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Editor
James H Carter

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PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another.

The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world often debates whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
Wilmer Cutler Pickering Hale and Dorr LLP
New York
June 2018

Chapter 38

SINGAPORE

Kelvin Poon, Paul Tan and Alessa Pang[1]

I INTRODUCTION

In recent years, Singapore has solidified its position in the region and globally as a leading location for international arbitration. Its dominance may be attributed to several factors, including:

a the innovative stewardship of the Singapore International Arbitration Centre (SIAC);
b an efficient and impartial judiciary respectful of the principles of arbitration;
c a vibrant arbitration bar comprising both Singapore and foreign counsel;
d Singapore's profile as the region's financial centre; and
e last but not least, world-class infrastructure and sociopolitical stability.

Predicated on this foundation, Singapore's arbitration scene has gone from strength to strength, a trend that has continued in 2017. It is now the third most popular arbitration seat, ranked just after London and Paris.[2] Symptomatic of the sophistication of the bar and judiciary, Singapore arbitral jurisprudence, while largely adhering to the norms of international arbitration practice, has also developed in ways unique to Singapore.

Although this chapter deals primarily with arbitration, brief mention is also made of the Singapore International Commercial Court (SICC) and the Singapore International Mediation Centre (SIMC).

i Structure of the Singapore legal regime governing arbitration

Singapore has two parallel arbitral systems. In general, an international arbitration as defined under Section 5 of the International Arbitration Act[3] (IAA) is governed by the IAA. Any arbitration that is not governed by the IAA is governed by the Arbitration Act (AA).[4] Additionally, the Rules of Court applicable to the IAA are set out in Order 69A, while those applicable to the AA are set out in Order 69.[5]

1 Kelvin Poon and Paul Tan are partners, and Alessa Pang is a senior associate with Rajah & Tann Singapore LLP.

2 2018 International Arbitration Survey: The Evolution of International Arbitration: https://www.whitecase.com/sites/whitecase/files/files/download/publications/2018-international-arbitration-survey.pdf.

3 Cap 143A (2002 Rev Ed).

4 Section 3 of the AA Cap 10 (2002 Rev Ed).

5 Supreme Court of Judicature Act (Cap 322), Rule 5, Rules of Court (2006, Rev Ed) (Rules of Court).

The application of the UNCITRAL Model Law

With the exception of Chapter VIII, the 1985 UNCITRAL Model Law on International Commercial Arbitration (Model Law) has the force of law in Singapore vide its incorporation by the IAA.[6] Any departures from the Model Law are listed in Part II of the IAA. Chapter VIII of the Model Law relates to the recognition and enforcement of awards. This has not been incorporated in the IAA to avoid duplication with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), to which Singapore is a signatory.[7] The New York Convention only governs the recognition and enforcement of foreign awards. The position in relation to awards issued in respect of international arbitrations seated in Singapore (and thus not governed by the AA) is governed by Section 19 of the IAA.

In turn, Section 19 of the IAA merely states that 'An award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award.'

The Singapore Court of Appeal has ruled that Section 19 should be read consonant with the underlying philosophy of the Model Law.[8] Although the Court of Appeal did not elaborate as to whether this meant that the precise grounds of Section 34 of the Model Law are replicated under Section 19, it would be surprising if it were not.

This is consistent with the primary legislative intent behind the IAA, which was to implement 'the Model Law [and] introduce additional provisions which will facilitate arbitrations'.[9] Some of these provisions include conciliation proceedings prior to arbitration,[10] granting immunity to arbitrators,[11] curial assistance of arbitration proceedings,[12] and the awarding of costs and interests.[13]

Unlike the IAA, the Model Law is not enacted in full in the AA. Nevertheless, the provisions of the AA are in fact 'largely based on the UNCITRAL Model Law, which forms the basis of Singapore's International Arbitration Act'.[14] Where there are similar provisions in the AA and the IAA, 'the court is entitled and indeed even required to have regard to the scheme of the [IAA or the Model Law] for guidance in the interpretation of the [AA]', given

6 Section 3 and Schedule 1 of the IAA. The Model Law has been incorporated into the IAA as its First Schedule. In the spirit of the Model Law, key provisions in the IAA, such as the definition of an 'international arbitration', are reproductions of or closely modelled after their corresponding provisions in the Model Law.

7 Part III and Schedule 2 of the IAA.

8 *PT First Media TBK v. Astro Nusantara International BV* [2014] 1 SLR 430 at [53]-[55].

9 Singapore Parliamentary Reports, 31 October 1994, Volume 63, Column 626.

10 See Sections 16 and 17 of the IAA.

11 See Section 25 of the IAA. The 2001 amendments to the IAA included an additional Section 25A, which further provided immunity to arbitral institutions and appointing authorities in the discharge of their functions.

12 Previously this was provided for under Section 12(7) of the IAA. Since the legislative amendments in 2009, Section 12(7) has been deleted and a new Section 12A introduced.

13 See Sections 20 and 21 of the IAA.

14 Singapore Parliamentary Reports, 5 October 2001, Volume 73, Column 2214.

the clear legislative intent to align Singapore's domestic laws with the Model Law.[15] As a result, it is expected that arbitral jurisprudence under the AA and the IAA would be similar, if not identical in practice.

Curial assistance in aid of local and foreign arbitrations

In *Swift-Fortune Ltd v. Magnifica Marine SA*,[16] the Singapore Court of Appeal ruled that Singapore courts do not have the power 'to grant interim measures, including *Mareva* interlocutory relief, to assist foreign arbitrations'. In the aftermath of this decision, Parliament, inspired by Article 17J of the Model Law 2006, enacted Section 12A IAA.[17] Section 12A empowers the court to make interim orders in support of foreign arbitrations, in addition to local arbitrations,[18] but only if the case is one of urgency and such an order is necessary for the purpose of preserving evidence or assets.[19] Otherwise, the consent of the tribunal or other parties is required.[20] Such interim measures include:

a injunctions;[21]
b securing the amount in dispute;[22]
c the preservation, interim custody or sale of the subject matter;[23] and
d preservation and interim custody of evidence.[24]

Consistent with the policy of limited curial intervention, the court can exercise these powers only when the arbitral tribunal or arbitral institution has no power to act, or is unable to act effectively for the time being.[25] One such situation envisaged by Parliament is where 'the foreign arbitral tribunal has power to make an interim order but that order cannot otherwise be enforced in Singapore apart from an application under this new section'.[26]

Witnesses within Singapore can be compelled to give evidence under Section 13 of the IAA. Since arbitrators derive their jurisdiction from the agreement of parties, the assistance of the court is required where compelling a third party to give evidence is necessary.[27] Section 13 removes the requirement under Article 27 of the Model Law that a party can only obtain such assistance from the court with the approval of the tribunal.

15 *L W Infrastructure Pte Ltd v. Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125 (CA) at [33–34]; *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [42].
16 [2007] 1 SLR(R) 629 at [59].
17 Singapore Parliamentary Reports, 19 October 2009, Volume 86, Column 1628.
18 Section 12A(2) IAA.
19 Section 12A(4) IAA.
20 Section 12A(5) IAA.
21 Section 12(1)(i) IAA.
22 Section 12(1)(g) IAA.
23 Section 12(1)(d) IAA.
24 Section 12(1)(f) IAA.
25 Section 12A(6) IAA.
26 Singapore Parliamentary Reports, 19 October 2009, Volume 86, Column 1628. Other examples include a party applying to court for relief before the arbitral tribunal has been fully or properly constituted; a party applying to court for relief against a non-party to the arbitration, which an arbitral tribunal has no power over; and where the arbitral tribunal is unable to hear an urgent application for interim relief sufficiently quickly (Ibid.).
27 Robert Merkin and Johanna Hjalmarsson, Singapore Arbitration Legislation: Annotated (Informa, 2009).

Additional grounds to set aside an award

The IAA and AA provide for two additional grounds on which an arbitral award may be set aside. The first is if the making of the award was induced or affected by fraud or corruption.[28] In *PT Asuransi Jasa Indonesia (Pesero) v. Dexia Bank SA*,[29] the Court of Appeal noted that an award induced or affected by fraud would be one that is contrary to public policy. The second additional ground is if a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.[30] In *Soh Beng Tee & Co Ltd v. Fairmount Development Pte Ltd*,[31] the Court held that a party challenging an arbitration award as having contravened the rules of natural justice must establish:

a which rule of natural justice was breached;
b how it was breached;
c in what way the breach was connected to the making of the award; and
d how the breach prejudiced its rights.

