWB* [2024] 1 SLR 32 at [22(c)].
100 *CVV v CWB* [2024] 1 SLR 32 at [3].
101 *CVV v CWB* [2024] 1 SLR 32 at [32].
102 *CVV v CWB* [2024] 1 SLR 32 at [33].
103 *CVV v CWB* [2024] 1 SLR 32 at [34], referring to *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37.
104 *CVV v CWB* [2024] 1 SLR 32 at [35], referring to *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [98].
105 *CVV v CWB* [2024] 1 SLR 32 at [35].

would have been helpful. Hopefully the Court of Appeal will have the opportunity to express its full views on this issue in a future case.

4.112 The Court of Appeal had the opportunity to consider an application to adduce further evidence within the context of an appeal in a setting-aside application in *COD v COE*.[106] COE, a marine and offshore equipment manufacturer, agreed to supply two fibre role cranes to COD, a shipbuilder. The cranes were intended to be mounted on COD's vessels for use in offshore operations. COD eventually refused to take delivery of the cranes and terminated the contracts due to COE's failure to deliver the cranes by contractually agreed delivery dates, and for alleged non-compliance with contractual specifications and requirements.

4.113 COE commenced two arbitrations alleging that COD's refusal to take delivery of the cranes constituted breaches of the parties' contracts. The reliefs sought by COE include specific performance, or alternatively, general damages.

4.114 In its partial award, the arbitral tribunal found that while the cranes did not comply with the contractual specifications, this was not sufficiently material to justify COD's termination of the contracts. The tribunal did not consider specific performance to be an appropriate remedy as this would absolve COE from the non-compliance issues. Instead, the tribunal awarded damages, and invited parties to put forward further submissions on quantum.

4.115 Although COD initially objected to the tribunal's request for further submissions, both parties eventually filed quantum submissions. The tribunal issued its final award ordering damages to be paid to COD based on the purchase price of the cranes, together with variation orders that increased the price, less scrap value.

4.116 COD applied under ss 48(1)(*a*)(iii) and/or 48(1)(*a*)(vii) of the Arbitration Act[107] to set aside the final award. It argued that it had been unable to present its case and/or there was a breach of natural justice in connection with the making of the award. In addition, the arbitral tribunal had adopted a procedure contrary to the parties' agreement when it bifurcated liability and quantum issues.

4.117 The setting-aside application was dismissed by the General Division. The High Court judge held, *inter alia*, that the arbitral tribunal did not proceed contrary to the parties' agreed procedure, and there

106 [2023] SGCA 29.
107 Cap 10, 2002 Rev Ed.

is generally no prohibition against an arbitrator asking for further submissions in the course of the arbitration as long as the arbitrator behaves in an even-handed fashion.

4.118 On appeal, the Court of Appeal affirmed the lower court's decision and agreed with the analysis and reasoning of the High Court judge. The Court of Appeal also dismissed COD's application filed in the Court of Appeal for permission to adduce further evidence at the appeal hearing in respect of the market value of the cranes that were the subject of the arbitration ("SUM 22").

4.119 In relation to SUM 22, COD contended that it had discovered after the High Court decision that the cranes were being advertised for sale at between US$1m to US$2m on an as-is-where-is basis, or US$3m to US$4m on a reconditioned and operational basis. According to COD, this new evidence would show that COE had lied to the arbitral tribunal that the cranes were merely worth their scrap value.

4.120 The main issue before the Court of Appeal was "whether the further evidence in the sense of fresh or new evidence on the purported market value of two cranes that were the subject of the underlying arbitration might be admitted in an appeal to set aside the tribunal's final award … in a non-jurisdictional challenge where the new evidence had not been adduced in the arbitration or in the setting aside application before the Judge below".[108] The Court of Appeal took the view that SUM 22 was "demonstrably" a reversal of the position that COD had taken before the High Court judge and that it was already aware of evidence suggesting the cranes to be of substantial value before the setting-aside application was heard, but elected to proceed with the setting-aside hearing without this evidence.[109] It was clear from the award that a "key gap" in COD's case in the arbitration was that it had not adduced evidence to show that the cranes had market value, and evidence of market value was also not put before the setting-aside judge.[110] In the circumstances, the filing of SUM 22 "manifested an abuse of process by a dissatisfied party who deployed a procedural tool to run a contrary case on appeal".[111]

4.121 When faced with an application for further evidence to be adduced for setting-aside applications on non-jurisdictional grounds, the Singapore courts' approach:[112]

108 *COD v COE* [2023] SGCA 29 at [3].
109 *COD v COE* [2023] SGCA 29 at [28].
110 *COD v COE* [2023] SGCA 29 at [32].
111 *COD v COE* [2023] SGCA 29 at [32].
112 *COD v COE* [2023] SGCA 29 at [39].

> … is a fact-dependent exercise, and the court must pay attention to the nature of the ground for setting-aside relied on by the parties, the facts and circumstances of the case, as well as the question of whether this evidence could have been brought prior to the challenge.

4.122 Where the application to adduce further evidence is filed in the context of an appeal against a refusal to set aside an award, the court must balance allowing evidence that would be relevant to the court's consideration of the grounds for setting aside, and refusing evidence that is intended to challenge the tribunal's findings on the merits.[113]

4.123 The arbitral tribunal had noted in its final award that COD had failed to adduce evidence of the existence of an available market for the cranes and their market value. In the circumstances, COD's suggestion in SUM 22 that it would be prejudiced if new evidence was not allowed to be adduced would "in fact turn reality on its head, and require the court to intervene in the Tribunal's factual finding as to the market for and value of the cranes".[114]

4.124 In *CWP v CWQ*,[115] the applicant CWP was a construction company engaged to carry out dredging and land reclamation works in a city port. CWP subcontracted the dredging works to CWQ, a marine engineering company specialising in offshore construction. Under the subcontract, the dredging works were to be completed by 24 August 2017. However, the subcontract works were completed on 26 August 2017 instead, because CWQ's vessels had to stop work at various times for different reasons.

4.125 CWQ commenced arbitration against CWP seeking compensation and an extension of time. A majority of the arbitral tribunal determined that CWQ was entitled to compensation under Art 3.9 of the subcontract, regardless of whether the stoppages prevented it from completing works before the time for completion expired, and CWP was consequently obliged to compensate CWQ for all the incidents that caused stoppages.

4.126 CWP applied to set aside the award pursuant to Art 34(2)*(a)*(iii) MAL and/or s 24(*b*) of the IAA. It alleged that the majority tribunal's decisions on the interpretation of Art 3.9 and compensation went beyond the scope of the submission to arbitration and was made in breach of natural justice.

113 *COD v COE* [2023] SGCA 29 at [38].
114 *COD v COE* [2023] SGCA 29 at [47].
115 [2023] 4 SLR 1725.

4.127 CWP's application was dismissed by the General Division. The court held that in determining scope of the submission to arbitration:[116]

> … there is no single source which determines, to the exclusion of all others, what issues the parties have placed before the tribunal for its determination. Instead, the court must take a practical and not an unduly narrow view in considering whether the five sources, *taken together*, indicate that the parties *contemplated and understood* that the issue in question was to be properly submitted for determination by the tribunal. [emphasis in original]

4.128 In the court's view, there was "never any doubt" between the parties and the arbitral tribunal as to what the live issues in the arbitration were.[117] In any event, even if CWP could demonstrate a breach of the fair hearing rule on the basis that the majority tribunal failed to consider its arguments, CWP has not shown that it would have been prejudiced by such a breach.[118]

4.129 In *ONGC Petro additions Ltd v DL E&C Co Ltd*,[119] the General Division had to consider when a tribunal may be said to have resolved an issue finally and conclusively. The applicant, ONGC Petrol additions Ltd ("ONGC") was the owner of a petrochemical complex in Gujarat. In November 2009, ONGC invited bids for the construction of a high-density polyethylene plant at the complex. DL E&C Co Ltd ("DL E&C") was one of two eligible bidders and its bid incorporated proprietary technology belonging to Chevron Philips Chemical Company LLC ("CPCC").

