4. ARBITRATION

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4.1 In 2018, the courts in Singapore dealt with a higher number of arbitration-related cases than in 2017. The majority of these cases involved applications for stay of court proceedings in favour of arbitration and applications to either resist enforcement of foreign awards in Singapore or to set aside awards in relation to which Singapore courts were the curial courts. Two applications to review arbitral tribunals' decisions on jurisdiction under s 10(3) of the Singapore International Arbitration Act[1] ("IAA") were also reported. On the whole, these decisions continued to show Singapore's stance of minimal inference with the arbitration process and respect of the parties' agreement to arbitrate.

Stay of court proceedings

Domestic arbitration under Arbitration Act[2] ("AA")

4.2 While Singapore maintains separate statutory regimes for international and domestic arbitrations, courts have scrupulously been clear that, in so far as possible, the judicial approach in upholding party autonomy applies to the domestic cases in the same manner it does in international cases. This is reflected in the cases relating to applications for stay under s 6(2) of the AA.[3] Despite the wider discretion given to

1 Cap 143A, 2002 Rev Ed.
2 Cap 10, 2002 Rev Ed.
3 Section 6(2) of the Arbitration Act (Cap 10, 2002 Rev Ed) states:
(2) The court to which an application has been made in accordance with subsection (1) may, if the court is satisfied that —

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the courts, recent court decisions have consistently adopted the *prima facie* approach prescribed by the Court of Appeal in *Tomolugen Holdings Ltd v Silica Investors Ltd*[4] ("*Tomolugen*") (which dealt with a case under the IAA) when considering whether the party seeking a stay of court proceedings could show that the arbitration agreement was not "'null and void', 'inoperative' or 'incapable of being performed'".[5]

Arbitration and judicial management

4.3 In *Takenaka Corp v Tam Chee Chong*,[6] Takenaka Corporation ("Takenaka") had engaged Acesian Star (S) Pte Ltd ("Acesian Star") in two construction projects at Changi airport. When Acesian Star, however, went under judicial management in January 2017, Takenaka terminated the contracts in relation to both projects, one for breach of contract and the other on the basis of judicial management, which was a default event under the contract. Takenaka's proof of debt was rejected by the judicial managers. Dissatisfied, Takenaka commenced proceedings to set aside the rejection of the proof of debt. The judicial managers sought a stay of proceedings on the basis of the existence of an arbitration agreement between the parties. Takenaka's main argument was that it would be better and more efficient for the court to have oversight of the dispute given the ongoing judicial management with a potential clawback action. It also submitted that Acesian Star would unlikely be able to bear the cost of the arbitration and that should Takenaka succeed, it would unlikely be able to recover the costs incurred.

4.4 Aedit Abdullah J granted the stay on condition that the deposit for cost of the arbitration be paid by Acesian Star to the Singapore International Arbitration Centre ("SIAC"). In coming to his decision, the learned judge said that the ongoing judicial management of itself could not constitute a "sufficient reason" as to why a stay should be refused. In the court's view, the reasons given by the party seeking the stay must outweigh the fact that the parties had voluntarily bound themselves to arbitrate. The learned judge reminded the parties that while the court's power to order a stay is discretionary, such discretion

> (*a*) there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement; and
> (*b*) the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration,
> make an order, upon such terms as the court thinks fit, staying the proceedings so far as the proceedings relate to that matter.

4 [2016] 1 SLR 373.

5 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [27].

6 [2018] SGHC 51.

ought to be exercised in a guarded manner, and stay would be denied only in exceptional circumstances, especially when the defendant is ready and willing to arbitrate. The court also rejected Takenaka's argument based on its unlikely ability to recover the cost to be incurred in the arbitration as a reason to refuse the stay.

4.5 The court's approach is unquestionably proper in that Takenaka's originating summons to set aside the rejection of its proof of debt appears to be an attempt to get the judicial manager to admit its claims without the merits of the case being adjudicated by the agreed process. The poor financial state of a party alone, in particular that of the respondent, should not be a ground for justifying a claimant reneging from its obligation to pursue its claim by the agreed dispute resolution mechanism. No party should be deprived of the right to defend a claim on the merits merely on the basis that it is in a poorer financial state than the other.

4.6 While stay was ordered, the learned judge did so on the condition that Acesian Star had to lodge its share of the costs of arbitration with the SIAC and, should it fail to do so, Takenaka would be at liberty to apply to the court. While it is a pragmatic step to ensure that the judicial managers are committed to pursue arbitration, such a condition could sometimes operate oppressively against a financially weaker party, thus depriving it of the opportunity to present its case before the agreed forum. The issue of inability to fund the arbitration by a party (in particular a responding party) has yet to be fully canvassed and its implications examined.

Stay and breach of natural justice

4.7 While people join clubs and form associations for specific interests, recreation and/or social networking, it is not uncommon that members and clubs as well as members *inter se* do get into occasional disagreements. Most clubs and associations, whether organised as companies or societies, often have disciplinary processes and dispute resolution mechanisms. Often, however, they end up in litigation with full media attention.[7]

7 Some examples include *Petrie Christopher Harrisson v Jones Alan* [2005] 2 SLR(R) 387; *Arul Chandran v Chew Chin Aik Victor JP* [2001] 1 SLR(R) 86; *Arul Chandran v William J Gartshore* [2000] SGHC 34; *McGuire Graeme v Rasmussen John* [1998] 1 SLR(R) 892; *Tan Boon Hai v Singapore Hainan Hwee Kuan* [2001] 1 SLR(R) 563; *Tan Hing Sing v Tan Check Peng* [2013] SGDC 190; *Foo Jong Peng v Phua Kiah Mai* [2012] 4 SLR 1267; *Abdul Rashid s/o Mohd Ali v R Vaisuvanathan* [2009] SGDC 394; and *Kay Swee Pin v Singapore Island Country Club* [2008] SGHC 143.

4.8 In *Ling Kong Henry v Tanglin Club*,[8] Ling was alleged to have sent "shockingly disrespectful" and "insulting" messages to other members. The club took disciplinary proceedings against Ling, resulting in a letter of reprimand. Ling then commenced proceedings for, *inter alia*, a declaration that the club had breached the rules of natural justice and fairness in its conduct of the disciplinary proceedings, and also sought various consequential reliefs. The club sought a stay under s 6 of the AA as the club's rules contained an agreement to arbitrate.

4.9 Valerie Thean J made two noteworthy preliminary points in her decision: (a) that clubs' rules form a contractual basis for the relationship between a club and its members; and (b) that multi-tiered dispute resolution clauses ending with arbitration are proper agreements to arbitrate that could be invoked upon exhaustion of upper tiers. In the circumstances, she was satisfied that there was an agreement to arbitrate between the parties within the meaning of s 6 of the AA.