As to whether there was actual or real prejudice caused by the alleged breach, the Court of Appeal in *L W Infrastructure Pte Ltd v. Lin Chin San Contractors Pte Ltd* clarified that the real inquiry is whether the materials not placed before the arbitrator could reasonably have made a difference to the arbitrator, rather than whether such material would necessarily have made a difference.[32]

The application of the New York Convention

Singapore is a signatory to the New York Convention, which is enacted in full in Schedule 2 of the IAA. Provisions giving effect to the New York Convention are set out in Part III of the IAA. In general, an award made in a New York Convention country shall enjoy automatic recognition[33] and is enforceable by leave of the Singapore High Court like a domestic IAA award.[34] Interim measures made by foreign arbitral tribunals may also be enforced under the New York Convention if they are measures that domestic IAA tribunals can order.[35] A party may apply for a refusal of enforcement of a New York Convention award only if any of the grounds under Section 31(2) and (4) of the IAA are satisfied.[36] These grounds are identical to those provided for setting aside a domestic IAA award under Article 34(2) of the Model Law and Section 24 of the IAA.

28 See Sections 48(1)(a)(vi) AA and Section 24(a) IAA.

29 [2007] 1 SLR(R) 597.

30 See Sections 48(1)(a)(vii) AA and Section 24(b) IAA.

31 [2007] 3 SLR(R) 86.

32 [2013] 1 SLR 125 at [54]. See further, Paul Tan, 'Arbitration jurisprudence in Singapore: Is there a disturbance in the force?', *Singapore Law Watch Commentary* (Issue 3/Oct 2012).

33 Section 29(2) of the IAA.

34 Section 29(1) read with Section 19 of the IAA.

35 Section 27(1) 'arbitral award' IAA. Parliament considered that while industry opinion was on balance against the adoption of Model Law 2006's interim measures (Articles 17A to 17J), some interim measures ordered by foreign arbitral tribunals ought to be enforceable. The current definition strikes a balance that achieves reciprocity by allowing 'the same range of measures that the court may order under section 12A in aid of foreign arbitration' (Singapore Parliamentary Reports, 9 April 2012, Volume 89, 'International Arbitration (Amendment) Bill').

36 *Aloe Vera of America, Inc v. Asianic Food (S) Pte Ltd* [2006] 3 SLR(R) 174 (HC) at [46].

In *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK*,[37] the Court of Appeal endorsed the principle that, while the court is not mandatorily required to annul an arbitral award where one or more of the grounds specified in Article 34(2) of the Model Law or Section 24 of the IAA applies, in many cases, the existence of any one of these grounds will be sufficiently serious for annulment of the award to be virtually automatic.[38] This principle ought to apply with equal force to Section 31(2) and (4) of the IAA. That said, courts retain a residual discretion to enforce or recognise an award even where one of the grounds for refusal have been established. This may be in cases where, for instance, no prejudice has been sustained by the aggrieved party.[39]

The New York Convention only applies to 'an arbitral award made in pursuance of an arbitration agreement in the territory of a Convention country other than Singapore'.[40] Hence a foreign arbitral award that is not made in a New York Convention country cannot be enforced under Part III of the IAA. Such an award may instead be enforced under Section 46(3) of the AA. Such awards are enforced with leave of the High Court under Section 46(3) of the AA.[41] While there are no provisions under the AA for the refusal of enforcement of such awards, in the second reading of the bill that enacted this Section, the Minister emphasised that there 'will not be an automatic right to enforcement […] the Courts have developed rules for the enforcement of foreign judgments and arbitration awards, and similar principles would be considered by a Court in deciding whether to grant leave'.[42] This indicates that the same analysis relating to New York Convention awards will apply.

There appears to be a disturbing trend where parties attempt to enforce awards while setting aside proceedings are pending. For example, in *Josias Van Zyl and others v. Kingdom of Lesotho*,[43] the plaintiffs commenced enforcement proceedings even though judgment for the setting aside application was still reserved. This is not the only case where a party has attempted as such. This procedural manoeuvre incurs additional time and costs for all the parties involved – all of which would be rendered unnecessary if the award is eventually set aside. Substantively, there are also disclosure issues. As the Singapore Rules of Court allow a party to apply for enforcement of an award on an *ex parte* basis, this begs the question as to how forcefully an enforcing party should set out the potential challenge. More importantly, should the court then exercise its discretion not to enforce the award? It is unclear how such an application would be best resolved. A party may rely on Section 31(2)(f) of the IAA to resist enforcement of a foreign award on the ground that: 'the award has not yet become binding on the parties to the arbitral award [...] or has been set aside or suspended' by the curial court. However, where awards made in Singapore-seated arbitrations are concerned, it may only be open to the Singapore court to exercise its discretion to adjourn its decision on the enforcement application per Article 36(2) of the Model Law.

37 [2011] 4 SLR 305.

38 Id., at [97].

39 [2011] 4 SLR 305 at [100]; citing *Paklito Investment Limited v. Klockner East Asia Limited* [1993] 2 HKLR 39.

40 Section 27(1) of the IAA 'foreign award'.

41 Singapore Parliamentary Reports, 24 April 2003, Volume 76, Column 2149; Chan Leng Sun SC, Singapore Law on Arbitral Awards (Academy Publishing, 2011) at [7.139].

42 Ibid.

43 *Josias Van Zyl and others v. Kingdom of Lesotho* [2017] SGHCR 104.

Appeal against jurisdictional rulings

Article 16(3) of the Model Law provides that if, on a challenge to the tribunal's jurisdiction, the tribunal rules as a preliminary question that it has jurisdiction, a party may request the High Court to decide the matter. The Model Law does not provide for an appeal against a decision by a tribunal that it has no jurisdiction, or against the decision of the High Court. In April 2012, Parliament passed amendments to the IAA that includes a new Section 10 that addresses these issues. Section 10(3)(b) provides for an appeal to the High Court if the tribunal rules on a plea at any stage of the arbitral proceedings that it has no jurisdiction. Further, Section 10(4) also provides for an appeal from a decision of the High Court to the Court of Appeal with leave of the High Court. Where the court decides that the tribunal has jurisdiction, Section 10(6) provides for the existing tribunal to continue the arbitral proceedings, or the appointment of a substitute arbitrator where any arbitrator is unable or unwilling to continue. Where the court decides that the tribunal has no jurisdiction, the Court of Appeal has confirmed that a court is empowered by 'the rubric of 'decid[ing] the matter' in Article 16(3) of the Model Law' to reverse the tribunal's positive ruling on jurisdiction.[44]

In *AQZ v. ARA (AQZ)*,[45] after reviewing the drafting history of the Model Law, the Singapore High Court confirmed that a party cannot rely on Section 10(3) of the IAA or Article 16(3) of the Model Law to set aside a jurisdictional award that also deals with the merits of the dispute.[46] This is so, even if the award marginally deals with the merits of the dispute.[47]

ii Differences between the IAA and the AA

There are three key differences between the IAA and AA: stay of domestic legal proceedings in favour of arbitration, the right of appeal against awards and interim measures granted by the arbitral tribunal.

Stay of domestic legal proceedings

Under Section 6 of the IAA, a stay of domestic legal proceedings in favour of arbitration will be mandatory if an arbitration agreement exists between the parties unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.[48] To obtain a stay under Section 6 of the IAA, the applicant has to show that he or she is a party to the relevant arbitration agreement, and that the proceedings involve a matter falling within the terms of the arbitration agreement.[49]

As to whether a matter falls within an agreement that provides for arbitration only if 'disputes' exist, the Singapore court takes an extremely broad view as to the scope of 'disputes'.

44 *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd* [2014] 1 SLR 130 at [70].

45 [2015] SGHC 49.

46 *AQZ v. ARA* at [71].

47 *AQZ v. ARA* at [65].

48 *Tjong Very Sumito and others v. Antig Investments Ptd Ltd* [2009] 4 SLR(R) 732 at [22].

49 Ibid.

Short of an unequivocal admission extending to both liability and quantum, the court will readily find that a dispute exists.[50] The High Court even went as far as to say that 'a dispute as to whether there is a dispute at all' constitutes a dispute.[51]

In contrast, under Section 6 of the AA, a stay of proceedings in favour of arbitration will only be granted if the court is satisfied that there is 'no sufficient reason why the matter should not be referred in accordance with the arbitration agreement', and that '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'. The court has also clarified that arbitrability is an important factor that ought to be taken into consideration when determining whether to grant a stay under Section 6(2) of the AA.[52]

The burden of proving 'sufficient reason' rests on the party resisting the stay.[53] Sufficient reason can encompass any other relevant circumstances that would assist the court in determining whether a stay ought to be granted, one of which is to show that there is no sustainable defence to a claim.[54]

While a stay is mandatory under the IAA, a stay under the AA is entirely discretionary.[55] In its Final Report on the draft Arbitration Bill, the Law Reform and Revision Division (Division) commented that the use of the word 'may' is specifically intended to preserve the discretionary power of the court in respect of stay of court proceedings.[56]

Appeal against arbitral awards

The second key difference between the IAA and AA lies in the right to appeal against arbitral awards. Under the IAA, the parties have no right to appeal against an arbitral award on its merits. The only recourse a party has against an award is to set it aside under one of the grounds provided under Article 34 of the Model Law or Section 24 of the IAA.