4.130 The contract was awarded to DL E&C. In ONGC's notification of award dated 6 January 2011 as well as ONGC's General Conditions of Contract, a formal contract was to be signed within 30 days of the notification of award. However, due to licensing disputes between DL E&C and CPCC, DL E&C informed ONGC that it could not entered into a formal contract. ONGC eventually re-awarded to the contract to the other eligible bidder.

4.131 ONGC commenced arbitration against DL E&C, seeking damages for abandonment of the contract. Its damages claim comprised three main heads, one of which was a claim for loss of net present value ("NPV") based on the higher NPV of DL E&C's bid versus the lower NPV of the other eligible bidder ("NPV Claim").

116 *CWP v CWQ* [2023] 4 SLR 1725 at [28].
117 *CWP v CWQ* [2023] 4 SLR 1725 at [34].
118 *CWP v CWQ* [2023] 4 SLR 1725 at [50].
119 [2023] SGHC 197.

4.132 In its award on liability, a majority of the arbitral tribunal found that there was a concluded contract between the parties which DL E&C had wrongfully abandoned. However, the only head of claim allowed was the NPV Claim quantified as the extra costs from the employment of a substitute contractor, subject to a cap of 20% of the contract price.

4.133 The liability award was not challenged. During the quantum phase of the proceedings, ONGC submitted a revised NPV Claim. Instead of being calculated based on the different NPVs of the two bidders, the revised NPV Claim consisted of an incremental cost claim (premised on the overall extra costs of building and operating the plant with the substitute contractor) and a loss of capability claim (based on the inability to produce a certain product which would have been available had CPCC technology been used). In its award on quantum, the arbitral tribunal dismissed the revised NPV Claim and awarded only nominal damages to ONGC on the basis that it had failed to prove its loss.

4.134 ONGC applied to the General Division to set aside the quantum award under Art 34(2)(*a*)(iii) of the MAL and s 24(*b*) of the IAA. ONGC argued that the tribunal had revisited or reversed three critical findings made in the liability award in respect of which it was *functus officio,* and consequently breached the rules of natural justice by adopting an unforeseeable chain of reasoning. In addition, some aspects of the arbitral tribunal's reasoning and illustrations used were not derived from the parties' submissions or otherwise raised to the parties, and ONGC did not have a reasonable opportunity to make submissions on them.

4.135 The General Division dismissed the setting-aside application. In so far as the allegations of revisiting or reversing its earlier determinations is concerned, the court noted that in order to determine whether a tribunal had resolved an issue finally and conclusively, "the primary focus must undoubtedly be on what the tribunal said and concluded in its award" and "one must not lose sight of the context in which the tribunal made its decision".[120] The general approach to be adopted, as expressed in the earlier case of *York International Pte Ltd v Voltas Ltd*,[121] comprises the following steps:[122]

120 *ONGC Petro additions Ltd v DL E&C Co Ltd* [2023] SGHC 197 at [35].
121 [2024] 4 SLR 484.
122 *ONGC Petro additions Ltd v DL E&C Co Ltd* [2023] SGHC 197 at [35], referring to *York International Pte Ltd v Voltas Ltd* [2024] 4 SLR 484 at [54].

(a) The court will give real weight to the question of substance and not merely to form.

(b) There is a role however for form. The arbitral tribunal's own description of the decision is relevant, although it will not be conclusive in determining its status.

(c) It may also be relevant to consider how a reasonable recipient of the tribunal's decision would have viewed it.

(d) A reasonable recipient is likely to consider the objective attributes of the decision relevant. These include the description of the decision by the tribunal, the formality of the language used, and the level of detail in which the tribunal has expressed its reasoning.

(e) A reasonable recipient would also consider such matters as whether the decision complies with the formal requirements for an award under any applicable rules.

(f) The focus must be on a reasonable recipient with all the information that would have been available to the parties and to the tribunal when the decision was made. It follows that the background or context in the proceedings in which the decision was made is also likely to be relevant.

4.136 The High Court judge was of the view that the arbitral tribunal did not make any final or conclusive determination in relation to the three critical findings referred to by ONGC. The arbitral tribunal had expressed in the liability award that the validity and quantum of the NPV Claim would be considered in the quantum phase, subject to a cap of 20% of the contract price. This was not a conclusive determination or an acceptance by the tribunal of the NPV Claim.[123] The arbitration record also showed that neither the tribunal nor ONGC were under the impression that any final determination had been made in respect of the NPV Claim at the liability phase.

4.137 In *CZO v CZP*,[124] the applicant CZO sought to set aside an award pursuant to s 24(*b*) of the IAA. CZO was a designer and manufacturer of electronic equipment while CZP was a developer of electronic devices that use touch, visual and voice technologies for use in the hospitality industry. In particular, CZP had developed a digital tablet that allowed diners to order and pay for food and beverages at their tables ("Device"). In addition, the Device also allowed diners to play digital games with optional in-app purchases. CZP earned a share of the revenue generated by these in-app purchases.

123 *ONGC Petro additions Ltd v DL E&C Co Ltd* [2023] SGHC 197 at [43].
124 [2023] SGHC 237.

4.138 The parties entered into a master supply agreement in October 2015 under which CZP engaged CZO to design, develop and manufacture the Device. Under the contract, CZO was obliged to repair defective Devices during a one-year defects warranty period. In addition, where a defect affects 5% or more of a particular manufacturing run (referred to as an "Epidemic Condition" in the contract), CZO was required to repair or replace all affected Devices. Between July 2017 and September 2021, more than 180,000 Devices were delivered to CZP.

4.139 Arising from the Covid-19 pandemic, in March 2020, CZP asked CZO to recommend a disinfecting method for the Devices. CZO recommended that liquid should not be sprayed directly on the Devices and the Devices should instead be disinfected by wiping with a cloth containing alcohol.

4.140 In June 2020, CZP notified CZO of an Epidemic Condition and returned a substantial number of malfunctioning Devices to CZO for diagnosis and repair or replacement. CZO denied any liability for repair or replacement. Subsequently, in late 2020, CZO implemented certain new measures on Devices to prevent the ingress of liquid. However, even the Devices with these new measures continued to malfunction, although at a significantly lower rate.

4.141 CZP commenced arbitration against CZO in March 2021, alleging that CZO had breached the parties' contract by failing to deliver Devices that met the relevant specifications and for failing to repair or replace the malfunctioning Devices. CZO argued that the malfunctioning was caused by the ingress of cleaning or disinfecting liquid that had been sprayed onto the Devices, but the specifications only required the Device to be able to withstand ingress of water and to withstand vertical falling drops of water.

4.142 The arbitral tribunal issued an award substantially in favour of CZP on both liability and quantum. In particular, the arbitral tribunal determined that it was normal restaurant practice to clean the Devices by spraying cleaning fluid, and this practice did not change in terms of method and frequency because of the Covid-19 pandemic. CZO therefore breached the contract by failing to develop and manufacture the Devices in accordance with the specifications as construed in accordance with California law (the law of the contract), and by failing to repair or replace the Devices.