4.10 Ling had argued that his claim did not fall within the scope of the arbitration agreement, which stated that only disputes "for which express provision has not been made in these Rules" will go to arbitration, given that the club's rules contained provisions on disciplinary proceedings and his claims arose out of those disciplinary proceedings. To this, the learned judge found that the review of the disciplinary proceedings was not provided for under the club's rules; thus, the subject matter fell within the scope of the arbitration provision.

4.11 The plaintiff's second argument was that, as the claim concerned breaches of the rules of natural justice, as a matter of public policy, such matters should be dealt with in court. The learned judge, citing *Tomolugen*,[9] viewed it as being "in line with the desirability of holding the parties to their agreement, as well as Singapore's strong policy in favour of arbitration", thereby upholding the principle of judicial non-intervention when parties have expressly agreed to arbitrate. In her view, a stay would only be refused in exceptional cases. In the circumstances, the court was not satisfied that "sufficient reasons" had been advanced to avert the stay sought. The learned judge's robust stand sends a clear signal that clubs and associations should now be conscious that the dispute resolution process in their rules and by-laws will be steadfastly upheld and that members should, therefore, not be too quick to drag their clubs to court. They should instead adhere to the dispute resolution processes set out in their constitutional documents and avoid the unnecessary unpleasant publicity and costs.

8 [2018] 5 SLR 871.
9 See para 4.2 above.

International arbitration under IAA

"Effective case management" as basis for stay

4.12 The statutory power of the court to order a stay of proceedings in international cases involving arbitration clauses is set out in s 6 of the IAA, which mandates the court to stay the pending proceedings so long as:

> … the proceedings relate to [a matter which is the subject of the agreement], unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

The Court of Appeal had held in *Tomolugen* that stay could be granted in favour of arbitration even if a party before the court was not a party to the arbitration agreement, pursuant to its "effective case management power" in the fair and efficient administration of justice.

4.13 The inherent case management power applied by the Court of Appeal in *Tomolugen* must, however, be distinguished from the statutory power under s 6 of the IAA which obliges the court to grant a stay. This was noted by Choo Han Teck J in *Epoch Minerals Pte Ltd v Raffles Asset Management (S) Pte Ltd*.[10] The plaintiff ("Epoch") employed the fourth defendant ("Gangadhara") to help find investors who might be interested in the plaintiff's business. Gangadhara allegedly found a potential investor and Epoch paid various sums to people/companies, including the second defendant ("AKS"), as directed by Gangadhara, supposedly to secure the investment. A "Term Sheet" was thereafter signed between Epoch and the third defendant ("Kamil") on behalf of the first defendant ("Raffles") to reflect the parties' agreement. No money was, however, ever received by Epoch by way of investment. Epoch commenced court proceedings against all defendants.

4.14 A stay was granted in respect of the action against Raffles but declined in respect of Kamil (who was considered to be only a representative of Raffles and could not, therefore, invoke the arbitration clause). AKS and Gangadhara, thereafter, also applied for a stay, on the ground of effective case management, arguing that it would be inconvenient and costlier to have the arbitration proceedings against Raffles proceed in parallel to the court proceedings against AKS, Kamil and Gangadhara. They also raised the risk of potential contradictory finding of facts.

10 [2018] SGHC 223.

4.15 In rejecting the application, Choo J observed that the court's "case management" power is not a legal principle but a description of the administrative part of the court's function, and it is not intended to affect what is properly called "judicial discretion". The court saw no reason why Epoch's claim that the defendants had conspired to harm it ought to be held in abeyance pending arbitration between Epoch and Raffles. The learned judge ruled that inconvenience and potential contradictory findings of facts would not be sufficient to frustrate the proceedings from continuing against the three defendants who were not concerned with the arbitration. While the learned judge quite rightly refused to exercise his discretion to permit a stay, his observation that the "case management" power of the court is not part of the "judicial discretion" as it is nothing more than the power to "[place] cases in order of priority, fixing of dates for and number of days for trial"[11] does seem to cast a note of discord with the principle laid down in *Tomolugen*, where the Court of Appeal in fact applied the same considerations of possible conflicting decisions, inconsistent findings, costs and inconvenience. In doing so the Court of Appeal was certainly doing much more than the fixing of dates and lengths of trial.

4.16 The court in *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama*[12] saw the "case management" power enunciated in *Tomolugen* quite differently from Choo J. The court in that case exercised the same and ordered a stay of court proceedings *vis-à-vis* a party who was not a party to the arbitration agreement. There, Nippon Catalyst Pte Ltd ("Nippon") had agreed to lease various catalysts to PT Trans-Pacific Petrochemical Indotama ("TPPI") to be installed in TPPI's refinery in Indonesia. TPPI, however, faced financial difficulties, stopped operation, and entered into a composition agreement with various creditors, including Nippon. Pursuant to the composition agreement, the parties tried but failed to conclude a new agreement for TPPI's continued use of the catalysts and Nippon claimed (before this court) that TPPI converted the catalysts for its own use, without its consent, following the expiry of the lease agreement on 31 December 2010. As between Nippon and TPPI, the issue was whether Nippon's claim for damages from 6 November 2012 onwards (its claim for rental between 1 January 2011 and 5 November 2012 having been settled), which period was ostensibly after the expiry of the agreement, arose out of the agreement and whether the conversion claim being in tort was a matter arising out of the agreement.

11 *Epoch Minerals Pte Ltd v Raffles Asset Management (S) Pte Ltd* [2018] SGHC 223 at [9].

12 [2018] SGHC 126.

4.17 Audrey Lim JC had no difficulty holding that the termination of the agreement and the alleged conversion of the catalysts, which occurred after such termination, were matters that "arose out of the Lease, whether framed in tort or contract".[13] The learned Judicial Commissioner took the view that courts must look at the underlying basis of a claim and not rely solely on how parties pleaded it.

4.18 As against Pertamina, which was not a party to the agreement, the court granted a stay on the basis of the "court's inherent power to manage its processes to prevent an abuse of process and to ensure the efficient and fair resolution of disputes".[14] The court took the view that a stay *vis-à-vis* Pertamina was to be assessed in the light of the stay to be granted to TPPI in favour of arbitration on the conversion claim, and that "the court, as the final arbiter, should take the lead in ensuring the efficient and fair resolution of the dispute as a whole".[15] She explained that, in taking the lead, the court must strike a balance between (a) a plaintiff's right to choose whom and where to sue; (b) the desire to prevent a plaintiff from circumventing an arbitration clause; and (c) the court's inherent power to manage its processes to prevent an abuse of process and to ensure the efficient and fair resolution of disputes.[16]

Co-existence of shareholders agreements and articles of association

4.19 Parties forming joint ventures usually also enter into shareholders agreement setting out the way they wish the joint venture entity to be managed. Invariably, with respect to the parties' respective rights *qua* shareholder as set out in the shareholders agreement, the parties' agreement is intended to override the provisions of the joint venture entity's memorandum and articles.