In its Final Report, the Division considered the 'desirability of abolishing the right of appeal to the Court on substantial issues in arbitration'.[57] Recognising that 'the substitution of the Court's view to that of the tribunal would inevitably subvert the agreement of the parties', it endorsed the recommendation of the parliamentary Law Reform Subcommittee that no right of appeal on substantive matters should be available in international arbitrations.

However, in relation to domestic arbitration, the Division saw that there was a need for the courts to be more closely involved in the evolution of decisions that concern domestic law and practice, and recommended the retention of a limited degree of review by the Court.

50 Id., at [69].

51 *Doshion Ltd v. Sembawang Engineers and Constructors Pte Ltd* [2011] 3 SLR 118 at [3].

52 *Larsen Oil and Gas Pte Ltd v. Petroprod Ltd* (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore) [2011] 3 SLR 414 at [24].

53 *Fasi Paul Frank v. Specialty Laboratories Asia Pte Ltd* [1999] 1 SLR(R) 1138 at [15]; See also *Kwan Im Tong Chinese Temple v. Fong Choon Hung Construction Pte Ltd* [1998] 1 SLR(R) 401.

54 Id., at [18].

55 *Australian Timber Products Pte Ltd v. Koh Brothers Building & Civil Engineering Contract (Pte) Ltd* [2005] 1 SLR(R) 168.

56 Law Reform and Revision Division, Attorney General Chambers, Review of Arbitration Laws, No. 3/2001 at [2.4.1].

57 Ibid., at [2.38.1].

This led to the inclusion of a limited right of appeal on a question of law arising out of an award under Section 49(1) of the AA. In *Ahong Construction (S) Pte Ltd v. United Boulevard Pte Ltd*,[58] 'a question of law' was defined as follows:

> *A question of law means a point of law in controversy which has to be resolved after opposing views and arguments have been considered […] If the point of law is settled and not something novel and it is contended that the arbitrator made an error in the application of the law, there lies no appeal against that error for there is no question of law which calls for an opinion of the Court.*

The distinction between a question of law and an error of law – which is not subject to appeal – under Section 49(1) of the AA represents a delicate balance between deference to the authority of the tribunal and the need to ensure the principled development of Singapore arbitration jurisprudence. Nonetheless, the parties may exclude the right to appeal by agreement under Section 49(2) of the AA or by adopting institutional rules that exclude an appeal to court.[59]

Interim measures granted by arbitral tribunal

When the revised AA was enacted to bring it in line with the IAA, Parliament adopted the position that some supervision by the courts over the conduct of arbitration in domestic arbitration is desirable.[60] As such, certain powers granted to an international arbitration tribunal under Section 12 of the IAA were not granted to a domestic arbitration tribunal under Section 28 of the AA, chief of which is the ability to grant injunctions. A domestic tribunal is also not able to make orders for securing the amount in dispute; for the preservation, interim custody or sale of the subject matter; and to prevent dissipation of assets. These powers are exclusively exercisable by the court under Section 31 of the AA.

In contrast, the court has no jurisdiction under the IAA to set aside or review interim measures made by an arbitral tribunal.[61] Since international arbitration is conceptualised as a form of dispute settlement that is not bound by the narrow application of the procedural rules of the arbitral seat, judicial review of orders deciding on procedural rules would frustrate the parties' objects and run counter to the principle of party autonomy.[62] However, the authors note that leave of the High Court is required for the tribunal's order to be enforced; the possibility of refusing leave could provide some residual curial protection for the rights of both parties.[63]

58 [1993] 2 SLR(R) 208, cited with approval by the Court of Appeal in *Northern Elevator Manufacturing Sdn Bhd v. United Engineers (Singapore) Pte Ltd* (No. 2) [2004] 2 SLR(R) 494.

59 *Daimler South East Asia Pte Ltd v. Front Row Investment Holdings (Singapore) Pte Ltd* [2012] 4 SLR 837 at [15].

60 Singapore Parliamentary Reports, 5 October 2001, Volume 73, Column 2213.

61 *PT Pukuafu Indah v. Newmont Indonesia Ltd* [2012] 4 SLR 1157 at [25].

62 Id., at [23].

63 Id., at [27].

iii SIAC

SIAC is an unmistakable landmark in the arbitral landscape of the region. Founded in 1991, it was established as 'a premier, global arbitral institution' which 'has a proven track record in providing quality, efficient and neutral arbitration services to the global business community'.[64]

SIAC continues to grow exponentially. 2017 was yet another milestone year for SIAC, with SIAC recording the highest ever number of cases filed (452) and the highest ever number of administered cases (421). The total sum in dispute for new case filings with SIAC amounted to US$4.07 billion.[65] The nature of cases filed at SIAC in 2017 continued to span diverse industries, arising from key sectors such as trade, commercial, corporate and construction.[66]

In August 2015, SIAC formally commenced the review of the 2013 SIAC Rules.[67] The revision sought to take into account developments in international arbitration practice and procedure. The revised set of SIAC rules (SIAC 2016 Rules) were published in July 2016, and took effect from 1 August 2016.[68] The 2016 SIAC Rules review and streamline several procedures. The revisions include new joinder, consolidation and remedy provisions, and permit a tribunal to order remedy against non-paying parties, and to determine the seat of arbitration should the parties have failed to or are unable to agree. A fee has also been imposed on challenging arbitrators. In a major development, a claim or defence may now be dismissed early if it is 'manifestly' without legal merit or lies outside the tribunal's jurisdiction. Singapore is the first major commercial arbitration centre to introduce this procedure, drawing upon principles established in court procedure for summary judgment. These comprehensive changes will improve SIAC's efficiency and reinforce Singapore's attractiveness as a seat of arbitration.

Extending its reach into investment arbitration practice, SIAC also introduced SIAC Investment Arbitration Rules on 1 January 2017.[69] Some highlights include a default list procedure for the appointment of the sole and presiding arbitrator, strict deadlines to challenge arbitrators and discretion for proceedings to progress notwithstanding a pending challenge, a procedure for early dismissal of claims and defences; and timelines for the closure of proceedings and the submission of a draft award.

In December 2017, SIAC announced its proposal on cross-institution cooperation for the consolidation of international arbitral proceedings.[70] The proposal was initiated by Mr Gary Born, the President of the SIAC Court of Arbitration. The SIAC proposal is

64 SIAC – About Us: siac.org.sg/2014-11-03-13-33-43/about-us.

65 SIAC – Annual Report 2017: http://siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2017.pdf (SIAC Annual Report 2017).

66 Id., at 15.

67 SIAC – Annual Report 2015: siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2015.pdf (SIAC Annual Report 2015) at 7.

68 SIAC Announces the Official Release of the SIAC Rules 2016: www.siac.org.sg/images/stories/press_release/SIAC%20Announces%20the%20Official%20Release%20of%20the%20SIAC%20Rules%20%202016_30June2016.pdf.

69 SIAC Announces Official Release of the SIAC Investment Arbitration Rules: www.siac.org.sg/69-siac-news/505-siac-announces-official-release-of-the-siac-investment-arbitration-rules.

70 Proposal on Cross-Institution Consolidation Protocol: http://siac.org.sg/images/stories/press_release/2017/[Press%20Release]%20PROPOSAL%20ON%20CROSS-INSTITUTION%20CONSOLIDATION%20%20PROTOCOL.pdf.

detailed in letters from Mr Born to other arbitral institutions permitting the cross-institution consolidation of arbitral proceedings. Mr Born's and SIAC's proposed cross-institution consolidation protocol include the following features:[71]

a a new, standalone mechanism for addressing the timing of consolidation applications, the appropriate decision-maker and the applicable criteria to determine when arbitral proceedings are sufficiently related to warrant cross-institution consolidation;

b a joint committee appointed from members of the courts or boards of concerned arbitral institutions would be mandated to decide the applications with a specific committee appointed for each application; and

c once consolidated, the proceedings should be administered only by one institution applying its own arbitration rules. The institutions can agree on objective criteria to determine which institution should administer the consolidated dispute.

The primary functions of the SIAC Court of Arbitration include the appointment of arbitrators, the determination of jurisdictional challenges, alongside overall case administration supervision at SIAC.[72] Mr Gary Born has been President of the SIAC Court since April 2015, having taken over from Michael Pryles. In December 2016, SIAC also announced the appointment of Mr Davinder Singh SC as the new chair of its board of directors with effect from 16 December 2016. Mr Singh SC's appointment followed Mr Lucien Wong's (the preceding chair of SIAC) departure in light of his appointment as the Attorney-General of Singapore.