4.143 Dissatisfied with the award, CZO applied to set aside the award pursuant to s 24(*b*) of the IAA. CZO argued that the arbitral tribunal had breached the fair hearing rule because it had failed to apply its mind to an issue of liability or by failing to consider CZO's evidence and submissions.

Additionally, the arbitral tribunal arrived at its decision on quantum by failing to consider critical evidence and submissions put forward by CZO.

4.144 The General Division disagreed with CZO's arguments and dismissed the setting-aside application. The court held that:[125]

> 35 Where a claimant's case on the fair hearing rule is that the tribunal failed to apply its mind to an essential issue in the arbitration, the claimant must persuade the court to draw an inference to that effect. It must show that this inference is a 'clear and virtually inescapable' one. One of the factors from which this inference can be drawn is that the tribunal's decision is inexplicable …
>
> 36 Where a claimant's case on the fair hearing rule is that the tribunal failed to consider its arguments or evidence, only a 'failure to even consider that argument' will amount to a breach of the rule … The fair hearing rule does not oblige a tribunal to deal with and dispose of every argument that the aggrieved party raised in the arbitration … Therefore, while it may be possible to draw the inference that a tribunal failed to consider one or both parties' arguments on a specific issue from the tribunal's failure to analyse that issue in its award, any such failed will not in itself suffice to warrant the inference …

4.145 *DBL v DBM*[126] concerned another setting-aside application made under s 24(*b*) of the IAA. DBL had agreed to sell prime steel slabs to DBM, and the contract specified that the goods were to be loaded at "any Port from [the Kingdom of Saudi Arabia]".[127] Disputes arose between the parties over where the goods had been loaded, with DBM alleging that the goods had been loaded in Iran and DBL was therefore in breach of the contract.

4.146 DBM subsequently cancelled the contract with DBL and demanded repayment of the purchase price. At around the same time, DBM's financing bank demanded repayment of the sums advanced by the bank on DBM's behalf to DBL. The bank proceeded to deduct these moneys from DBM's bank account, causing DBM's account to be placed in overdraft and to incur penalty interest. According to DBM, as of March 2014, the principal amount owed by DBL to DBM was US$9.4m ("Original Outstanding Amount").

4.147 Between April and May 2014, DBM entered into a separate agreement with another party to purchase nickel. The counterparty requested that DBL – which was closely associated with it – be named as the nickel seller so that DBL could supply nickel to DBM in order reduce the sums due to DBM. As a result of this nickel transaction,

125 *CZO v CZP* [2023] SGHC 237 at [35] and [36].
126 [2024] 4 SLR 979.
127 *DBL v DBM* [2024] 4 SLR 979 at [5(a)].

the Original Outstanding Amount was reduced to US$4.6m ("New Outstanding Amount").

4.148 In July 2020, DBM commenced arbitration against DBL, seeking damages for breach of the contract on the basis that the prime steel slabs had been loaded in Iran instead of Saudi Arabia. It sought payment of the New Outstanding Amount, plus certain other losses including loss of revenue on the forward sale of the steel slabs and penalty interest imposed by DBM's financing bank. According to DBM, its claim was not time-barred because the limitation period had been extended by various acknowledgments as to the Original Outstanding Amount and/or the New Outstanding Amount made by DBL.

4.149 In the course of the arbitration, the arbitral tribunal issued an agreed hearing protocol which, among other things, provided for demonstrative exhibits intended to be relied upon by the parties be disclosed by 14 October 2021. Prior to the hearing, DBL adduced a "Vessel Finder Port Movements report" purportedly showing the location of the vessel on which the goods steel slabs had been loaded during the relevant time periods.

4.150 During oral closing submissions, DBM argued – based on data extracted from DBL's Vessel Finder Port Movements report and plotted against the coordinates of the relevant port and vessel speed – that it was not possible for the vessel to have been at the Dammam Port (a port in Saudi Arabia) on 19 September 2013.

4.151 In its award, the arbitral tribunal found largely in DBM's favour, holding that the steel slabs were not loaded on the vessel in Saudi Arabia on 19 September 2013, and that the vessel was in Iran at the relevant time. DBL was consequently in breach of the contract. The arbitral tribunal also agreed with DBM that its claim was not time-barred on the basis of DBL's various acknowledgments.

4.152 In its setting-aside application filed in the General Division, DBL argued that there was a breach of natural justice because the arbitral tribunal had allowed DBM to present a demonstrative at the oral closing submissions, and failed to consider DBL's defences in relation to, *inter alia*, the applicability of time bar.

4.153 The High Court dismissed the application. In arriving at its decision, the court noted that the arbitral tribunal had relied on other findings, as well as DBM's demonstrative, in determining that DBL had

breached the contract.[128] Indeed, the arbitral tribunal had assessed the evidence before it separately and independently, and its views were not somehow tainted by the demonstrative.[129] It was also clear that the arbitral tribunal had considered the various arguments put forward by DBL, but was not persuaded by these arguments and found in favour of DBM. While the arbitral tribunal did not give reasons for some of its findings, there was no obligation for it to give reasons for all the findings made;[130] the arbitral tribunal is also not obliged to deal with every argument canvassed under each of the essential issues in the arbitration, as long as each of the essential issued are dealt with.[131]

4.154 *CYE v CYF*[132] concerned an application to set aside a domestic arbitration award under s 48 of the AA. CYE and CYF had entered into a contract under which CYF was to provide CYE with storage, facilities and other services for gasoil at its terminal. The gasoil was to be supplied by Company A to CYE, with the transfer to take place at CYF's terminal.

4.155 Disputes arose between the parties, which led to CYE commencing an SIAC arbitration against CYF for, among other things, breach of contract and for conspiracy with Company A to defraud CYE. CYF raised a counterclaim against CYE for unpaid storage fees.

4.156 In its final award, the sole arbitrator dismissed all of CYE's claims and allowed CYF's counterclaims. CYE thereafter applied to set aside the final award, alleging the sole arbitrator had failed in numerous respects, including failing to consider CYE's claims and arguments, failing to decide on issues within the scope of the submission to arbitration, and failing to give any or adequate reasons for his decisions. CYE also asserted that CYF had suppressed material evidence and adduced false oral testimony in the arbitration, such that the award was induced or affected by fraud and was also contrary to public policy.

4.157 The General Division did not accept any of CYE's arguments and dismissed the setting-aside application. The court reiterated that even if an award had inadequate reasons and explanations, this was generally not capable of sustaining a challenge against an award.[133] Further, while natural justice required that the parties should be heard, it did not require

128 *DBL v DBM* [2024] 4 SLR 979 at [54].
129 *DBL v DBM* [2024] 4 SLR 979 at [57].
130 *DBL v DBM* [2024] 4 SLR 979 at [61].
131 *DBL v DBM* [2024] 4 SLR 979 at [86].
132 [2023] SGHC 275.
133 *CYE v CYF* [2023] SGHC 275 at [99], referring to *CEF v CEH* [2022] 2 SLR 918.

that they be given responses on all submissions made.[134] While CYE may have disagreed with the sole arbitrator's reasons, this was not a ground for setting aside an award.[135]

4.158 CYE also argued that remission was inappropriate in this case because of the arbitrator's "apparent predisposition" against CYE and there was "reasonable cause for concern that the [arbitrator] may hold it against [CYE] for having asked the [arbitrator] to clarify certain entries in the [arbitrator's] *curriculum vitae*".[136] The High Court held that there was no basis to CYE's concerns, particularly as the setting-aside application was not based on any allegations of bias on the part of the sole arbitrator. The High Court had strong words for CYE's remission arguments, noting that:[137]

> As a matter of principle, I should say that the court would not look fondly on applicants who attempt, post-award, to create evidence or circumstances to portray an arbitral tribunal as being incapable of viewing the matter objectively should the dispute be remitted to it by the court. If parties can prevent remission simply by being antagonistic towards a tribunal after it is *functus officio* and questioning (by innuendo) the tribunal's impartiality without any real bite to any implied suggestion of bias, such conduct would, in my view, make a mockery of the process of arbitration *and* the process of seeking recourse from the court against an arbitral award. [emphasis in original]

4.159 Several setting-aside applications were also heard by the SICC in 2023. In *CNA v CNB*,[138] the parties' long-running dispute – in arbitrations and in domestic courts – related to the development and licensing of a massively multiplayer online role playing game ("MMORPG").