4.20 In *BTY v BUA*,[17] the joint venture company and its shareholders were all parties to an investment agreement which contained an SIAC arbitration clause ("cl 29.2"). The agreement obliged the parties, as a completion requirement, to procure a shareholders' resolution to be passed causing the defendant to adopt new articles in the agreed form. This was done within five months of signing of the investment agreement so that the defendant adopted new articles ("the Articles").

13 *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama* [2018] SGHC 126 at [30].
14 *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama* [2018] SGHC 126 at [64].
15 *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama* [2018] SGHC 126 at [65].
16 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [188].
17 [2018] SGHC 213.

4.21 Under the investment agreement, the consent of both sets of shareholders was required for "adopting or approving the annual accounts". Differences between the shareholders arose, and the 2015 financial year accounts were not approved at the meeting held for that purpose. Subsequent attempts to agree to the accounts were unsuccessful. The majority shareholders, however, then proceeded to approve the accounts without the consent of the minority, as required under the investment agreement. The accounts were then lodged with the Accounting and Corporate Regulatory Authority ("ACRA"). The majority shareholders did so on the basis that the Articles only required a directors' resolution to be signed by the majority of the directors to approve the account and that they were under a legal obligation to lodge the account with ACRA. The plaintiff commenced court action alleging that the majority had acted in breach of the Articles, and the defendant applied for a stay of the litigation proceedings relying on cl 29.2 of the investment agreement.

4.22 One of the main issues before the court was whether the dispute arose out of the investment agreement or out of the defendant's Articles. In that regard, Vinodh Coomaraswamy J referred to *Tomulugen*,[18] stating that he first needed to define what the "matter" to be decided in the proceedings before him was to then see if such matter fell within the scope of the arbitration agreement contained in the investment agreement. The matter before him, he said, was "whether the defendant adopted or approved the 2015 Accounts in breach of the Articles".

4.23 The court explained at length the differences between a shareholders' agreement, which applies to the legal relationship between the parties to such agreement, and a company's articles of association, which create a separate legal relationship between the parties that operates on a separate legal plane. In the court's view, the investment agreement is a private contract which derives its contractual force purely from the private law of obligations (contract law) while the Articles are a component of the defendant's constitution and derive their contractual force from company law. As such, he concluded that, as the dispute arose only under the Articles, it could not fall within the scope of cl 29.2. Stay was, therefore, denied.

4.24 It is interesting that the learned judge distinguished the two legal relationships under the investment agreement and the Articles, and how it appears from his reasoning that the obligations arising out of company law and the Articles are higher than, and supersede, those arising out of the investment agreement. It should be noted that the provisions in the investment agreement required the consent of both

18 See para 4.2 above.

sets of shareholders for "adopting or approving the annual accounts", thereby imposing a higher standard on the parties than that under the Articles. The question as to whether there was a breach in the process of approving the defendant's account would, therefore, have to involve a consideration of the requirements imposed by the investment agreement. The issue could well be different if the standards required under the Articles were higher, in which event, the standards required under the Articles would have to be satisfied, and the parties would be in breach of the Articles if they failed to comply with the threshold imposed therein.

4.25 The Court of Appeal in *Tomolugen*[19] held that in assessing the nature of the claims pursued by a plaintiff, the court ought to look at the substance or underlying basis and true nature of the issue or claim, and not limit itself to the manner in which the issues were presented by the parties. The learned judge appears, however, to have anchored his finding on the "matter" based solely upon the pleaded case of whether there was a breach of Art 61 or of Art 44 read with Art 43.3 of the Articles, and thereby concluded that the matter before him was simply whether the defendant had adopted or approved the 2015 accounts in breach of the Articles. As the investment agreement imposed higher standards on the parties in relation to the approval of the yearly account of the defendant, it could be suggested that the real matter before the court had arisen out of the investment agreement. It would then follow that the arbitration clause contained in the investment agreement was applicable and that a stay of proceedings ordered by the assistant registrar would have been justified.

4.26 One further point to be noted from this case is that a company's articles of association do not often contain arbitration clauses while shareholders' agreements often do. In that respect, this case highlights that issues between shareholders may arise from both their shareholders' agreement and from the company's articles of association and that it may, therefore, be suitable to align them by adopting the same dispute resolution mechanism in both documents.

Anti-suit injunction post-award

Post-award permanent anti-suit injunction

4.27 The court's power to grant anti-suit injunctions against a party to an arbitration agreement in pursuing its claim in the court of another jurisdiction is justifiable as being consistent with the court's duty under

19 See para 4.2 above.

the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[20] ("New York Convention") to enforce an agreement to arbitrate. Such injunction orders are normally made while the action in the foreign court is still pending and while the arbitration is still ongoing. The issue of whether such order could or should be made after the foreign court proceedings had concluded in a judgment arose for consideration in the case of *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd*.[21] In that case, Hilton International Manage (Maldives) Pvt Ltd ("Hilton") had obtained in 2015 awards in its favour from an International Chamber of Commerce ("ICC") tribunal for over US$20m in damages for Sun Travels & Tours Pvt Ltd's ("Sun Travels"') breach of the hotel management agreement. Sun Travels thereafter started two sets of proceedings in the Maldives in 2016: one resisting enforcement, and another civil proceeding in which it claimed over US$16m of damages against the plaintiff for breach of the hotel management agreement. These claims for damages were the same claims as those already disposed of, and dismissed, in the arbitration. Sun Travels succeeded in its civil claim in March 2017 ("March Judgment") against which Hilton filed an appeal. Hilton's enforcement action was dismissed on the basis of the March Judgment. Hilton applied at the Singapore court in November 2017 for a permanent anti-suit injunction as well as for other declaratory reliefs. Belinda Ang Saw Ean J declined to make the anti-suit injunction but granted a limited permanent injunction order restraining Sun Travels from "from taking any steps in reliance on the ruling in the March Judgment by the courts of the Republic of Maldives, or any decision upholding the March Judgment".[22] The court also made declaratory orders to the effect that the ICC awards were "final, valid and binding on the parties" and that Sun Travels' claim before the courts in Maldives were "in breach of the arbitration agreement in the Management Agreement".[23]

4.28 In her consideration of the application, Ang J explained that, following the conclusion of arbitration proceedings, there were at least two implied negative obligations which are not mutually exclusive: (a) an obligation not to commence court proceedings stemming from an agreement to resolve any disputes by reference to arbitration; and (b) an obligation not to set aside or otherwise attack an arbitral award in jurisdictions other than the seat of the arbitration.

20 330 UNTS 38 (10 June 1958; entry into force 7 June 1959).
21 [2018] SGHC 56.
22 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [4].
23 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [4].