In January 2016, SIAC opened a representative office in the China (Shanghai) Pilot Free Trade Zone, with the aim of working with mainland Chinese arbitration commissions to promote the development of international arbitration and global best practices by organising training workshops and networking events for both arbitrators and practitioners.[73] SIAC also signed a memorandum of agreement with Gujarat International Finance Tec-City (GIFT) Company Limited and GIFT SEZ Limited to establish a representative office in India's first-ever international financial services centre in GIFT. This representative office was opened in August 2017. It will work closely with SIAC's existing Mumbai office to promote SIAC's services throughout India.[74]

iv The SICC and SIMC

The SICC was officially launched on 5 January 2015.[75] Although a court-based system, the SICC attempts to replicate some of the attractions of arbitration, including confidentiality, more procedural flexibility, especially in terms of pleading and leading evidence of 'foreign' law, as well as the admission of foreign counsel before the SICC. Some important differences include the unilateral appointment of the tribunal (from a list of international and Singapore judges), an opt-out appellate review, and provisions governing judgments in default, consolidation and joinder. One key factor, however, is that judgments of the SICC only have

71 Id.

72 SIAC – Annual Report 2013: www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2013.pdf.

73 SIAC Annual Report 2015 at 21.

74 SIAC Annual Report 2016 at 8.

75 Singapore International Commercial Court - Establishment of the SICC: www.sicc.gov.sg/About.aspx?id=21.

the status of a High Court judgment and not an award for the purposes of the New York Convention. In light of this, the Choice of Court Agreements Bill 2016 was introduced in Parliament in 2016. On 14 April 2016, the Choice of Court Agreements Act was passed by Parliament, implementing the 2005 Hague Convention on Choice of Courts Agreement (Convention). On 2 June 2016, Singapore ratified the Convention.[76] The Convention came into force in Singapore on 1 October 2016.[77] This is significant because the Convention serves to enhance the international enforceability of Singapore court judgments, including those of the SICC. As of January 2018, the SICC has handled 17 cases, and issued 16 written judgments, including one at the appellate level.[78]

As will be detailed below, changes have also been made to Singapore legislation to grant the SICC jurisdiction to hear proceedings arising out of international arbitration proceedings seated in Singapore.

SIMC was also officially launched in 2014.[79] The SIMC aims to provide best-in-class mediation services targeted at parties engaged in cross-border commercial disputes. SIMC shares SIAC's state-of-the-art premises in the form of Maxwell Chambers, where customised mediation suites are also provided.[80] SIMC complements SIAC's capabilities: under the innovative SIAC-SIMC Arb-Med-Arb Protocol, arbitrators and mediators are appointed by SIAC and SIMC respectively, where settlement agreements may be converted into consent orders for the purpose of enforcement.

II THE YEAR IN REVIEW

i SICC to have jurisdiction to hear IAA applications

On 9 January 2018, the Supreme Court of Judicature (Amendment) Bill was passed in Parliament. The Bill clarifies that the SICC has the same jurisdiction as the Singapore High Court to hear proceedings relating to international commercial arbitration under the IAA, and also removes the pre-action certification procedure.[81] A consequence of these amendments is that when parties choose Singapore as the seat of arbitration, applications made under the IAA (such as to set aside an award) parties can choose to bring such applications in the SICC where the conditions in the Rules of Court are met. Parties to arbitration proceedings seated in Singapore will therefore have the benefit of having the expertise of both local and

76 Ministry of Law, press release, 'Singapore Ratifies Hague Convention on Choice of Court Agreements' (2 June 2016): www.mlaw.gov.sg/content/minlaw/en/news/press-releases/singapore-ratifies-hague-convention-on-choice-of-court-agreement.html.

77 Ministry of Law, 'Choice of Court Agreements Act – Commencement' (4 October 2016): www.mlaw.gov.sg/content/dam/minlaw/corp/News/CoCAA.pdf.

78 Sundaresh Menon, 'The Rule of Law and the SICC' (Speech delivered for the Singapore International Chamber of Commerce Distinguished Speaker Series, 10 January 2018), 18-19.

79 Singapore International Mediation Centre: simc.com.sg.

80 Ibid.

81 Ministry of Law, 'Note by Senior Minister of State for Law and Finance, Indranee Rajah S.C., on The Supreme Court of Judicature (Amendment) Bill and the Singapore International Commercial Court (16 January 2018): www.mlaw.gov.sg/content/dam/minlaw/corp/News/Note%20on%20the%20SCJ%20Amendment%20Bill%20and%20SICC%20190118.pdf.

international judges with judicial knowledge in arbitration-related matters to hear such applications. However, as of now, only Singapore-qualified lawyers from Singapore law practices may appear before the SICC for IAA-related matters.[82]

ii Deregulation of third-party funding

To consolidate Singapore's position as a key seat of international commercial arbitration, a framework for third-party funding was introduced in Sections 5A and 5B of the Civil Law (Amendment) Act 2017, which came into force on 1 March 2017. Previously considered contrary to public policy, third parties may now fund a party to pursue a legal claim, and receive a share of the award should the claimant succeed. This provides a viable route for parties to finance costly proceedings, and will attract more high-value international arbitrations to Singapore.

Currently, third-party funding applies only to international arbitration and related proceedings. This includes court or mediation proceedings connected to international arbitration, applications to stay proceedings under Section 6 of the IAA or applications to enforce an arbitration agreement, and proceedings in connection with the enforcement of an award or foreign award under the IAA. Additionally, there are certain requirements that third-party funders must meet and continue to satisfy. The funder must be a professional whose principal business is the provision of funds for dispute resolution for unrelated parties, and they are subject to, *inter alia*, capital adequacy requirements and access to funds within its control.

Importantly, practitioners will have to disclose whether their clients are receiving third-party funding, and are prohibited from receiving commission or referral fees from, or hold shares or have ownership in, third-party funders. Further industry guidelines for third-party funders, lawyers and arbitrators are provided in the Law Society of Singapore's Guidance Note (10.1.1).

The framework for third-party funding is a significant milestone in the development of the country's dispute resolution infrastructure, and brings Singapore in line with key arbitral seats worldwide.

iii Developments in arbitration jurisprudence

In 2017, a number of significant decisions were made relating to applications for anti-suit injunction and applications to set aside arbitral awards. The cases discussed below are noteworthy as they either clarify novel or previously uncertain areas of the law, or demonstrate a deviation from the English position.

The court's powers to grant an anti-suit injunction in support of an arbitration agreement

In *BC Andaman Co Ltd and others v. Xie Ning Yun and another (BC Andaman)*,[83] the High Court granted a permanent anti-suit injunction to restrain the defendants from commencing or continuing with Thai court proceedings. The Thai proceedings had been commenced after both sides agreed to discontinue arbitration proceedings in Singapore.

82 Id., at 3.

83 [2017] SGHC 64.

Notably, the defendants initiated the discontinuation of the Singapore arbitration. The tribunal issued a 'with prejudice' arbitral award, which dismissed the defendants' claims and ordered the defendants to pay costs.

Two factors were considered by the High Court. First, the defendants had commenced the Thai proceedings almost immediately after the Singapore arbitration. The High Court took the view that such conduct was unconscionable and justified the grant of an anti-suit injunction.[84] Worse still, the defendants were simply re-litigating before the Thai courts matters which they were bound by the arbitration agreement to litigate before the Singapore arbitral tribunal, but had refused to continue with. Secondly, the High Court noted that the anti-suit injunction could be granted on another ground, namely to protect the substantive contractual rights of the plaintiffs to enforce the arbitration agreement.[85]

Hilton International Manage (Maldives) Pvt Ltd v. Sun Travel & Tours Pvt Ltd (Hilton)[86] follows *BC Andaman*. The *Hilton* decision raised the novel issue as to whether there would be a breach of an arbitration agreement to commence court proceedings after the arbitration has concluded, and the arbitral award has been issued, or whether such a breach of the arbitration agreement, if any, should be characterised and considered differently. [87]

Two important points were discussed in *Hilton*. First, the High Court clarified the source of its power to grant a permanent anti-suit injunction to restrain a party from instituting or continuing with proceedings in breach of an arbitration agreement. Second, the High Court also considered whether an attempt to circumvent arbitral awards would constitute a party's breach of its negative obligation not to commence proceedings or not to set aside the arbitral awards in a jurisdiction other than the seat of the arbitration.

The High Court agreed that the powers to grant injunctions pursuant to Section 12A(2) and 12(1)(i) of the IAA is limited only to interim injunctions.[88] However, the High Court disagreed with Judith Prakash J's analysis in *R1(HC)*[89] that Section 4(10) of the Civil Law Act (CLA) grants a court power to grant a permanent anti-suit injunction. On the express language of Section 4(10) of the CLA,[90] the provision only gives the court power to grant an interim injunction and not a permanent injunction. This reading was affirmed by the Court of Appeal in *Swift-Fortune Ltd v. Magnifica Marine SA*.[91] Instead, the High Court held (at [43]) that the court's power to issue a permanent anti-suit injunction is derived from Section 18(2) read with Paragraph 14 of the First Schedule of the Supreme Court of Judicature Act. The provision grants the court the power to 'grant all reliefs and remedies at law and in equity', which must include the equitable remedy of a permanent injunction. Additionally,

84 *BC Andaman* at [60].