4.160 CNA and CNB were co-owners of the intellectual property rights ("IPR") of the MMORPG; CNC was CNB's IPR successor. CND and CNE were successors to CNA's original counterparty to a software licensing agreement. In May 2017, CNB and CNC commenced an arbitration under the ICC rules against CNA, CND and CNE pursuant to the arbitration agreement in the software licensing agreement.

4.161 In June 2017, CNA, CND and CNE (*ie*, the respondents to the ICC arbitration) entered into an agreement purportedly extending the validity of the software licensing agreement. The extension agreement

134 *CYE v CYF* [2023] SGHC 275 at [101], referring to *SEF Construction Pte Ltd v Skay Connected Pte Ltd* [2010] 1 SLR 733 at [60].
135 *CYE v CYF* [2023] SGHC 275 at [102].
136 *CYE v CYF* [2023] SGHC 275 [158].
137 *CYE v CYF* [2023] SGHC 275 at [162].
138 [2023] 5 SLR 1.

contained an arbitration clause for arbitration under the auspices of the Shanghai International Arbitration Centre ("SHIAC").

4.162 CNA, CND and CNE raised jurisdictional objections in the ICC arbitration on account of the competing SHIAC arbitration clause. CND also commenced a SHIAC arbitration against CNA pursuant to the terms of the extension agreement and, in January 2018, obtained an award declaring that the extension agreement was valid.

4.163 The ICC tribunal issued two partial awards. In its first partial award issued in June 2020, the ICC tribunal held that the extension agreement was invalid and that it had jurisdiction over the parties' disputes. The ICC tribunal then issued a second partial award in July 2021, awarding costs and expenses to CNB and CNC for the liability phase of the arbitration.

4.164 CNA, CND and CNE filed applications to set aside both partial awards under Arts 34(2)(*a*)(i) and/or 34(2)(*a*)(iii) of the MAL. The applicants contended, *inter alia,* that the ICC tribunal had no jurisdiction over the dispute because of the SHIAC arbitration clause.

4.165 The SICC dismissed the setting-aside applications, holding that CNA had entered into the extension agreement despite knowing that CNB did not want it renewed; and that CNA's conduct in relation to the extension agreement clearly demonstrated preference in favour of CND and CNE to CNB's detriment, thereby breaching its fiduciary duty of loyalty to the CNA-CNB joint interests.[139] The SICC agreed with the ICC tribunal that as the extension agreement was not valid, the operative arbitration clause remained the ICC arbitration clause. In the course of its decision, the SICC reiterated that when considering an application to set aside an award on the ground of lack of jurisdiction, the supervisory court undertakes a *de novo* hearing of the tribunal's earlier decision on jurisdiction.[140] In such circumstances, the supervisory court may place weight on the tribunal's primary findings of fact, but is not bound to do so.[141]

4.166 *CYW v CYX*[142] concerned an application to set aside an award under s 24(*b*) of the IAA and Art 34(2)(*a*)(ii) of the MAL. CYW had

139 *CNA v CNB* [2023] 5 SLR 1 at [158].

140 *CNA v CNB* [2023] 5 SLR 1 at [79], referring to *AZQ v ARA* [2015] 2 SLR 971 at [49], *AKN v AKN* [2015] 4 SLR 488 at [112]. See also: *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [163].

141 *CNA v CNB* [2023] 5 SLR 1 at [84], referring to *BXH v BXI* [2020] 3 SLR 1368 at [180].

142 [2023] 5 SLR 208.

commenced an SIAC arbitration against CYX for disputes arising out of a security deed. The deed had been entered into by a director of CYW as security for a bill of exchange facility between CYX and Company B to fund CYW's purchase of livestock. CYW was unsuccessful in the arbitration; the arbitral tribunal dismissed CYW's claims and ordered CYW to pay US$8.2m to CYX for the latter's counterclaim.

4.167 In its setting-aside application, CYW asserted that the arbitral tribunal had acted in a draconian and unreasonable manner by insisting on short timelines, disregarding difficulties faced by CYW in evidence gathering and adducing expert evidence due to the (then) ongoing Covid-19 pandemic, and refusing to grant more time to CYW to obtain translations of documents it relied on.

4.168 The SICC dismissed the application, holding that the arbitral tribunal's approach towards timelines was one "which was open to be taken by a reasonable and fair-minded tribunal"[143] and there was no prejudice suffered by CYW from the non-admission of certain expert evidence.[144]

4.169 The SICC's decision is undoubtedly correct. This was not a case where a tribunal had neglected to consult the parties on timelines or had disregarded the parties' agreed position. The procedural timelines had been agreed to by the parties, but CYW found itself unable to meet the timelines. As a result, CYW sought repeated extensions of time which were granted for the most part by the arbitral tribunal. However, while natural justice requires a tribunal to ensure that a party has adequate time to prepare for and present its case, procedural fairness also requires the tribunal to ensure that the grant of time to one party does not unduly prejudice the other party or significantly delay the progress of the case.

4.170 In *DBX v DBZ*,[145] the SICC had the opportunity to provide clarity as to the interplay between the timelines for the filing of a setting-aside application and a correction to the award made on the arbitral tribunal's own initiative. DBZ had commenced two SIAC arbitrations against DBX and DBY to recover certain outstanding debt. The same tribunal was appointed for the two arbitrations and final awards were issued dated 18 February 2023. The arbitral tribunal subsequently issued corrections to both awards on its own initiative on 20 March 2023.

4.171 The original awards were delivered to DBX and DBY by e-mail on 6 March 2023, and by courier on 10 March 2023 and 14 March

143 *CYW v CYX* [2023] 5 SLR 208 at [85]–[88].
144 *CYW v CYX* [2023] 5 SLR 208 at [89]–[101].
145 [2024] 3 SLR 141.

2023. The corrections were delivered by courier on 24 March 2023 and 22 May 2023.

4.172 On 19 June 2023, DBX and DBY applied to set aside the two awards under Arts 34(2)(*a*)(i), 34(2)(*a*)(ii) and 34(2)(*b*)(ii) of the MAL and s 24(*b*) of the IAA. DBZ resisted the applications on the merits, but also argued that the setting-aside applications had been filed out of time.