4.29 The learned judge explained that the power to grant a permanent anti-suit injunctions does not stem from s 12A(2) read with s 12(1)(*i*) of the IAA, which only allows the courts to grant *interim* injunctions, or Art 5 of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law of International Commercial Arbitration[24] ("MAL") as those provisions are concerned with the *interim* measures which a court could make in support of arbitration before or during arbitral proceedings. Ang J disagreed with Judith Prakash J (as she then was) in *R1 International Pte Ltd v Lonstroff AG*[25] who had ruled that the source of the court's power to grant permanent anti-suit injunctions is found in s 4(10) of the Civil Law Act[26] ("CLA"). In her view, s 4(10) of the CLA is also concerned with *interim* injunctions, while the court's power to grant permanent anti-suit injunctions comes from the general power set out in s 18(2) read with para 14 of the First Schedule to the Supreme Court of Judicature Act[27] which gives the courts power to "grant all reliefs and remedies at law and in equity".[28]

4.30 The learned judge was convinced that where proceedings were commenced in relation to claims already fully resolved by arbitration, it would in substance be "an attack on the award and is a breach of the party's obligation not to set aside or otherwise attack"[29] in any jurisdiction other than in the seat of the arbitration. Such proceedings in the court's view would be vexatious and oppressive. The learned judge, however, accepted that the question as to whether foreign proceedings constitute an abuse of the foreign court's process would be for the foreign court to determine. In the court's view, Sun Travel's Maldivian action was a belated and impermissible challenge against the ICC awards.

4.31 There is no question that a court could order an anti-suit injunction even after an arbitration had concluded but the applicant must do so expeditiously. In this instance, by the time Hilton brought the application, the appeal in Maldives was too far advanced to warrant an anti-suit injunction to restrain the defendant from involvement in the pending appeal and beyond. The court candidly observed that while it has often been said that anti-suit injunctions do not offend the principle

24 UN Doc A/40/17, annex I; UN Doc A/61/17, annex I (21 June 1985; amended 7 July 2006).
25 [2014] 3 SLR 166 at [40].
26 Cap 43, 1999 Rev Ed.
27 Cap 322, 2007 Rev Ed.
28 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [43].
29 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [55].

of comity by virtue of being a restraint on the defendant and not the foreign court, the practical effect of such an injunction is, nevertheless, an indirect interference with the processes of the foreign court. The learned judge, accordingly, declined to order the normal anti-suit injunction restraining Sun Travels from commencing or continuing with the Maldivian proceedings and instead granted the order restraining Sun Travels from relying on the ruling in the March Judgment.

4.32 The order made by Ang J is indeed creative and novel. Its effect is to restrain a party from relying on a foreign judgment, thus nullifying the judgment's impact with the corresponding support for the enforcement of the arbitral awards.

Appeal against arbitral tribunal's ruling on jurisdiction

4.33 Article 16(3) of the MAL provides that an arbitral tribunal's positive ruling on a preliminary question that it has jurisdiction may be reviewed and decided by the court of the seat within 30 days of such a ruling. In 2012, the IAA was amended to extend the court's power of review to include a negative jurisdiction ruling of a tribunal. The provision, as currently worded, is no longer limited to a preliminary question of jurisdiction contemplated under Art 16 of the MAL but extends to any negative jurisdiction ruling made by the tribunal "at any stage of the arbitral proceedings". Under s 10(3) of the IAA, any party may, within 30 days after having received notice of a tribunal's ruling on jurisdiction, apply to the High Court to decide the matter. Under s 10(4) of the IAA, leave to appeal the High Court's decision is required for any further appeal to the Court of Appeal.

4.34 An appeal for leave to appeal to the Court of Appeal was sought by the plaintiff in *BQP v BQQ*,[30] where the plaintiff failed to reverse the tribunal's decision on jurisdiction before Quentin Loh J. The case involved the interpretation and scope of arbitration clauses in two agreements entered into between the parties, namely, an offshore round logs supply memorandum of agreement ("RLS MOA") between the plaintiff and defendant, which provided for SIAC arbitration, and an onshore merchantability wood agreement ("MWA") between the defendant and the plaintiff's Indonesia-incorporated nominee, which provided for arbitration by the Indonesian National Board of Arbitration ("BANI"). The tribunal had ruled in favour of the defendant in that the matter fell within the MWA and was, therefore, subject to the SIAC arbitration clause. The court affirmed the tribunal's decision against which the plaintiff sought leave to appeal and was refused.

30 [2018] 4 SLR 1364.

4.35 The plaintiff had asserted that the question of whether pre-contractual negotiations are admissible in evidence to construe written arguments and whether it is desirable to have a blanket rule against the admission of pre-contractual negotiations were questions of general principle to be decided for the first time, and questions of importance upon which further arguments and a decision of a higher tribunal would be to the public advantage. While Loh J accepted that, at first blush, the questions did exist and that these were issues of public importance which had not yet been decided by the Court of Appeal,[31] he promptly highlighted the difference between court litigation and international arbitration and held that the principles enunciated by the Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*[32] on the admissibility of extrinsic evidence (limitation of the parol evidence rule) are not applicable to international arbitration cases, even when Singapore is the seat and Singapore law is the governing law of the underlying contract. The plaintiff's challenge to jurisdiction and application for leave to appeal were, therefore, both dismissed.

4.36 This case is yet another reminder of the oft-ignored tenet that in international arbitration, the Evidence Act[33] does not apply and that arbitral tribunals retain control over the process of discovery of evidence and have a wide discretion to decide the admissibility, relevance, materiality and the weight of the evidence adduced by the parties. Tribunals are also free to adopt international practices and have widely accepted the International Bar Association Rules on Taking of Evidence in International Arbitration.[34]

Repudiation and/or waiver of agreement to arbitrate

4.37 An arbitration agreement may not normally be revoked unilaterally. A party to an arbitration may commence court proceedings for the purpose of seeking interim relief or security (if so available) in aid of arbitration. However, if a party commences court action without making clear that this is done as ancillary to, or in aid of, arbitration, it risks being held as having repudiated the arbitration agreement; if such repudiation is accepted by the other party, it may be thereafter estopped from commencing or maintaining arbitration.

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31 *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [132(d)]; *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 at [62] and [69]; *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [75].

32 [2013] 4 SLR 193.

33 Cap 97, 1997 Rev Ed.

34 Available at https://www.ibanet.org/publications/publications_iba_guides_and_free_materials.aspx (accessed April 2019).