85 *BC Andaman* at [62].

86 [2017] SGHC 56.

87 *Hilton* at [49].

88 *Hilton* at [40]. See also *R1 International Pte Ltd v. Lonstroff AG (R1(HC))* [2014] 3 SLR 166 at [40].

89 R1(HC) at [43].

90 Section 4(10) of the CLA provides: 'A Mandatory Order or an injunction may be granted or a receiver appointed by an interlocutory order of the court, either unconditionally or upon such terms and conditions as the court thinks just, in all cases in which it appears to the court to be just or convenient that such order should be made.'

91 [2007] 1 SLR(R) 629 at [64].

the High Court also clarified[92] that Article 5 of the Model Law would not prevent the court from issuing a permanent anti-suit injunction as it is not a matter governed by the Model Law, especially if the arbitration proceedings have concluded.

On the second point, the High Court took the view that there would be at least two implied negative obligations arising from a positive agreement to arbitrate.[93]

The first, as identified in the UK Supreme Court decision of *Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP*[94] (*AES UST*), is a negative obligation not to commence court proceedings stemming from an agreement to resolve any disputes by reference to arbitration.

Relying on the English cases of *C v. D*[95] and *Shashoua v. Sharma*,[96] the High Court found that a party to an arbitration agreement also has an additional negative obligation not to set aside or otherwise attack an arbitral award in jurisdictions other than the seat of the arbitration. As such, if a party attempts to reopen matters already decided in the arbitration by commencing foreign litigation proceedings, such conduct would amount to a breach of the arbitration agreement. It would also be regarded as vexatious and oppressive conduct, and can be an abuse of the court's process.[97]

In the circumstances, and applying the principle that a court would readily grant an anti-suit injunction to restrain proceedings brought in breach of an arbitration agreement,[98] the High Court granted the permanent anti-suit injunction. However, as there was an appeal pending before the foreign court, the High Court granted the relief in terms of restraining the defendant from taking any steps reliance on the foreign court's judgment. The High Court also granted[99] the plaintiff's application for an order declaring that the arbitral awards in question were final, valid and binding on the parties,[100] and an order declaring that the defendant's claim in the foreign court proceedings was in respect of disputes that had arisen out of or in connection with the arbitration agreement, and any consequential proceedings (such as an appeal) would be in breach of the arbitration agreement.

Special circumstances required for jurisdictional challenges to stay arbitration proceedings

In *BLY v. BLZ and another (BLY)*,[101] the High Court preferred a 'special circumstances' test to determine whether discretion should be exercised to stay an arbitration pending a jurisdictional challenge, instead of a 'balance of convenience' test (as submitted by the plaintiff) or an 'irreparable prejudice' test as set out in a sole prior authority.[102]

The High Court concluded that the court's statutory discretion to stay proceedings must be 'exercised judicially', requiring the court to 'exercise its discretion by reference to all

92 *Hilton* at [46].
93 *Hilton* at [53].
94 [2013] UKSC 35 at [11].
95 [2007] EWCA Civ 1282.
96 [2009] EWHC 957.
97 *Hilton* at [55]-[56].
98 *BC Andaman* at [65].
99 *Hilton* at [65].
100 Following *Noble Assurance v. Gerling-Konzern General Insurance* [2007] EWHC 253.
101 *BLY v. BLZ and another* [2017] SGHC 59.
102 *AYY v. AYZ* [2015] SGHCR 22.

the circumstances of the particular case'.[103] This is consistent with the 'fundamental feature' of Article 16(3) of the Model Law, which is that arbitral proceedings can continue despite a party having filed an application for curial review of a tribunal's jurisdictional ruling.[104] The 'special circumstances' test would therefore accurately capture the balance between the court's need to 'have control over a tribunal's decision on jurisdiction' and ward against the abuse of this remedy to hold up the arbitration.[105]

The High Court took the view that 'special circumstances' would be wide enough to include the conduct of the other party in relation to the arbitral proceedings, or manifestly and egregiously improper conduct by the tribunal.[106] However, 'special circumstances' would not include costs incurred in potentially useless arbitration proceedings, which is a 'usual and attendant by-product' of a tribunal's decision to continue proceedings;[107] nor would it include any potential detriment stemming from an award that may be passed while pending determination on a curial review (and the inconvenience associated with having to challenge the award thereafter).[108] Last, the strength of the objection to the tribunal's jurisdiction cannot 'itself be a reason to grant a stay.[109] Accordingly, the court did not grant the plaintiff's stay application, as the tribunal had ordered a disclosure of information that was not unduly sensitive, and any prejudice could be controlled by the parties' confidentiality clause.[110]

This decision reaffirms the Court's commitment to minimal curial intervention, and illustrates the high threshold for 'special circumstances' that would warrant a stay on proceedings. This should be kept in mind, and parties should diligently participate in the arbitration or risk substantial prejudice to their own case should the application for curial review ultimately fail.

Clarification of the scope of setting aside of arbitral awards

In *AKN v. ALC*,[111] the Court of Appeal clarified the law in respect of a setting aside application. At the outset, the Court of Appeal emphasised[112] that parties, having opted to subject their disputes to be resolved by arbitration, must accept the consequences of having made this decision. The court must ensure minimal intervention in the face of a setting aside application and must be careful not to hear an appeal on the legal merits of an arbitral award. Bearing these principles in mind, the Court of Appeal disagreed with the High Court's decision to set aside the entire award. Instead, the Court of Appeal reinstated parts of the arbitral award under a more restrictive reading of the grounds for challenge under the IAA and the Model Law. The decision illustrates the difference between a tribunal totally ignoring or disregarding a party's arguments and a tribunal merely misunderstanding the arguments. The former situation would suffice to constitute a breach of natural justice, whereas the latter would not.

103 *BLY* at [8].
104 *BLY* at [9].
105 *BLY* at [11].
106 *BLY* at [14] and [20].
107 *BLY* at [15].
108 *BLY* at [16].
109 *BLY* at [17].
110 *BLY* at [24] and [25].
111 [2015] 3 SLR 488 (*AKN*).
112 *AKN* at [37].

This distinction is further presented in *JVL v. Agritrade*,[113] where the High Court ruled that a breach of natural justice had been breached as the tribunal had ruled on the basis of an issue that had not been advanced in the proceedings. During the arbitration, the defendant did not at any point advance an argument on the collateral contract exception as part of its case (despite bearing the burden of doing so, having relied on the parol evidence rule). Accordingly, the tribunal was precluded from adopting the collateral contract exception as part of its 'chain of reasoning' in reaching its decision, unless it had directed the plaintiff to specifically deal with it.[114] The High Court took the view that AKN was a 'useful analogy' to the present case. Given that the collateral contract point was 'determinative of the ultimate issue before the tribunal', the High Court held that the breach of natural justice was connected to the making of the award.[115] In view of the fact that one of the arbitrators, in his dissent, had reach an opposite conclusion despite the limited evidence available to the tribunal, there was a strong suggestion that the plaintiff had suffered prejudice in 'the L W Infrastructure sense'.[116]

In *GD Midea Air Conditioning Equipment Co Ltd v. Tornado Consumer Goods Ltd (GD Midea)*,[117] the High Court allowed an application to set aside parts of an arbitral award, on the basis that the tribunal had: (1) acted in excess of its jurisdiction by making findings on issues which had not been raised by either party and, indeed, was not in the list of agreed issues; (2) breached the agreed procedure by departing from the agreed list of issues; and (3) breached the rules of natural justice by denying the applicant a full opportunity to present its case, causing the plaintiff prejudice.

On the first issue, the High Court noted[118] that the notice of arbitration, pleadings and submissions in the arbitration did not allege any breach of a specific clause in the contract between the parties. In the circumstances, the tribunal had exceeded its jurisdiction by addressing matters beyond the scope of the submission to arbitration. With respect to the agreed procedure issue, the High Court noted that the parties had deliberated on, crafted and submitted the agreed list of issues to the tribunal with the expectation that the dispute would be decided within this framework. As the tribunal's departure from the agreed list of Issues was causally related to its finding that the applicant had breached the contract (and the broader finding against the applicant), the High Court set aside the arbitral award for the tribunal's breach of agreed procedure.[119] The High Court also found that there had been a breach of the rules of natural justice as the tribunal had made a finding that there had been a breach, without giving notice to the parties.[120]

Circumscribed arbitrability of intra-corporate disputes

In *Tomolugen Holdings Ltd v. Silica Investors Limited*,[121] the Court of Appeal held that minority oppression claims under Section 216 of the Companies Act[122] are arbitrable. The Court of

113 [2016] SGHC 126 (*Agritrade*).
114 *Agritrade* at [168].
115 *Agritrade* at [190] to [193].
116 *Agritrade* at [202].
117 [2017] *SGHC* 193
118 *GD Midea* at [43].
119 *GD Midea* at [64].
120 *GD Midea* at [66].
121 [2015] SGCA 57 (*Tomolugen*).
122 Cap 50 (2006 Rev Ed).