4.173 The SICC noted that the three-month time period for setting aside an award under Art 34 of the MAL "may not be enlarged by the Court".[146] Where a correction is requested by a party under Art 34(3) of the MAL and accepted by the tribunal, the date of commencement of the setting-aside time limit is postponed to the date on which the request for correction is disposed of by the tribunal.[147] However, where a correction is made on the tribunal's own initiative pursuant to Art 33(2) of the MAL, the correction does not extend the time limit for setting aside. The court noted that:[148]

> The scheme makes good sense, in line with the attributes of speed and finality. The correction of an error in computation or a clerical or typographical error, or an error of similar nature, which the arbitral tribunal considers it can make on its own initiative, is unlikely to be contentious – and that is so even if the error in computation has an effect on the bottom line of the award, because it can readily be corrected once recognised. In a decision of the Iran-US Claims Tribunal, to which RCo referred, *Harold Birnbaum and Islamic Republic of Iran,* DEC 124-967-2 (14 December 1995), such a correction was described as 'a restoration of the award's proper contents' (at [10]). That can be seen as the reason the Model Law does not include the statement that a correction, whether pursuant to the request of a party or on the arbitral tribunal's own initiative and as distinct from an interpretation, shall form part of the award; it is regarded as already part of the award, and by the correction is simply recognised and made apparent.

4.174 As the awards dated 18 February 2023 were received by DBX and DBY on 6 March 2023, the three-month time period commenced on 6 March 2023. The setting-aside application, which was filed on 19 June 2023, was therefore filed out of time and dismissed on this basis.

4.175 *DBO v DBP*[149] concerned a partial award made under the early dismissal procedure in the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules"). Under r 29 of the SIAC Rules, a party may apply to the tribunal for the early dismissal of a claim

146 *DBX v DBZ* [2024] 3 SLR 141 at [32].
147 *DBX v DBZ* [2024] 3 SLR 141 at [43].
148 *DBX v DBZ* [2024] 3 SLR 141 at [56].
149 [2023] SGHC(I) 21.

or defence on the basis that the claim or defence is "manifestly without legal merit".

4.176 The dispute between the parties arose out of a facility agreement which had been secured to facilitate a construction and development project. Sales of units in the project were affected due to the Covid-19 pandemic, which eventually led to the borrowers being unable to repay the loan when it matured. As a result of the default, the lenders took over the operation and control of the fifth respondent, who was also a guarantor of the loan.

4.177 The borrowers commenced an SIAC arbitration against the lenders. The borrowers argued that the facility agreement had been discharged by frustration because the loan was to have been repaid by sales of units in the project, but the sales could not be performed due to the pandemic and related restrictions. The lenders asserted that the facility agreement had not been frustrated, and advanced a counterclaim for the amounts due under the facility agreement.

4.178 The lenders filed an application under r 29 of the SIAC Rules seeking a dismissal of the borrowers' claim that the facility agreement had been discharged by frustration and a declaration that the agreement remained valid and enforceable. During the hearing of the early dismissal application, the borrowers were given permission to amend their pleadings to include a plea that there was a collateral contract to the effect that funds for repaying the facility agreement would come from sales of units in the project, as well as income from a mall operated by one of the borrowers.

4.179 In its partial award, the arbitral tribunal held that the borrowers' pleaded case – at its highest – that the facility agreement had been discharged by frustration was manifestly without merit. The borrowers applied to set aside the partial award on the basis that the arbitral tribunal had breached the rules of natural justice and exceeded its jurisdiction. In particular, the borrowers alleged that the tribunal had failed to assume the existence of a collateral contract in its analysis and as the existence of the collateral contract was in dispute, the arbitral tribunal should not have decided that the borrowers' case on collateral contract was manifestly without legal merit.

4.180 The SICC dismissed the setting-aside application, noting that the arbitral tribunal was not bound to assume the existence of a collateral contract (nor did it agree to do so),[150] and only had to assume the existence

150 *DBO v DBP* [2023] SGHC(I) 21 at [33].

of the facts alleged by the borrowers in support of their contention that a collateral contract existed.[151] Even assuming that the "manifestly without legal merit" threshold under r 29.1 of the SIAC Rules required the arbitral tribunal to assume the existence of the collateral contract, a failure to do so would only have been an error of law which is not a ground to set aside the partial award.[152]

4.181 In the context of an early dismissal application under the SIAC Rules, the fact that the existence of a collateral contract was in dispute did not mean that the arbitral tribunal could not dismiss the collateral contract claim at the early dismissal stage.[153] Similarly, the existence of conflicting authorities on whether the doctrine of frustration applied to the facility agreement did not mean that the arbitral tribunal could not decide at the stage of the early dismissal application that the case on frustration was "manifestly without legal merit".[154]

4.182 The last of the SICC decisions relating to setting aside is *CZT v CZU*.[155] This case related to an agreement for the sale and purchase of certain component packages. CZU had contracted with CZT to buy the component packages, which were to be used by a third party contractor to construct certain products for CZU. Subsequently, the parties agreed to re-organise their contractual relationship; this resulted in certain rights of CZU under the sale and purchase agreement being transferred to the contractor.

4.183 Disputes arose with CZU alleging that there were defects in the component packages. This led CZU to start court proceedings in its home jurisdiction against the third party contractor and CZT; this was only partially successful against the contractor but unsuccessful against CZT because of the arbitration clause in the sale and purchase contract.

4.184 CZU then commenced an ICC arbitration against CZT pursuant to the arbitration agreement, alleging defects in the component packages. CZT denied the claims on the basis of the expiry of the warranty period. Further, as CZU had transferred its rights to the contractor, there was no obligation between CZU and CZT upon which the claims could be based.

4.185 A majority of the arbitral tribunal found that CZT had delivered defective components and was consequently liable to CZU. CZT applied

151 *DBO v DBP* [2023] SGHC(I) 21 at [44].
152 *DBO v DBP* [2023] SGHC(I) 21 at [48].
153 *DBO v DBP* [2023] SGHC(I) 21 at [60].
154 *DBO v DBP* [2023] SGHC(I) 21 at [65].
155 [2024] 3 SLR 169.

under s 24(*b*) of the IAA, Arts 34(2)(*a*)(ii), 34(2)(*a*)(iii) and 34(2)(*b*)(ii) of the MAL to set aside the award. Among its arguments, CZU asserted that the majority had failed to consider its critical arguments and that the conclusions in the final award were based on facts or matters not argued by the parties or unsupported by the arbitration record. CZU also argued that there was a reasonable suspicion of bias on the part of the majority that was apparent from the dissenting opinion and separate *ex parte* communications between the presiding arbitrator and counsel for the parties.

4.186 The SICC did not agree with CZT's submissions, holding that the majority did not fail to consider CZT's critical arguments (as alleged)[156] and that none of the majority tribunal's findings "went outside the range that could be expected when construing contractual provisions and comparing the terms of related agreements".[157] Further, the court did not consider apparent or reasonable bias to have been established, holding that the dissenting arbitrator's dissent was "hardly sufficient basis for a finding of apparent bias"[158] and the presiding arbitrator's call to the parties' counsel – which took place only after the award was issued – "evidenced [his] unhappiness with [the dissenting arbitrator's] dissemination of the Dissent, contrary to the ICC's position that the Dissent should not form part of the Final Award".[159]

B. Enforcement of awards

4.187 As an alternative to applying to set aside an award at its seat, a dissatisfied party may choose to challenge the enforcement of an award before the enforcement courts. Generally, an award on an arbitration agreement may be enforced in the same manner as a judgment or an order to the same effect.[160] The Singapore courts may, however, refuse to enforce a foreign award on the grounds set out at s 31 of the IAA.[161]

4.188 There were four published judgments in 2023 relating to the enforcement of foreign arbitration awards in Singapore. The first of these

156 *CZT v CZU* [2024] 3 SLR 169 at [42] and [53].
157 *CZT v CZU* [2024] 3 SLR 169 at [64].
158 *CZT v CZU* [2024] 3 SLR 169 at [99].
159 *CZT v CZU* [2024] 3 SLR 169 at [106].
160 International Arbitration Act 1994 (2020 Rev Ed) ss 19 and 29; Arbitration Act 2001 (2020 Rev Ed) s 46.
161 There is no equivalent provision for the refusal of enforcement of a Singapore-seated arbitration award (whether an international or a domestic arbitration). Recourse against a Singapore-seated international arbitration award is limited to setting aside, while a Singapore-seated domestic arbitration award may be set aside or appealed against.

is *Deutsche Telekom AG v The Republic of India*.[162] An Indian state-owned entity agreed to lease to a Deutsche Telekom ("DT") subsidiary S-Band electromagnetic spectrum on two satellites to be manufactured and launched by the India Space Research Organisation. The lease agreement contemplated, among other things, the offering of mobile multimedia and information services to the Indian market via a hybrid satellite-terrestrial communications platform.