4.38 In *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd*,[35] the receiver and managers of Hualon Corp (Malaysia) Sdn Bhd ("Hualon") (a Malaysian company) commenced proceedings in the British Virgin Islands ("BVI") courts against its former directors and Marty Ltd ("Marty") (a company incorporated in the BVI) for wrongful transfer of its shares in its Vietnamese subsidiary to Marty and another BVI entity. Marty indicated that it would defend the action but filed no defence. However, it challenged the BVI court's jurisdiction on the ground of *forum non conveniens*, but its challenge was dismissed on 10 February 2015. Hualon's receiver thereafter became aware of the existence of an arbitration clause between the parties and commenced SIAC arbitration in early March 2016. On 26 March 2016, Marty applied for summary judgment in the BVI court. The BVI action continued, and Hualon was ordered to provide security for costs. The action was struck out for failure to provide security. Marty challenged the SIAC tribunal's jurisdiction which ruled that it had jurisdiction in April 2016. An appeal to the High Court was unsuccessful.

4.39 The Court of Appeal, however, reversed the decision. Judith Prakash JA (delivering the judgment of the Court of Appeal) ruled that a party who had commenced court action in breach of an arbitration agreement must be presumed to have the intention to no longer be bound by the arbitration agreement. Such presumption could, however, be displaced by the claimant furnishing an explanation for commencing the court proceedings. The court, not convinced by the receiver's bare assertion that he was simply not aware of the existence of an agreement to arbitrate, held that, in any event, Hualon was not entitled to rely on its own alleged ignorance because it was not communicated to Marty. The court considered that Marty accepted the repudiation by its 26 March 2015 application for summary judgment for striking out Hualon's claim. That application, in the court's view, engaged the jurisdiction of the BVI court on the merits of its case. It is noteworthy that Hualon did not discontinue the BVI proceedings when it commenced the arbitration.

4.40 This decision appears to take a slightly different route from the English position[36] that the commencement of court proceedings is of itself not a repudiatory breach unless the party in question shows that it no longer intends to be bound by the agreement to arbitrate.

35 [2018] 2 SLR 1207.

36 *The Mercanaut* [1980] 2 Lloyd's Rep 183 (cited in *Chitty on Contracts* vol 2 (Hugh Beale gen ed) (Sweet & Maxwell, 32nd Ed, 2015) at para 32-051 and David St John Sutton, Judith Gill & Matthew Gearing, *Russell on Arbitration* (Sweet & Maxwell, 24th Ed, 2015) at para 2-137).

4.41 This decision also raises an interesting question of whether the right to arbitrate could be waived. The Court of Appeal observed that the issue could be framed as to whether the contract breaker had two rights to choose from (that is, commencing arbitration or court proceedings) so that he could waive one of them, or that by entering into an arbitration agreement, the contract breaker had given up his right to go to court so that he was not faced with a choice between two rights but rather with a choice between complying with his contractual obligations to only commence arbitration in case of dispute and breaking them. These all make for interesting discourse. The authors suggest that the question could also be framed as to whether arbitration is seen as a right or an obligation.

Setting aside of awards

Domestic awards under AA

4.42 Section 48(*a*)(vii) of the AA provides an additional ground for an award to be set aside, that is, "a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced". Notwithstanding the many prescribed grounds set out in s 48 of the AA, such as an award dealing with matters not contemplated by the agreement, or not giving parties adequate notice or failing to give them opportunity to be heard (not following agreed procedure), a losing party often still tends to use the ground of "breach of natural justice" as a catch-all provision to attempt to set aside an award.

4.43 In *Fisher, Stephen J v Sunho Construction Pte Ltd*,[37] the plaintiff alleged that the arbitrator, a quantity surveyor, appointed under the Singapore Institute of Architects Articles and Conditions of Building Contract, was said to have failed to consider ten issues in dispute between the parties. Kannan Ramesh J ruled that whether or not the arbitrator failed to consider one or more issues would usually be a matter of inference, and such inference, if it is to be drawn at all, "must be shown to be clear and virtually inescapable".[38] He found that the plaintiff's arguments constituted complaints towards the findings of the arbitrator rather than the arbitrator having failed to consider the issues raised.

4.44 The plaintiff also argued that he had been deprived of the right to be heard because the arbitrator had departed from the expert

37 [2018] SGHC 76.

38 *Fisher, Stephen J v Sunho Construction Pte Ltd* [2018] SGHC 76 at [32].

evidence adduced by both sides and had unilaterally assessed some rectification costs without inviting any submissions from the parties on his own way of assessment of such costs. To this, the learned judge ruled that arbitrators are "not bound to accept an either/or approach" and that they are "perfectly entitled to embrace a middle path (even without apprising the parties of his provisional thinking or analysis)"[39] (citing the Court of Appeal's decision in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd*[40] ("*Soh Beng Tee*")). As the arbitrator was an experienced quantity surveyor, it was perfectly appropriate for him to assess the costs. The learned judge also rejected the plaintiff's argument that the award was against Singapore's public policy, reminding the parties that the threshold for setting aside an arbitral award for breach of public policy was very high and should only operate in situations where the upholding of an award would "shock the conscience" or was "clearly injurious to the public good".[41] He also held that "[e]rrors of law or fact, *per se*, do not engage the public policy of Singapore"[42] and rejected the application for setting aside.

Awards under IAA

Jurisdiction decision in award on merits

4.45 Challenges against a tribunal's jurisdiction could be made in the course of the arbitration and be decided by the tribunal as a preliminary question of jurisdiction under Art 16 of the MAL or s 10 of the IAA or in an "award on the merits". A decision made under Art 16 of the MAL is not an "award" (and it matters not what label the tribunal may wish to give to it) as defined in the IAA as it would not be "a decision of the arbitral tribunal on the substance of the dispute" and could, therefore, not be liable to be set aside under Art 34 of the MAL.

4.46 Article 16 of the MAL and s 10 of the IAA provide a dissatisfied party with the avenue to seek a review of a decision on a preliminary question of jurisdiction, and such party must do so within 30 days of the decision. The question whether that is the only avenue of recourse, such that the failure to challenge the tribunal's decision in court within the 30-day period automatically deprives a party from taking up the challenge when the final award on the substance of the dispute is made, continues to vex parties and the courts.

39 *Fisher, Stephen J v Sunho Construction Pte Ltd* [2018] SGHC 76 at [52].
40 [2007] 3 SLR(R) 86.
41 *Fisher, Stephen J v Sunho Construction Pte Ltd* [2018] SGHC 76 at [60].
42 *Fisher, Stephen J v Sunho Construction Pte Ltd* [2018] SGHC 76 at [60], citing *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 59.