Appeal observed[123] that, unlike claims associated with the liquidation of an insolvent company, a claim for relief under Section 216 of the Companies Act does not engage the same public policy considerations. The Court of Appeal also noted that many other jurisdictions (namely, Hong Kong and England) have held that disputes over oppressive or unfairly prejudicial conduct towards minority shareholders are arbitrable.[124]

Significantly, the Court of Appeal disagreed[125] with the High Court's holding that jurisdictional limitations on the relief that a tribunal may grant are relevant to determining arbitrability. Parties are free to apply to the court for relief that the tribunal is not empowered to award.[126] Possible procedural complexity and inconvenience do not suffice to justify rendering a dispute non-arbitrable.

Another noteworthy point arising in the decision is the Court of Appeal's endorsement of the *prima facie* approach to the threshold question. This departs from the English position. The Court of Appeal took the view that the *prima facie* approach was more consistent with what the drafters of the IAA envisaged; the word 'satisfied' in Section 6(2) of the IAA does not mean that the court is required to conduct a full merits review when faced with the threshold question.

Tomolugen was revisited in the Court of Appeal decision in *L Capital Jones Ltd & Anor v. Maniach Pte Ltd (L Capital Jones)*.[127] In this case, the appellants were unsuccessful in their application for a stay of the minority oppression proceedings that had been commenced against them. On appeal, the appellants appealed against the High Court judge's specific finding that minority oppression claims are not arbitrable. The respondent submitted that, notwithstanding *Tomolugen*, its specific oppression claim in the court proceedings was not arbitrable, and also challenged the High Court Judge's decision that the appellants had not taken a step in the proceedings, and that the dispute in the court proceedings fell within the scope of the parties' arbitration agreement.

The Court of Appeal first emphasised that *Tomolugen* 'left open the possibility that the facts of particular s 216 claims [under the Companies Act]' may raise public policy considerations against arbitration.[128] On this point, the respondent alleged that the appellants had taken out judicial management applications in Singapore and in Australia in 'bad faith'. Given that this argument was founded on 'the abuse of court process', there was 'strong public interest' in ensuring that the matter was litigated before the courts.[129] However, the Court rejected the respondent's argument and took the view that this was an argument that should have been raised before the court hearing the judicial management proceedings.[130]

The Court of Appeal also held that the appellants' earlier application to strike out the court proceedings (and not to stay the proceedings) constituted a 'step in the proceedings'. Even if the appellants did not subsequently pursue the striking-out application at the oral hearing, there mere act of filing the application would have constituted a step in the

123 *Tomolugen* at [88] – [89].

124 Id., [90] – [94].

125 Id., [97] – [103].

126 Ibid.

127 *L Capital Jones Ltd & Anor v. Maniach Pte Ltd* [2017] 1 SLR 312.

128 *L Capital* at [26].

129 *L Capital* at [28].

130 *L Capital* at [30].

proceedings. This was an invocation of the court's jurisdiction and therefore amounted to a step under Section 6(1) of the IAA. The appellants were therefore precluded from applying for a stay of the minority oppression proceedings.[131]

Stay of court proceedings in favour of arbitration pursuant to Section 6 of the IAA

In *Wilson Taylor Asia Pacific Pte Ltd v. Dyna-Jet Pte Ltd* [2017] SGCA 32 (*Wilson Taylor*),[132] the appellant made an application to stay court proceedings commenced by the respondent in favour of arbitration pursuant to Section 6 of the IAA. At first instance before an assistant registrar, the appellant's application was dismissed. The appellant appealed to a High Court judge, who also dismissed the application for stay.[133] This decision is significant, as it highlights the peculiarities that can arise when dealing with asymmetrical arbitration clauses that provide only one party with the right to decide whether to refer the dispute to arbitration or litigation.

The Court of Appeal applied *Tomolugen*, stating that Section 6 of the IAA required the court to be satisfied that three requirements had been fulfilled before an application for stay of court proceedings would be granted, namely: that there is a valid arbitration agreement between the parties to the court proceedings; that the dispute in the court proceedings (or any part thereof) falls within the scope of the arbitration agreement; and that the arbitration agreement is not null and void, inoperative or incapable of being performed.[134]

The Court of Appeal first held that there had been a valid arbitration agreement between the appellant and the respondent. It was immaterial that the clause was an 'asymmetrical' one, in that it entitled only the respondent to compel its counterparty to arbitrate a dispute and made arbitration 'entirely optional'.[135]

However, the Court of Appeal disagreed with the High Court's view that the dispute fell within the scope of the arbitration agreement in the clause. The Court of Appeal took the view that the critical words in the clause were 'at the election of [the respondent]'.[136] The Court of Appeal held that the 'only plausible way' to construe the material phrase was that 'it gave the respondent alone the option to choose whether any disputes arising in connection with the [contract], whether initiated by the appellant or the respondent, were to be resolved by arbitration or litigation'. Given that the respondent had elected to refer the dispute to litigation by commencing the court proceedings, the dispute 'never fell within the scope of the clause'. Rather, the clause would only give rise to an arbitration agreement 'only if and when the respondent elected to arbitrate a specific dispute in the future'.[137] Accordingly, the Court of Appeal dismissed the appeal.

In reaching its decision, the Court of Appeal highlighted that in Section 6 IAA stay applications, it is the applicant's burden to advance the interpretation of the arbitration agreement that would support its contention that the dispute in question could be brought within the arbitration agreement.[138]

131 *L Capital* at [78] to [83].

132 *Wilson Taylor Asia Pacific Pte Ltd v. Dyna-Jet Pte Ltd* [2017] SGCA 32.

133 See *Dyna-Jet Pte Ltd v. Wilson Taylor Asia Pacific Pte Ltd* [2017] 3 SLR 267.

134 *Wilson Taylor* at [11].

135 *Wilson Taylor* at [13].

136 *Wilson Taylor* at [16].

137 *Wilson Taylor* at [22].

138 *Wilson Taylor* at [22].

Determining whether an arbitration agreement has been formed

BCY v. BCZ (BCY)[139] involved a dispute as to whether an arbitration agreement had been formed. The parties were involved in the proposed sale of the plaintiff's shares in a company to the defendant and a co-purchaser. While seven drafts of the sale and purchase agreement, which incorporated an ICC arbitration clause, were circulated, the sale and purchase agreement was not eventually signed. The plaintiff did not proceed with the sale of the shares.

The defendant commenced arbitration pursuant to the ICC rules. The plaintiff raised a jurisdictional objection on the basis that no was arbitration agreement between the parties. The arbitrator found that the proper law of the arbitration agreement was New York law as the governing law of the main contract was New York law. Applying New York law on contract formation, the arbitrator found that an arbitration agreement came into existence. The plaintiff commenced proceedings pursuant to Section 10(3) of the IAA for a declaration that the arbitrator had no jurisdiction to hear and determine any of the defendant's claims in the arbitration.

Two issues arose before the High Court, namely:

a What was the proper governing law of the arbitration agreement?

b Applying the proper governing law of the arbitration agreement, had there been a binding arbitration agreement formed between the parties prior to the unexecuted sale and purchase agreement?

On the first issue, the plaintiff submitted that the governing law of the arbitration agreement was Singapore law. In contrast, the defendant submitted that the arbitrator had correctly found it to be New York law. The High Court affirmed (at [40]) the three-step test in *Sulamérica Cia Nacional de Seguros SA v. Enesa Engelharia SA (Sulamérica)*[140] to determine the governing law of an arbitration: the parties' express choice; the implied choice of the parties as gleaned from their intentions at the time of contracting; or the system of law with which the arbitration agreement has the closest and most real connection.

In the absence of an express choice of governing law, the dispute centred on the second step of the test. The plaintiff relied on *Firstlink Investments Corp Ltd v. GT Payment Pte Ltd (Firstlink)*[141] and submitted that decisive weight should be accorded to the law of the seat of the arbitration to determine the parties' implied choice of law. The defendant agreed with the arbitrator's finding, which was that parties impliedly choose the governing law of the main contract to govern the arbitration agreement as well.[142]

The High Court agreed with Moore-Bick LJ's approach in *Sulamérica*,[143] that is, that the parties' implied choice of law under the three-step test for determining the governing law is likely to be the same as the expressly chosen law of the substantive contract. In so doing, the High Court disapproved *Firstlink* and did not regard the case as representing the law in Singapore. Hence, where the arbitration agreement is part of the main contract, the governing law of the main contract is a strong indicator of the governing law of the arbitration agreement unless there are strong indications to the contrary. An example of a strong indicator to the contrary would be where the governing law of the main contract

139 *BCY v. BCZ* [2017] 3 SLR 357.