4.189 The agreement was annulled by the Republic of India. This led DT to commence an arbitration in Switzerland against India, in which DT alleged that the annulment of the lease agreement was a violation of a bilateral investment treaty between India and Germany ("India-Germany BIT").

4.190 DT obtained an interim award (dealing with jurisdiction and liability) on 13 December 2017 and a final award (dealing with quantum) on 27 May 2020, both in DT's favour. DT was subsequently granted leave to enforce the award in Singapore. The Government of India ("Government"), however, opposed the Singapore enforcement proceedings. The Government had earlier failed to set aside the award in Switzerland, the seat court, and had applied to the Federal Supreme Court of Switzerland to review the interim award.

4.191 The Government applied in the Singapore enforcement proceedings (a) to set aside the order granting leave to enforce the final award ("SUM 155"); (b) to stay the enforcement proceedings and associated interlocutory applications pending the outcome of the review proceedings before the Federal Supreme Court of Switzerland ("SUM 24"); and (c) for permission to adduce further evidence in support of SUM 24 ("SUM 45").

4.192 The SICC dismissed SUM 155, where the Government had argued that DT's investment did not fall within the terms of Art 9 of the India-Germany BIT and the arbitral tribunal therefore lacked jurisdiction to determine the dispute pursuant to ss 31(2)(*b*) and 31(2)(*d*) of the IAA. This argument was rejected by the SICC, which held that none of the grounds put forth by the Government to resist enforcement of the final award were made out. The SICC also held that the exception to state immunity under s 11(1) of the State Immunity Act 1979[163] applied and the final award was consequently enforceable against the Government.[164] The SICC disagreed that certain findings made by the Indian courts in

162 [2024] 3 SLR 1.
163 2020 Rev Ed.
164 *Deutsche Telekom AG v The Republic of India* [2024] 3 SLR 1 at [172].

winding-up proceedings against DT's subsidiary could be treated as binding findings of fraud on the part of DT, or as sufficient evidence of fraud and illegality for the purposes of the proceedings before the SICC.[165]

4.193 Further, the decision of the Swiss courts in the setting-aside application had *res judicata* effect, and the Government was precluded from raising arguments rejected by the Swiss courts in the Singapore enforcement proceedings.[166] The Government should have, but failed to raise the allegations underlying their illegality argument before the arbitral tribunal; consequently, the Government must be deemed to have waived the same points as jurisdictional objections.[167]

4.194 SUM 24 was framed by the Government as a request for a case management stay. The SICC declined to exercise its discretionary case management powers as the revision application before the Federal Supreme Court of Switzerland had "minimal prospect of success",[168] there would be no saving of judicial resources as SUM 24 was only filed on 17 May 2022 despite the Supreme Court of India judgment relied upon by the Government to support its enforcement objections having been issued in January 2022[169] and the risk of inconsistency between the decisions of the Singapore and Swiss courts was "low at best".[170]

4.195 The SICC also refused to allow the Government to produce applications filed by it in the US seeking a stay of enforcement in that jurisdiction (*ie*, SUM 45). The SICC took the view that the papers for the US stay applications had been available before the hearing of SUM 24 and SUM 155, and therefore did not constitute new evidence that arose after the hearing before the SICC.[171] In any event, the fact that the US court granted a stay did not require the Singapore courts to make the same orders, and that the US court's reasons were neither evidence of facts or matters to be considered by the Singapore court when determining whether to grant a case management stay.[172]

4.196 The Government appealed against the SICC's decision in relation to SUM 155, maintaining that enforcement of the award should be refused because the arbitral tribunal lacked jurisdiction. The appeal was

165 *Deutsche Telekom AG v The Republic of India* [2024] 3 SLR 1 at [123]–[135].
166 *Deutsche Telekom AG v The Republic of India* [2024] 3 SLR 1 at [150] and [151].
167 *Deutsche Telekom AG v The Republic of India* [2024] 3 SLR 1 at [162].
168 *Deutsche Telekom AG v The Republic of India* [2024] 3 SLR 1 at [150] and [177].
169 *Deutsche Telekom AG v The Republic of India* [2024] 3 SLR 1 at [179].
170 *Deutsche Telekom AG v The Republic of India* [2024] 3 SLR 1 at [180].
171 *Deutsche Telekom AG v The Republic of India* [2024] 3 SLR 1 at [185].
172 *Deutsche Telekom AG v The Republic of India* [2024] 3 SLR 1 at [186].

dismissed.[173] In coming to its decision, the Court of Appeal noted that it was not settled law in Singapore how an enforcement court should treat an earlier decision of the seat court that pertains to the validity of an arbitral award.[174]

4.197 The five-judge bench confirmed that the doctrine of transnational issue estoppel "can and should be applied by a Singapore enforcement court when determining whether preclusive effect should be accorded to a seat court's decision going towards the validity of an arbitral award",[175] and applies "in the arbitral context as 'part of the residual domestic law applicable in setting aside or enforcement proceedings'".[176] This approach not only "appropriately respects" the parties' choice of arbitral seat,[177] but also "coheres with the notion that courts co-exist as part of an international legal order, within which they should 'respect each other's decisions in the fullest sense, and so far as possible avoid duplication, repetition and inconsistency in decision-making'".[178]

4.198 Further, where the enforcement court is "not precluded by transnational issue estoppel from considering an issue going to the validity of an arbitral award, it may nonetheless be appropriate for the enforcement court to grant primacy to a prior decision of the seat court".[179]

4.199 Interestingly, while Jonathan Hugh Mance IJ agreed with the other members of the Bench, he expressed in his concurring opinion that the primacy principle may not be a needed tool when considering the appropriate treatment of an earlier decision of the seat court. He opined that:[180]

> The common law tool of issue estoppel is, as Menon CJ demonstrates, readily available when the issue in both jurisdictions is in essence the same, so that the decision by the court of the seat can be seen effectively to have decided that there are no circumstances which could or should preclude recognition and enforcement under Art V. Issue estoppel is a flexible tool, particularly in an international context, and a general precondition to its deployment is that it should work justice not injustice … The additional procedural power recognised in *Henderson v Henderson* to restrain abuses of process is again closely responsive to circumstances in the rare circumstances where it is

173 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56.
174 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [3].
175 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [4] and [96].
176 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [97].
177 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [98].
178 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [99].
179 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [4], [121] and [122].
180 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [212].