4.47 In *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd*,[43] Rakna Arakshaka Lanka Ltd ("RALL") and Avant Garde Maritime Services ("AGMS") entered into various agreements, including the establishment of a floating armoury on a vessel which was operated by AGMS of the coast of Sri Lanka. After the 2015 Sri Lankan presidential elections, the vessel was detained and ceased operation. AGMS commenced SIAC arbitration against RALL for alleged failure to provide assistance to obtain the vessel's release. The parties thereafter negotiated and signed a memorandum of understanding ("MOU") settling the matters in dispute, but the settlement apparently fell through and the tribunal was asked to revive the arbitration. The tribunal made an interim order on 19 December 2015 holding that RALL had failed to ensure continuity of the agreement between the parties, which went to the root of the MOU, and that, therefore, the dispute remained alive. The case then proceeded to the substantive hearing and the tribunal issued its final award in AGMS's favour in November 2016. RALL did not participate in the proceedings (including the preliminary hearing on jurisdiction and the substantive hearing) and it did not file any submission despite having been invited to do so repeatedly.

4.48 In February 2017, RALL applied to set aside the tribunal's award on the ground that the tribunal lacked jurisdiction as the MOU terminated the arbitration and the tribunal's mandate. It applied pursuant to Art 34(2)(a)(iii) of the MAL.

4.49 Quentin Loh J rejected the application ruling that, as the issue of jurisdiction had been decided as a preliminary issue by the tribunal, it would not be appropriate to apply under Art 34(2)(a)(iii) of the MAL against the award on the merits. RALL's allegation that the master agreement had been procured by bribery (AGMS's chairman had allegedly bribed RALL's chairman), and that enforcing cl 3.1 required the performance of an illegal act, was flatly rejected by the court's reasoning that fraud must go to the making of the award, and not the performance of the contract. In any event, the finding on the legality by the tribunal was a finding that could not be reopened by the court.

4.50 In the learned judge's view, all considerations of finality, certainty, practicality, cost, preventing dilatory tactics and settling the position at an early stage at the seat militate against allowing a dissatisfied party to reserve its objections to the last minute and indulge in tactics which could then result in immense delays and cost. RALL, having decided to stay away from the arbitration proceedings, could not be allowed to challenge the tribunal's jurisdiction at the seat in disregard of Art 16(3) of the MAL.

43 [2018] SGHC 78.

4.51 While it is understandable that the learned judge took a dim view of RALL's tactics, on principle, it is not at all clear that Art 16 of the MAL and s 10 of the IAA ought to be so strictly interpreted to prevent a party from seeking to challenge jurisdiction at the stage when the final award on the merits is made. It should be noted that both Art 16(3) of the MAL and s 10 of the IAA use the permissive "may" to provide recourse to the courts to seek review of the tribunal's decision with no prescribed sanction against its not doing so. Jurisdiction, being a matter that goes to the very foundation of the arbitration, ought not to be shut out merely on grounds of expediency, practicality and costs. It could be equally argued that time and costs may well be saved by having the matter proceed expeditiously to a merits hearing rather than have the process disturbed by occasional visits to the court during the course of the arbitration.

4.52 An application for jurisdictional review was brought by the plaintiff under Art 16(3) of the MAL together with a setting aside application under Art 34 in *Sinolanka Hotels & Spa (Pte) Ltd v Interna Contract SpA*.[44] In rejecting Sinolanka Hotels & Spa (Pte) Ltd's applications, Ang Cheng Hock JC pointed out the incorrect application made under Art 16. The court, nevertheless, considered the application under Art 34 of the MAL, but saw no merits in it. The court observed that its task in reviewing a tribunal's decision on jurisdiction, be it in an application for a jurisdictional ruling under Art 16(3) of the MAL or an application to set aside an award for lack of jurisdiction under Art 34(2)(a) of the MAL, is to undertake a *de novo* hearing on the issue of jurisdiction. Looking at the evidence before him, the learned Judicial Commissioner found it plain and unambiguous that the parties had agreed to ICC arbitration and that the "letter of acceptance" was part of the agreement.

Disclosure of document for "attorney eyes only"

4.53 In *China Machine New Energy Corp v Jaguar Energy Guatemala LLC*,[45] Kannan Ramesh J had to deal with various allegations of breach of natural justice, including concepts which are not commonly brought up before the Singapore courts, such as an attorney-eyes-only ("AEO") order and allegations of "guerrilla tactics".

4.54 The parties, China Machine New Energy Corp ("CMNC") and Jaguar Energy Guatemala LLC ("Jaguar"), had entered into an Engineering, Procurement and Construction Contract ("EPC Contract") in relation to the construction of a coal-fired power plant

44 [2018] SGHC 157.
45 [2018] SGHC 101.

and a deferred payment scheme with secured notes. Disputes arose over CMNC's delays in the construction and over Jaguar's failure to perfect security of the notes issued. In January 2014, Jaguar terminated the agreement and commenced arbitration. The arbitration clause contained in the EPC Contract provided for an expedited procedure such that the tribunal's final award was to be issued 90 days after the selection of the third arbitrator or, if the majority of the arbitrators agreed, within a further 90 days.

4.55 During the arbitration, Jaguar was reluctant to disclose certain information due to CMNC's threatening actions against its personnel and their contractors, and it was concerned that CMNC would misuse that information to interfere with the construction project and/or with the arbitration. In the circumstances, and after hearing the parties, the tribunal ordered an AEO regime. It was a twofold regime and CMNC could apply to see the "protected documents" under certain conditions. It, however, never did, and the tribunal eventually rendered an award in favour of Jaguar.

4.56 CMNC applied to set aside the award for breach of natural justice on the ground that the AEO regime deprived it of a reasonable opportunity to be heard. Applying the principles set out in *Soh Beng Tee*,[46] Ramesh J reiterated the principle of minimal curial intervention when dealing with allegations of breach of natural justice, especially when the court's intervention is sought in relation to a procedural or a case-management decision of an arbitral tribunal. In addition, he observed that, under Art 18 of the MAL, equality of treatment did not require an identity of treatment, and in the present case, the AEO regime had been adopted specifically because the parties required a different treatment. Ramesh J concluded that, in any event, CMNC had suffered no prejudice from the imposition of the AEO regime.

4.57 Two further interesting issues were brought up in this case. The first arose from CMNC's submission that Jaguar breached its obligation to arbitrate in good faith, using "guerrilla tactics", and that the tribunal failed to restrain Jaguar from doing so. From these submissions followed the question of whether an arbitration agreement includes an implied duty to arbitrate in good faith, which has yet to be decided in Singapore. The court observed that it would depend on the law governing the arbitration clause, and that not all jurisdictions recognise a general duty to perform contractual obligations in good faith. For instance, there does not seem to be such a duty under English law and Singapore law, while such implied duty is quite inherent to any civil law jurisdiction. However, the court remarked that a duty of good faith could,

46 See para 4.44 above.

nevertheless, be implied from the inherently co-operative nature of the arbitral process even under laws which do not recognise a general duty to perform contractual obligations in good faith. The learned judge left the question open, concluding that while it seems clear that an arbitration agreement includes a duty to co-operate in the arbitral process, it is unclear if this is the same as or falls under a duty of good faith.