140 *Sulamérica Cia Nacional de Seguros SA v. Enesa Engelharia SA* [2013] 1 WLR 102.

141 *Firstlink Investments Corp Ltd v. GT Payment Pte Ltd* [2014] SGHCR 12.

142 *BCY* at [41].

143 *BCY* at [49] and [59].

would 'negate the arbitration agreement' despite the parties' clear intention to be bound to arbitrate their disputes.[144] Applying this approach, the High Court therefore found that New York law was the governing law of the arbitration. Applying New York law, it could not be said that an arbitration agreement had been formed.

BLY is significant as it conclusively clarifies the position in Singapore law where the determination of the governing law of the arbitration agreement is concerned.

Ad hoc admission of foreign counsel for arbitration-related court proceedings

As Singapore becomes an increasingly popular choice as an arbitral seat for international parties, a corollary effect of this is an increase in the number of applications for the *ad hoc* admission of foreign counsel under Section 15 of the Legal Profession Act (LPA) to represent parties in court proceedings arising out of the arbitration proceedings. In recent years, there have been at least three such applications, namely: *Re Wordsworth, Samuel Sherratt QC (Re Wordsworth)*,[145] *Re Landau, Toby Thomas QC*,[146] and *Re Harish Salve (Re Harish Salve (CA)*).[147] The applications in *Re Wordsworth* and *Re Harish Salve* were granted. As detailed in the next section, the *ad hoc* admission of Mr Stephen Jagusch QC followed *Re Wordsworth*.

The application in *Re Harish Salve (CA)* was dismissed at first instance,[148] and allowed on appeal. The decision is notable as it marks the first time a senior advocate from the Indian Bar applying for *ad hoc* admission to the Singapore Bar.[149] Applying the two-stage analysis applicable under Section 15 of the LPA, the Court of Appeal found that: (1) the appellant met the mandatory requirements set out in Section 15(1) of the LPA; and (2) in view of the foreign law issues being raised in the main setting aside application, it was 'reasonable, in the sense that there is good and sufficient reason', to admit Mr Harish Salve SC for the purposes of the setting aside application.

iii Investor–state disputes

Developments in regulatory framework for investor–state arbitration

In 1998, SIAC entered into an agreement with the International Centre for Settlement of Investment Disputes (ICSID), allowing ICSID proceedings to be conducted at SIAC. Legislation that fosters an environment friendly to investor–state arbitration has also been developed, including Section 11 of the State Immunity Act,[150] which provides that a state is not immune in proceedings before the courts of Singapore where it relates to arbitration. Further, as mentioned above, SIAC announced in 2017 the introduction of the SIAC Investment Arbitration Rules 2017.[151] The implementation of investment arbitration rules by SIAC would no doubt contribute to increasing Singapore's attractiveness as a venue to conduct investor-state arbitration.

144 BCY at [74].

145 *Re Wordsworth, Samuel Sherratt QC* [2016] 5 SLR 179.

146 *Re Landau, Toby Thomas QC* [2016] SGHC 258.

147 *Re Harish Salve* [2018] 1 SLR 345.

148 *Re Harish Salve* [2017] SGHC 28 (*Re Harish Salve (HC)*).

149 *Re Harish Salve (HC)* at [2].

150 Cap 313 (1985 Rev Ed).

151 SIAC – SIAC Announces Official Release of the SIAC Investment Arbitration Rules: www.siac.org.sg/69-siac-news/505-siac-announces-official-release-of-the-siac-investment-arbitration-rules.

Singapore's increasing prominence as a place for investor–state arbitration

Singapore has been selected as the seat of several prominent investor–state arbitrations, including *White Industries v. India* (Singapore as the seat although conducted in London), *Lao People's Democratic Republic v. Sanum Investments Ltd* (administered by the Permanent Court of Arbitration (PCA) with Singapore as the seat), and *Philip Morris v. Australia* (administered by the PCA with Singapore as the seat). In *Philip Morris v. Australia* the tribunal was called to consider the place of arbitration, with Philip Morris and the Australian government advocating for Singapore and London respectively. The tribunal eventually concluded that the choice of Singapore was the 'more natural and logical one' over London,[152] noting that the PCA has concluded a host country agreement with Singapore, but not with the United Kingdom or any institution in London.[153]

In 2016, the Kingdom of Lesotho commenced proceedings before the Singapore High Court to set aside an investment treaty award that held Lesotho liable for a denial of justice, marking the first case in Singapore in which an investor–state arbitral award on the merits has been sought to be set aside. The matter was heard in January 2017, and the Singapore High Court allowed the application in a 172-page judgment In *Kingdom of Lesotho v. Swissbourgh Diamond Mines (Pty) Limited (Kingdom of Lesotho)*.[154] After *Sanum Investments Ltd v. Government of the Lao People's Democratic Republic*,[155] this would be the second investor–state arbitration-related proceedings commenced before the Singapore courts. This attests to Singapore's growth in prominence as a preferred choice of seat for investor–state arbitration proceedings.

High court sets aside investor-state arbitration award

The dispute in the Kingdom of Lesotho dates back more than 25 years ago. The first defendant was granted mining leases in respect of five areas in Lesotho some time in 1988. Thereafter, the first defendant entered into licensing agreements with the fifth to ninth defendants by which each of the five companies would hold and exercise the rights to one of the five areas covered by the mining leases. In the middle of 1991, disputes emerged over the validity of the mining leases and the measures by Lesotho which purported to cancel them. The defendants contended that the mining leases had been unlawfully expropriated.

Lesotho is a member of the Southern African Development Community (SADC), an international organisation with separate personality under international law. The SADC was established by the SADC Treaty, which is a multilateral treaty to which 15 member states are parties. Pursuant to Article 9 of the SADC Treaty, a regional tribunal (SADC Tribunal) was established to adjudicate on disputes on the SADC Treaty. Article 10 of the SADC Treaty further provides for the establishment of the SADC Summit, which is the supreme policy-making organ of the SADC. The SADC Tribunal came into being on 14 August 2010, with the incorporation of the SADC Tribunal Protocol as part of the SADC Treaty. In 2006, SADC signed a Protocol on Finance and Investment (SADC Investment Protocol) which granted protections to investors. Under Annex 1 to the SADC Investment Protocol, an investor could commence arbitration proceedings against SADC member states if the dispute arose after 16 April 2010.

152 PCA Case No. 2012-12 Procedural Order No. 3 at [39].

153 Id., at [40].

154 [2017] SGHC 195.

155 *Sanum Investments Ltd v. Government of the Lao People's Democratic Republic* [2016] 5 SLR 536.

The arbitration agreement in Annex 1 to the SADC Investment Protocol applies to '[d]isputes between an investor and a State Party concerning an obligation of the latter in relation to an admitted investment of the former…after exhausting local remedies'.

In June 2009, the investors commenced a claim against Lesotho under the SADC Treaty and the SADC Tribunal Protocol. Pursuant to Article 9 of the SADC Treaty, the dispute was before the SADC Tribunal. However, before the dispute could even be heard, the SADC Tribunal was dissolved by resolution by the SADC Summit in August 2012.

In June 2012, the defendants commenced arbitration (under the auspices of the Permanent Court of Arbitration (PCA)) against Lesotho pursuant to the arbitration agreement contained in Annex 1 to the SADC Investment Protocol. In this arbitration, the defendants claimed that a dispute had arisen after 16 April 2010 as a result of Lesotho's alleged breach of its obligations under the SADC Treaty for contributing to the shuttering of the SADC Tribunal. The PCA tribunal issued an award (by majority) in favour of the defendants, holding that it had the jurisdiction to hear and determine the claims of the second to fourth defendants. The award also determined that Lesotho had breached its obligations In the SADC Treaty, the SADC Investment Protocol and the SADC Tribunal Protocol. The parties were ordered to establish a new tribunal to hear and determine the defendants' part-heard claims that had been pending before the SADC Tribunal. Lastly, Lesotho was ordered to pay the defendants' costs of the arbitration.

Lesotho applied to the Singapore High Court to set aside the award on the basis that the PCA tribunal lacked jurisdiction or that the award exceeded the scope of the submission to arbitration. Lesotho also applied to set aside the costs aspect of the award for breach of natural justice, as it had not been given the opportunity to present its case on costs. The Singapore High Court set aside the award entirely under Article 34(2)(a)(iii) of the Model Law.