> appropriate for use in relation to a foreign judgment not giving rise to an issue estoppel …

Therefore:[181]

> 214 The two tools of issue estoppel and the power in *Henderson v Henderson* are, in my opinion and as this passage indicates, available and sufficient to enable justice to be done in cases where there has been a prior decision either of a court of the seat or of another enforcement court. Inherent in the suggestion of a Primacy Principle is the proposition that a decision of the former enjoys a special legal status which the latter lacks. I am not at present persuaded that, in this respect, a special legal status does exist.
>
> 215 I see in any event no sound reason why both decisions of a seat court and decisions of another enforcement court may not give rise to an issue estoppel, as would be the effect of Eder J's decision in *Diag Human SE v The Czech Republic* [2014] EWHC 1639 (Comm), holding that an issue estoppel could arise by virtue of a prior decision of another enforcement court. …
>
> 216 Short of any issue estoppel or abuse arising from the seat court's decision or from a repeat attempt to challenge it, I question however whether there is room for a further principle of law precluding full consideration in an enforcement court of whatever issues arise under Art V. Any enforcement court will of course give close attention to what is said or held by, in particular, a court of the seat, because the seat reflects the parties' choice. But, if the party challenging enforcement is not precluded from doing this by issue estoppel or *Henderson v Henderson*, it seems to me that an enforcement court should ultimately be free to arrive at its own analysis and conclusion.

4.200 While dissatisfied parties may try to use all the tools at their disposal to challenge an award or its enforcement, the Court of Appeal's decision makes it clear that Singapore courts will not look favourably on a party who seeks to delay enforcement by re-litigating points already dismissed by the seat court.

4.201 The enforcement of an interim order issued in a Singapore-seated arbitration was considered in *CXG v CXI*.[182] The claimants were founders and minority shareholders of CXK, a financial technology company and the third defendant in the court action. As part of its business, CXK operated an e-wallet open-loop payment method ("CXK App").

4.202 Disputes had arisen between the shareholders of CXK, which led to the claimants initiating arbitration against the respondents and pursuing, among other claims, a claim for minority oppression. In the course of the arbitration, the claimants applied for an interim injunction

181 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [214] and [216].
182 [2024] 3 SLR 1282.

to restrain the defendants from operating and offering a competing payment system to the CXK App. The arbitral tribunal issued an interim order on 16 August 2022 declining to grant the reliefs sought by the claimants, but directing the defendants to complete certain commitments within 90 days of the interim order. The commitments mainly related to limiting the use of the competing payment system.

4.203 The claimants applied under s 12(6) of the IAA for leave to enter judgment in terms of the interim order. The defendants resisted the leave application on the ground that it was not appropriate for a Singapore court to exercise jurisdiction to hear the application as Singapore was not the appropriate forum.

4.204 The General Division dismissed the defendants' application, holding that under s 12(6) of the IAA, the Singapore courts clearly have jurisdiction to hear an application to enforce an interim order issued in a Singapore-seated arbitration[183] and where parties chose Singapore as the arbitral seat, they agreed to submit to the curial law and jurisdiction of Singapore.[184] As the Singapore courts would *prima facie* be an appropriate forum to hear the leave application, the onus rests on the defendants to show why *forum non conveniens* principles should be taken into consideration in the assessment of the appropriate forum.[185]

4.205 However, *forum non conveniens* principles are "ill-suited to applications for the enforcement of domestic interim measures".[186] For one, *forum non conveniens* principles are concerned with the substantive dispute; but the court is not concerned with substantive merits when considering whether to allow enforcement of domestic interim measures and the usual connecting factors between a forum and a dispute are irrelevant.[187] Further:[188]

> 64 The application of [*forum non conveniens*] principles is also antithetical, in a practical sense, to the question of whether it is appropriate for this court to exercise jurisdiction over the enforcement of domestic interim measures under s 12(6) of the IAA.
>
> 65 The common practice, and reality, in international arbitrations is that the chosen seat may have little or even no connection with the parties or the dispute; its choice may turn on, or reflect the parties' confidence in, the legal infrastructure of the seat, the national curial law and willingness of the courts to

183 *CXG v CXI* [2023] SGHC 244 at [31].
184 *CXG v CXI* [2023] SGHC 244 at [33] and [37].
185 *CXG v CXI* [2023] SGHC 244 at [37].
186 *CXG v CXI* [2023] SGHC 244 at [61].
187 *CXG v CXI* [2023] SGHC 244 at [61]–[63].
188 *CXG v CXI* [2023] SGHC 244 at [64]–[66].

> support and facilitate the arbitration. Indeed, the lack of connecting factors to, and the neutrality of, the seat may be the precise reason why the parties chose that very seat … Applying [*forum non conveniens*] principles to enforcement would be contrary to party autonomy and the expectations of the parties.
>
> 66 Applying [*forum non conveniens*] principles would also introduce uncertainty. The application of [*forum non conveniens*], which involves multi-factorial considerations, is often a complicated and unpredictable exercise. If the defendants are correct, the 'appropriate' jurisdiction to enforce an interim measure would not only be unclear from the outset, it may also engage different jurisdictions depending on the nature and terms of the interim measure to be enforced. It therefore presents ample opportunity for a respondent to engage in delay and tactical attempts to obstruct the arbitration process, which is the very mischief s 12(6) seeks to avoid … Such an outcome would potentially make Singapore a less attractive seat for international arbitrations …

4.206 The dispute in *CZD v CZE*[189] related to a loan extended by CZD to CZE to facilitate the restructuring of two companies. Disputes arose due to CZE's alleged failure to repay the loan, which led to CZD commencing arbitration at the Beijing Arbitration Commission ("BAC") against CZE. The BAC tribunal issued an award in favour of CZD in 2021. Subsequently, CZE initiated several legal challenges to the award in the People's Republic of China ("PRC"), all of which were rejected.

4.207 CZD applied and obtained permission to enforce the award in Singapore. CZE sought to set aside the order granting leave, arguing that the award had been satisfied in enforcement proceedings brought by CZD in the PRC. CZE also argued that the award went beyond the scope of the submission to arbitration pursuant to s 31(2)(*d*) of the IAA, that CZD had failed to make full and frank disclosure in the enforcement proceedings in Singapore, and that the enforcement of the award would be contrary to Singapore public policy under s 31(4)(*b*) of the IAA because of procedural fraud on the part of CZD in the arbitration.

4.208 The General Division dismissed CZE's application. The court held that the fact that CZE's shares were frozen in enforcement proceedings in the PRC did not mean that the award had been satisfied[190] and in any event, the satisfaction of an award was not a recognised ground of challenge under s 31 of the IAA.[191] There was also no evidence to support CZE's allegation of procedural fraud, although the court accepted that procedural fraud (if established) would fall within the public policy

189 [2023] 5 SLR 806.
190 *CZD v CZE* [2023] 5 SLR 806 at [44].
191 *CZD v CZE* [2023] 5 SLR 806 at [45].

ground for refusing enforcement.[192] The High Court, however, accepted that CZD's failure to disclose CZE's pending application for civil supervision of the decision by the Fourth Intermediate Court (essentially similar to an appeal against the Fourth Intermediate Court's decision) in its application for leave to enforce the arbitration award constituted a breach of CZD's duty to make full and frank disclosure of material facts.[193] However, the failure to disclose became inconsequential because by the time CZE's application was heard by the court, the pending application had already been rejected.[194]

IV. Arbitration confidentiality

4.209 It is often said that arbitration is a confidential process and that the parties, as well as the tribunal, are obliged to keep confidential the arbitration proceedings as well as any documents arising therefrom. This obligation is not expressly set out in either the IAA or the AA, although there is recognition in the IAA[195] that arbitral tribunals have the power to enforce "any obligation of confidentiality" whether expressed in contract, under "any written law or rule of law" or "under the rules of arbitration" adopted by the parties.[196] Further, while s 22 of the IAA had previously (before the 2022 amendments) provided for proceedings under the Act "be heard otherwise than in open court" "on the application of any party", the default position now is that "proceedings under this Act in any court are to be heard in private"[197] unless "the court, on its own motion or upon the application of any person" orders that the proceedings be heard in open court.[198]