4.58 The other issue that arose in this case is one of fraud and corruption. CMNC submitted that the tribunal failed to investigate allegations of corruption and fraud and that the award was induced or affected by corruption. The court explained that while arbitral tribunals have a duty to investigate allegations of corruption, such a duty is only triggered when the allegations of corruption affect the issues under consideration in the arbitration. In the present case, the tribunal held that the allegations of corruption, which had not been proven in any court, did not have any bearing on the issues in the arbitration. The tribunal was, therefore, under no duty to investigate the allegations, and its finding was a finding of fact which was not subject to appeal. Further, the learned judge said that a breach of the tribunal's duty to investigate the allegations of corruption *per se* did not render an award liable to be set aside for breach of public policy.

4.59 The tribunal in this case was working within an agreed expedited procedure. While a tribunal has a duty to proceed expeditiously, it also has an equally important duty to adopt processes that are appropriate and proportionate to the complexity of the case before it. Where a matter is less suited for an expedited process, the tribunal ought not to shy away from proposing to parties to proceed on the normal track rather than on an expedited basis.

Res judicata *and issue estoppel – Decision of enforcement court and seat court*

4.60 A party who has failed in an arbitration could seek to set aside the award at the seat of arbitration and/or to resist the award at the place of enforcement. In cases with important interests at stake, parties would normally lose no time in taking action in both places. In *BAZ v BBA*,[47] the plaintiffs (respondents in the arbitration) were family members and companies controlled by the same family members, and they lost in an ICC arbitration seated in Singapore. Action was brought to enforce the award in New Delhi by the successful defendant (claimant in the arbitration) while the plaintiffs sought to set aside the award in Singapore. The Indian enforcement progressed faster than the setting-

47 [2018] SGHC 275.

aside proceedings in Singapore. The Delhi High Court[48] granted enforcement of the award against all the plaintiffs on 31 January 2018 save for those who were identified as minors. The decision was subsequently affirmed by the Indian Supreme Court[49] in February 2018. As a consequence, an interesting point of issue estoppel was raised before Belinda Ang Saw Ean J when the setting-aside application was heard in Singapore. This case has also the distinction of being the first case argued by two leading senior advocates representing each side.

4.61 The dispute in that case arose out of a share purchase and share subscription agreement ("SPSSA") under which the buyer purchased shares in an Indian company ("the Company") that were held by 20 sellers (including five minors who were identified as such only when the matter went before the courts),[50] thereby becoming the controlling shareholder of the Company. The SPSSA was governed by Indian law. The buyer commenced ICC arbitration when it discovered the genesis, nature and severity of some ongoing investigations in relation to the Company which, it submitted, had been fraudulently misrepresented by the sellers. The buyer obtained a majority award in its favour and was awarded damages in excess of $720m.

4.62 Ang J examined the *travaux preparatoires* of the New York Convention and the MAL and noted that neither the New York Convention nor the MAL dictates how a court goes about deciding whether a ground under Art V or 34 has been established. She observed that both instruments provide a mechanism for the seat court to decide whether to set aside an award first, and direct the enforcement court to give regard to the judgment of the seat court in setting aside an award. The primacy and the judicial oversight of the seat court is not entirely taken away by the alignment of the grounds. The learned judge took the view that there are differing views on whether issue estoppel should be applicable in setting-aside proceedings to preclude a party from re-litigating issues already decided in a prior foreign enforcement proceeding, and the law in this area is underdeveloped and remains unsettled.

48 *Daiichi Sankyo Co Ltd v Malvinder Mohan Singh* OMP (EFA) (COMM) 6/2016 (31 January 2018).

49 Order of Indian Supreme Court available at https://www.livelaw.in/sc-dismisses-singh-brothers-appeal-rs-3500-cr-arbitral-award-daiichi-read-order/ (accessed April 2019).

50 The fact of minors being involved was not noted until the matter went before the Delhi High Court. The majority award and the dissenting opinion by a retired Chief Justice of the Union of India made no mention of any involvement of minors.

4.63 The learned judge did not feel bound by the Delhi High Court decision, stating that each court, especially a seat court, can have a fresh view on setting aside proceedings and on each and every issue raised before it. She, however, recognised that the Delhi High Court judgment may have persuasive effect, especially because the law of the arbitration agreement was Indian law. To the specific question of issue estoppel, the learned judge held that it could not arise at least in relation to questions of arbitrability and public policy. She also explained that *res judicata* was wholly inapplicable to a court's review of an arbitral award in enforcement or setting-aside proceedings which involve the review of the process of the arbitration proceedings, and not the merits of the substantive claims between the parties.

Awarding consequential damages – Exceeding jurisdiction

4.64 Turning to the sellers' substantive grounds, the court rejected the argument that the buyer's claim was time barred, reasoning that the defence of time limitation is not a jurisdictional issue but rather an issue of admissibility which did not fall under the scope of Art 34(2)(a)(i) of the MAL. The plaintiffs had also raised the issue of the manner in which the tribunal had reached its decision on the quantum of the claim, arguing that the tribunal had awarded consequential damages which it was prohibited from doing under the terms of the contract. The learned judge examined at length the manner in which the majority had calculated the damages and came to the view that the award of damages was simply compensating for the difference between the purchase price paid and the actual value of the shares, and taking into account the dividends received by the sellers and not an award for loss of opportunity, and not an award for consequential damages.

4.65 The sellers had also made arguments of breach of natural justice, but Ang J reiterated the principle of minimal curial intervention and said that she would not allow a re-characterisation of an issue raised before the arbitration or an introduction of an issue material to the merits of the dispute not raised during the arbitration in an attempt to set aside an award.

Involvement of minors

4.66 A factor that did not feature in the arbitration was the fact that amongst the sellers were minors. This was first raised and considered in the Delhi High Court, which quite properly disallowed enforcement against minors. It is uncontroversial that the protection of minors in commercial transactions is part of Singapore public policy. Although the buyer had initially argued in court that the minors were represented by the same legal team and senior counsel, they eventually conceded that the award could not be enforced against them. Ang J had little difficulty

agreeing with the Delhi High Court that permitting a finding of fraud and enforcing the award against minors was against public policy, both of Indian law and Singapore law. Save in so far as the award was made against the minors and was set aside as being against the public policy of protection of minors, the rest of the award was otherwise upheld.

Enforcement of awards

Adjournment of enforcement pending setting aside at seat court

4.67 A party with an adverse award made against it could apply to set aside the award at the seat of arbitration as well as resisting the enforcement at the seat. An award that has been successfully set aside would, in most instances, be considered to have lost its binding power and enforcement would accordingly be refused. A court asked to enforce an award may be informed that a setting-aside application is pending at the seat of enforcement and the court may, if it thinks proper, adjourn the enforcement action under Art VI of the New York Convention. This then gives rise to the perennial tension between an award's finality and the award-debtor's right to seek to nullify the award.