At the outset, the High Court applied *AQZ* and clarified that it could not set aside the award under Article 16(3) of the Model Law, as the award also dealt with the merits of the dispute. Instead, the High Court agreed that a party could rely on Article 34(2)(a)(iii) of the Model Law to set aside an award on the basis that the matters in the award exceeded the scope of the tribunal's jurisdiction.[156]

Further, the High Court also decided that:

a the defendants' right to submit disputes to the SADC Tribunal did not qualify as an 'investment';[157]

b the defendants' purported investment was not 'admitted';[158]

c the dispute before the PCA tribunal did not involve an obligation of Lesotho 'in relation to' the defendants' right to submit disputes to the SADC Tribunal;[159] and

d the defendants did not exhaust local remedies, as required under the arbitration agreement in Annex 1 to the SADC Investment Protocol.[160]

156 *Kingdom of Lesotho* at [73] to [86].

157 *Kingdom of Lesotho* at [194] to [227].

158 *Kingdom of Lesotho* at [237] to [251].

159 *Kingdom of Lesotho* at [269]-[270], [276].

160 *Kingdom of Lesotho* at [305] to [319].

High Court decision on ad hoc admission of Queen's Counsel to represent a state in setting-aside proceedings

In *Re Wordsworth*, the High Court allowed the *ad hoc* admission of an English QC to represent the Kingdom of Lesotho in its set-aside application and any appeal arising therefrom. The High Court allowed the *ad hoc* admission, having accepted the applicant's submissions that the issues arising in the main setting aside application were 'fairly complex', 'novel' and would have 'significant precedential value in interpreting the [South Africa Development Community] treaties.'[161] Further, given that the issues arising were in the specific realm of public international law, it would require expertise in investor–state arbitration and public international law – areas of practice in which the applicant, Mr Samuel Wordsworth QC, possessed special qualifications and experience.

A significant aspect of the High Court's decision was its willingness to consider as 'relevant' the fact that 'parties who use Singapore as a venue for international arbitration should have the assurance that our courts will adopt a robust approach to achieve a just outcome in challenges to arbitral awards', by being 'willing to recognise the need for foreign legal representation particularly to meet the needs of litigants in situations where suitable local counsel with the requisite expertise and experience are limited or unavailable'.[162]

In its decision, the High Court also indicated that if the defendants wished to seek admission of a suitable foreign counsel (provided their prospective applicant satisfies the mandatory requirements under Section 15 of the Legal Profession Act), it would be open to them to do so.[163] In March 2018, the defendants successfully applied for the admission of Mr Stephen Jagusch QC to appear as co-counsel in the appeal.

High Court decision on service of a Singapore court order giving leave to enforce an arbitration award on a state respondent

The High Court has also affirmed the applicability of Section 14(1) of the State Immunity Act (SIA)[164] when effecting service of a Singapore court order granting leave to enforce an arbitration award (leave order).

In *Josias Van Zyl and others v. Kingdom of Lesotho (Josias Van Zyl)*,[165] the plaintiffs sought permission to serve the leave order on the Kingdom of Lesotho through substituted means, either by posting it at the local address of Lesotho's Singapore solicitors, by emailing a copy of the leave order to Lesotho's Singapore solicitors, or both.

The award that the plaintiffs sought to enforce was the subject of separate setting aside proceedings, which had been heard in January 2017. The plaintiffs sought to enforce the award pending the High Court judge's decision on the setting aside proceedings.

Lesotho is a state to which the SIA applied. The question, therefore, was whether the leave order constituted a 'writ or other document required to be served for instituting proceedings against a State' within the terms of Section 14(1) of the SIA.[166] The plaintiffs'

161 *Re Wordsworth* at [52].

162 *Re Wordsworth* at [69].

163 *Re Wordsworth* at [70].

164 State Immunity Act (Cap 313, 2014 Red Ed).

165 *Josias Van Zyl and others v. Kingdom of Lesotho* [2017] SGHCR 02.

166 *Josias Van Zyl* at [3].

application was dismissed, as the assistant registrar eventually found that the leave order did fall within the terms of Section 14(1) of the SIA. The assistant registrar provided the following reasons for his decision:

a the phrase 'writ or other document' can include documents other than originating processes;[167]

b an order giving permission to enforce an award is required to be served under O 69A Rule 6(2) of the Rules of Court, and service has the effect of instituting proceedings, at least in relation to the enforcement of the award against the counterparty.[168] The assistant registrar found support in an English decision;[169,170]

c the reference to entry of 'appearance' in Sections 14(2) and (3) of the SIA does not require that Section 14 apply only to documents in response to which an appearance must be entered. An application to set aside an order giving permission to enforce an award can be accommodated within Section 2(2)(a) of the SIA. Again, the assistant registrar found support for this in an English authority;[171,172] and

d as a matter of principle, there is no reason to exclude proceedings to enforce an award against a state from the procedural requirements on service as set out in Section 14 of the SIA. The procedural requirement ensures that a state has sufficient time and opportunity to respond to the court proceedings.[173]

The assistant registrar also rejected the plaintiffs' submission to disregard the English authorities on the ground that O 69A Rule 6(3) of the Singapore Rules of Court makes no reference to O 11 Rule 7, which implements the procedure for service of process on a foreign state. The assistant registrar took the view that the omission is a mere 'aberration', and 'cannot obviate the mandatory stipulations in s 14 of [the SIA]'. The assistant registrar also clarified that Lesotho's commencement of the setting aside proceedings were separate from the plaintiff's subsequent enforcement proceedings. Accordingly, Lesotho's initiation of the setting aside proceedings 'cannot be construed as a waiver of the procedural privileges it is entitled to' under Section 14 of the SIA.

The decision in *Josias Van Zyl* is significant as it is the first Singapore decision on Section 14 of the SIA, and clarifies the service method that must be employed where enforcement proceedings are concerned.

The plaintiffs unsuccessfully appealed the assistant registrar's decision.[174] On appeal, Ramesh J agreed[175] with the reasoning adopted by the assistant registrar, differing only on the point that whether 'entry of appearance' corresponds with an application to set aside an order granting leave to enforce an award is not so much a justification for interpreting Section 14(1) of the SIA, as it was a consequence of it. In Ramesh J's view, the anterior question

167 *Josias Van Zyl* at [14].

168 *Josias Van Zyl* at [15].

169 *Norsk Hydro ASA v. State Property Fund of Ukraine and others* [2009] *Bus LR 558 and L and Others v. Y Regional Government of X* [2015] 1 WLR 3948.

170 *Josias Van Zyl* at [16] and [17].

171 *Gold Reserve Inc v. Bolivarian Republic of Venezuela* [2016] 1 WLR 2829.

172 *Josias Van Zyl* at [18].

173 *Josias Van Zyl* at [19].

174 *Josias Van Zyl v. Kingdom of Lesotho* [2017] SGHC 104 *(Josias Van Zyl (RA))*.

175 *Josias Van Zyl (RA)* at [74].

is whether Section 14(1) of the SIA was intended to apply to a leave order.[176] If so, then a corresponding procedure must be read to extend to the time for filing an application to set aside such an order.

No doubt, the decision arising from this case will serve as much-needed guidance for parties who have chosen Singapore as the seat for investor–state arbitration proceedings. It is also a decision that will be welcomed by state parties, who can be assured that their procedural privileges under the SIA will be preserved even in the context of the service of court orders such as the leave order.

III OUTLOOK AND CONCLUSIONS

The Singapore courts continue to take a balanced approach towards the regulation of the arbitral process, applying strict scrutiny before intervening in the process or allowing a challenge to the award in annulment or enforcement proceedings. Such judicial support for arbitration, coupled with timely legislative and infrastructural developments, have allowed Singapore to bolster its reputation as an attractive jurisdiction in which to conduct arbitration, both commercial and investor–state.

SIAC's surging caseload and the increasing internationality of its cases reflects its pre-eminent profile in the region. In the hands of capable new leadership, SIAC is well positioned to scale even greater heights.

With these elements in place, Singapore has the legal and infrastructural framework to consolidate its status as the region's international arbitration centre. With the commencement of the SICC and SIMC, Singapore now offers a full suite of dispute resolution services for the region and beyond.

176 *Josias Van Zyl (RA)* at [69].

Appendix 1

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Kelvin Poon is a partner in the international arbitration, construction and projects practice group of Rajah & Tann Singapore LLP. He has represented clients in a broad range of construction, commercial and insolvency disputes before the Singapore courts and in numerous arbitrations. Kelvin regularly acts in major construction, corporate and commercial disputes for private and public listed companies, major international corporations, and financial institutions. He has represented clients in numerous institutional and *ad hoc* arbitrations involving ICC, JCAA, LCIA, SIAC and UNCITRAL rules. Kelvin also regularly appears in the High Court and the Court of Appeal in Singapore.

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