4.210 In *The Republic of India v Deutsche Telekom AG*,[199] DT had applied for directions that its enforcement proceedings to be heard in private under s 22(2) of the IAA and a consent order to this effect was

192 *CZD v CZE* [2023] 5 SLR 806 at [42], referring to *BAZ v BBA* [2020] 5 SLR 266 at [50].
193 *CZD v CZE* [2023] 5 SLR 806 at [55].
194 *CZD v CZE* [2023] 5 SLR 806 at [59].
195 International Arbitration Act 1994 (2020 Rev Ed) s 12(1)(*j*).
196 An example of a procedural rule that imposes an obligation of confidentiality is r 39 of the Arbitration Rules of the Singapore International Arbitration Centre (6th Ed, 1 August 2016). In particular, r 39.1 states:

> Unless otherwise agreed by the parties, a party and any arbitrator, including any Emergency Arbitrator, and any person appointed by the Tribunal, including any administrative secretary and any expert, shall at all times treat all matters relating to the proceedings and the Award as confidential. The discussions and deliberations of the Tribunal shall be confidential.

197 International Arbitration Act 1994 (2020 Rev Ed) s 22(1).
198 International Arbitration Act 1994 (2020 Rev Ed) s 22(2).
199 [2023] 2 SLR 77. The main facts are set out at paras 4.188–4.191 above.

granted. After the Government filed its appeal against the decisions of the SICC, the Government applied to the Court of Appeal for the appeal proceedings to be similarly sealed and heard in private.

4.211 DT resisted the application, arguing that the confidentiality of the underlying arbitration had been lost and information pertaining to the arbitration, as well as the related proceedings in various jurisdictions, were already in the public domain. On the Government's part, while it accepted that some information relating to the arbitration had been published online, it took the position that the confidentiality of the arbitration had not been entirely lost, and that there was a real risk of prejudice if its application was not granted because information relating to the arbitration had already been misused by third parties to portray the Government in a negative light.

4.212 The Court of Appeal dismissed the application, noting that "the purpose of ss 22 and 23 [of the IAA] is to protect the confidentiality of the arbitration itself and the interest in keeping any enforcement proceedings confidential under the IAA is essentially a derivative interest designed ultimately to protect the confidentiality of the underlying arbitration"[200] and that "imposing a cloak of privacy on court proceedings is an *exceptional* measure that departs from the general rule that such proceedings are subject to the principle of open justice" [emphasis in original].[201]

4.213 In the present case, where the confidentiality of the arbitration had already been lost, there was no basis to maintain confidentiality of the enforcement proceedings and insufficient basis to override the strong interest in open justice in court proceedings.[202] Chief Justice Menon reasoned that the court "should not be made to go through an empty exercise to protect confidentiality when there is nothing left to protect"[203] and that the court "is not required to protect information that is already in the public sphere"[204].

4.214 The judgment narrative suggests that the Government may have played a part in causing information relating to the arbitration and related proceedings to have been made public. In this connection, the court refers to an article published in the *Global Arbitration Review* regarding the arbitration, as well as a post by the Government's own lawyers on LinkedIn. While the court did not mention or lay blame on

200 *The Republic of India v Deutsche Telekom AG* [2023] 2 SLR 77 at [23].
201 *The Republic of India v Deutsche Telekom AG* [2023] 2 SLR 77 at [24].
202 *The Republic of India v Deutsche Telekom AG* [2023] 2 SLR 77 at [27].
203 *The Republic of India v Deutsche Telekom AG* [2023] 2 SLR 77 at [28].
204 *The Republic of India v Deutsche Telekom AG* [2023] 2 SLR 77 at [29].

a specific party for having placed the information into the public sphere, the question that remains is whether the identity of the "discloser" of confidential arbitration information would be relevant in the court's consideration of whether that confidentiality has been lost.

4.215 In *CZT v CZU*,[205] the issue of confidentiality of tribunal deliberations came before the SICC. A majority of the arbitral tribunal in an ICC arbitration had decided in favour of CZU and ordered CZT to pay damages, interest and costs. The final award was signed by only two of the three arbitrators and it was recorded in the award that the dissenting arbitrator had refused to sign the award "in light of his disagreement with the conclusions and reasoning of the other two arbitrators".[206]

4.216 CZT filed an application to set aside the final award.[207] CZT then applied to the SICC, seeking production of records of deliberations from each of the tribunal members. In support of its application, CZT argued that the record of deliberations was relevant and material to its setting-aside application as (a) the majority had decided a key issue on grounds not contained in the final award and a breach of the fair hearing rule can arise from the majority's chain of reasoning; (b) the majority attempted to conceal the true reasons behind the award; and (c) the majority lacked impartiality.

4.217 The SICC denied CZT's production application. The court emphasised that arbitration proceedings are confidential, and the confidentiality may be provided for in the relevant procedural rules, or implied in law.[208] While there were no statutory provisions in Singapore in relation to the confidentiality of deliberations, the default position was that arbitrators' records of deliberations were confidential, this included the deliberations stage of a tribunal's proceedings and the ICC scrutiny process.[209]

4.218 The court emphasised that the confidentiality of deliberations existed as an implied obligation in law, and was necessary to allow for frank discussion between arbitrators, and protect arbitrators from outside influence.[210] The existence of this implied obligation also "helps to minimise spurious annulment or enforcement challenges based on matters raised in deliberations or differences between the deliberations

205 [2023] 5 SLR 241.
206 *CZT v CZU* [2023] 5 SLR 241 at [17].
207 See para 4.185 above.
208 *CZT v CZU* [2023] 5 SLR 241 at [41], referring to *International Coal Pte Ltd v Kristle Trading Ltd* [2009] 1 SLR(R) 945 at [82].
209 *CZT v CZU* [2023] 5 SLR 241 at [71]–[73].
210 *CZT v CZU* [2023] 5 SLR 241 at [44].

and the final award and is thereby critical to the integrity and efficacy of the whole arbitral process".[211]

4.219 However, the confidentiality of deliberations is not absolute, and may be lifted where there is a challenge to the essential process of the arbitration.[212] "[If] the facts and circumstances are such that the interests of justice in ordering the production of records of deliberations outweigh the policy reasons for protecting the confidentiality of deliberations",[213] the onus rests on the party seeking disclosure to demonstrate that (a) the facts and circumstances are so compelling as to warrant the lifting of confidentiality; (b) the allegations are of a sufficiently serious nature, and (c) the allegations have real prospects of succeeding.[214] On the present facts, the SICC did not consider an allegation of breach of the fair hearing rule to justify displacement of the confidentiality of deliberations; CZT's allegations could in any event be decided based on what was in the arbitration records.[215]

4.220 This decision has clarified that the scope of arbitration confidentiality extends to a tribunal's deliberations, particularly for cases where the applicable procedural rules are silent or provide no guidance. While a party may seek production of the records of a tribunal's deliberations, the threshold to cross is a very high one. In addition, arbitrators will be assured that in a Singapore-seated arbitration, they may freely deliberate and change their views without being accused of taking inconsistent positions or being indecisive.

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211 *CZT v CZU* [2023] 5 SLR 241 at [44(d)].
212 *CZT v CZU* [2023] 5 SLR 241 at [45] and [50].
213 *CZT v CZU* [2023] 5 SLR 241 at [52].
214 *CZT v CZU* [2023] 5 SLR 241 at [53].
215 *CZT v CZU* [2023] 5 SLR 241 at [59].