4.68 The case of *Man Diesel Turbo SE v I M Skaugen Marine Services Pte Ltd*[51] is an enforcement action brought by the plaintiff ("Man Diesel") against the defendant ("Skaugen") to enforce an award made in Denmark. The disputes between the parties arose out of two contracts, one for engines and another for propellers. A few weeks before the final hearing, Skaugen applied to introduce a new counterclaim, an expert report and new evidence. The application was rejected. A final award was thereafter issued in favour of Man Diesel, upholding the propellers contract and terminating the engines contract. Further disputes arose between the parties in relation to the performance of the final award, specifically in relation to the payment and delivery of the propellers. Skaugen commenced a second arbitration against Man Diesel to request the termination of the propellers contract. In that arbitration, Skaugen added the same counterclaim earlier rejected by order of the first tribunal. Skaugen had asked the Singapore court to adjourn the enforcement proceeding under Art VI of the New York Convention and s 31(5) of the IAA, pending the decision on its application to set aside the award in Denmark.

4.69 Given such lack of guidance and decision from any Singapore court in that respect, Belinda Ang Saw Ean J discussed cases from other jurisdictions, including cases from England and Wales and from

51 [2018] SGHC 132.

Canada, and she came out with a multi-factorial approach to the exercise of the court's discretion, considering (a) whether the application to set aside was *bona fide* and not a delaying tactic; (b) the length of adjournment; and (c) the likely consequences occasioned by an adjournment and any resulting prejudice. The learned judge reached the view that imposing a threshold test would be unsatisfactory or unhelpful. Instead, she chose to adopt an approach of "a sliding scale as between manifest validity and manifest invalidity" of the award and of what would be "most just or least unjust".[52]

4.70 In her Honour's view, Skaugen had to at least show, from the strength of its arguments, that it was demonstrably pursuing a meritorious application in the seat court. In the present case, the court viewed the grounds advanced by Skaugen as rather weak and held that they could not justify any adjournment against enforcing the award, and ordered its immediate enforcement.

Residual discretion to enforce notwithstanding existence of grounds to refuse

4.71 In relation to the enforcement of foreign awards, Art V of the New York Convention obliges the Singapore courts, as enforcement courts, to enforce awards unless grounds exist to refuse enforcement. While there is no discretion to refuse enforcement, the use of the term "may be refused" therein permits an interpretation that the courts may, nevertheless, enforce awards even if such grounds exist.

4.72 The case of *Sanum Investments Ltd v ST Group Co Ltd*[53] brought the interesting issue of the exercise of this residual power[54] to the fore. There, Sanum Investments Limited ("Sanum"), a Macau company in the gaming industry, entered into several agreements for the creation of joint ventures to develop and run casinos and slot clubs in Laos with the defendants (ST Group Co, Ltd, Sithat, ST Vegas Co, ST Vegas Enterprise and Xaysana; together, "the Lao disputants"). One of the slot clubs was not immediately part of the "slot club joint venture" as there were existing third-party machine owners already involved at the time the agreement was concluded, but it was to be "turned over" by 11 October 2011. The turnover, however, never took place.

52 *Man Diesel Turbo SE v I M Skaugen Marine Services Pte Ltd* [2018] SGHC 132 at [55].

53 [2018] SGHC 141.

54 Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 38 (10 June 1958; entry into force 7 June 1959).

4.73 Sanum commenced and lost proceedings in Laos in relation to the turnover of the slot club, and ST Vegas Co succeeded in other proceedings in Laos, obtaining a declaration that the parties no longer owed any obligations to each other in relation to that slot club. Sanum appealed unsuccessfully against that decision.

4.74 Sanum thereafter commenced SIAC arbitration proceedings in Singapore on the basis of an arbitration clause contained in the master agreement between the parties, which provided that "Parties shall arbitrate their dispute using an internationally recognised mediation arbitration [*sic*] Company in Macau, SAR PRC". The Lao disputants had at all times objected to the SIAC arbitration and did not participate. They took the position that the SIAC was not the proper institution. In the absence of nomination by the Lao disputants, the SIAC appointed a three-member tribunal. The tribunal found it had jurisdiction under the master agreement and under another agreement between the parties (the participation agreement) and awarded damages of over US$200m in favour of Sanum.

4.75 The master agreement made no reference to the SIAC, but the participation agreement made specific refence to the SIAC. The tribunal read these together and came to the conclusion that its jurisdiction was properly founded. The learned judge, however, found that the underlying dispute arose out of the master agreement alone and that, therefore, the only arbitration agreement would be that found in cl 2(1) of the master agreement. The court also came to the view that any suggestion that cl 2(10) of the master agreement and cl 19 of the participation agreement should be combined and reconciled must be rejected.

4.76 In relation to the parties to the arbitration commenced under the master agreement, the court found that one of the impleaded parties (ST Vegas Enterprise) could not be made a party and was wrongly added. The court also considered the term "internationally-recognised mediation arbitration [*sic*] Company in Macau", and accepted that the SIAC would qualify as an "'internationally-recognised' arbitration body", but held that the tribunal's conclusion that the seat was Singapore was wrong, as it should be Macau. As regards the composition of the tribunal, the court noted that the SIAC had relied upon cl 19 of the participation agreement in appointing a three-member tribunal when the relevant arbitration clause (that is, cl 2(1) of the master agreement) made no specific provision for the number of arbitrators, with the default being a single arbitrator and not three under the SIAC Rules 2013. Notwithstanding all these findings, the court, however, found that the Lao disputants had done little to demonstrate the manner in which these procedural irregularities had affected the arbitral procedure adopted, namely, the consequences of having an incorrectly seated

arbitration, an incorrect number of arbitrators, a dispute decided on the basis on two agreements instead of one, and a misjoinder of an additional non-party.

4.77 This decision demonstrates again the strong pro-enforcement stance of the Singapore courts. Despite several procedural irregularities, the court decided that the award would still be enforced. The learned judge left no stone unturned in examining the steps taken by the tribunal and found procedural mistakes but, nevertheless, came to the conclusion that enforcement could not be withheld as the award-debtor had not shown the prejudice it had suffered. It serves as a warning to parties that it is always wiser to participate in the arbitral process rather than wait until an adverse award is made and hope to rely on procedural errors to set aside or resist its enforcement.

4.78 As a final note, the authors observe that the application by the defendants in this case was purportedly made under Art 36 of Ch VIII of the MAL, which has been expressly declared as not having force of law in Singapore.[55] It would appear that, as the plaintiff had already entered judgment after having obtained leave for enforcement, the defendants' recourse ought to have been an appeal against the judgment so entered. It is curious why this was not raised or mentioned and instead the court was led to discuss provisions that have not been given force of law in Singapore.

55 See s 3(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed).