New York State Bar Association International Section Seasonal Meeting
Seoul, Korea, April 23-24, 2018.

Panel Outline (June Yeum, Clyde & Co)

1. **PT First Media TBK v Astro Nusantara International BV (Singapore Court of Appeal, 2013)**
   - Considers the question of **whether the enforcing court can dis-apply the NYC grounds (for refusing enforcement) if the unsuccessful party failed to exercise its remedies to set aside the award at the seat.**

   - Singapore international arbitration law adopts the "choice of remedies" thinking – an unsuccessful party can choose to actively challenge an award at the seat (by filing a setting aside application), or to wait passively and challenge at a later juncture by refusing enforcement.

   - Hong Kong arbitration law is less clear, and suggests that the right to exercise choice of remedies must be exercised in good faith. If the unsuccessful party delays in setting aside the award in bad faith, the grounds for refusing enforcement could be dis-applied.

2. **BCY v BCZ (Singapore High Court, 2016)**
   - **What is the law governing an arbitration agreement in the absence of an express choice of law?**

   - The NYC provides a ground for refusing enforcement if the agreement is invalid under the applicable law. This is increasingly an issue given that commercial contracts do not often express the law governing an arbitration agreement.

   - Should the implied choice of law be the law of the substantive contract, or, as the language of the NYC suggests, the law of the seat? *BCY v BCZ* [2016] SGHC 249 suggests that the substantive governing law governs the arbitration agreement.

   - *Firstlink Investments v GT Payment* suggests that neutrality is paramount when parties are in dispute, and suggests that the law of the seat applies.

3. **Applicability of accepted IA standards in Asia**
   - **Most** jurisdictions in Asia are party to NYC: Singapore, Malaysia, Indonesia, India, China, Philippines, Thailand, Japan

   - **Latest** jurisdiction to join: Myanmar (2013)

   - Notable non-NYC jurisdiction: Taiwan

   - While most jurisdictions in Asia are NYC signatories, they differ in extent to which they comport with NYC standards and other accepted IA standards (e.g. Model Law):

     (a) Singapore (faithfully applies Model Law and NYC)

- International Arbitration Act grounds for setting aside and resisting enforcement are no more and no less than Model Law and NYC respectively.

- Courts faithfully apply these grounds and rarely set aside awards.

(b) India (law partly based on Model Law)

- India's Arbitration and Conciliation Act ("IACA") has two parts. Part I deals with Indian-seated arbitration. Part II deals with enforcement of foreign awards.

- Part I is based on Model Law 1985 to some extent. Key differences between Part I and Model Law:

Area of difference	**Model Law 1985**	**IACA**
Arbitration agreement and substantive claim before court	**Art 8(1):** "A **court** before which an action is brought in a matter which is the subject of an arbitration agreement **shall**, if a party so requests not later than when submitting his first statement on the substance of the dispute, **refer the parties to arbitration** unless it finds that the **agreement is null and void, inoperative or incapable of being performed**."	**Section 8(1):** "A **judicial authority**, before which an action is brought in a matter which is the subject of an arbitration agreement **shall**, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, **refer the parties to arbitration** unless it finds that ***prima facie* no valid arbitration agreement exists."**
Failure or impossibility to act	Article 14 • Arbitrator can be removed by the appointing authority if he is unable or fails to perform his functions • Decision of appointing authority is **not subject to appeal**	Section 14 • Arbitrator's mandate terminates if he is unable or fails to perform his functions • Decision to remove arbitrator can be appealed to the court
Setting aside of award	Article 34 - Award can be set aside for, among others, being in	Section 34 - Public policy defined as fraud/ corruption; "contravention with

	conflict with public policy	the **fundamental policy of Indian law**"; "conflict with the most basic **notions of morality or justice**". - For arbitrations that involve only Indian parties, award can be set aside for "**patent illegality** appearing on the face of the award"

(c) Indonesia (non-Model Law)

- Indonesia's arbitration laws are contained in Law No 30 of 1999 dated 12 Aug 1999 ("Indo Arbitration Law").

- Indonesia's arbitration law has its own grounds for setting aside award: award being based on forged documents, opposing party concealing important documents and award being obtained through fraud.

- Default language of arbitration is Indonesian.

- Default procedure: documents-only arbitration, unless parties agree otherwise.

4. Some peculiarities of IA practice in Asia

Interim relief

- **Singapore**

  - Court-ordered interim relief (freezing of assets; interim injunctions) available but generally only prior to constitution of tribunal.

  - After tribunal is constituted, parties are expected to seek interim relief from tribunal first.

  - Security for costs is only available from the arbitral tribunal.

  - Interim relief ordered by emergency arbitrator is enforceable.

- **Indonesia**:

  - No court-ordered interim relief as court not allowed to interfere at all once dispute is referred to arbitration: Article 3, 11, Indo Arbitration Law.

- Arbitral tribunal is permitted to grant interim relief, including attachment orders or sale of perishable goods, but there is no means to enforce such orders if they are not complied with.

- **India**

  - Court-ordered interim relief (e.g. preservation or custody of subject matter; securing the amount in dispute; injunction) available, even for foreign-seated arbitrations.

  - However, once arbitral tribunal has been constituted, the court shall not entertain interim relief application unless circumstances exist which "may not render [tribunal-ordered relief] efficacious".

  - Any tribunal-ordered interim relief can be directly enforced:

    Interim relief orders by the tribunal "shall be deemed to be an order of the Court for all purposes and shall be enforceable… in the same manner as if it were an order of the Court."

  - Emergency arbitrator ("EA")

    - Indian courts will not enforce EA award per se but may take the EA's decision into account when deciding whether to grant Court-ordered interim relief

    - *See*, Raffles Design International India Private Limited v Educomp Professional Education Limited (Delhi High Court refused to enforce an EA award and the court would have to re-consider the merits of the interim relief application).

    - *See*, Avitel Post Studioz Ltd v HSBC Pi Holdings (Mauritius Ltd) (Bombay High Court granted an interim mandatory injunction being cognizant of the petitioner's success before the EA).

5. Tactical considerations in India-related arbitrations

- Indian parties quite commonly resort to interlocutory motions before the Indian courts even after the dispute is referred to arbitration.

- The objective is to have a second (or third!) bite at the cherry in the event they cannot prevail in the arbitration.

- If the Indian court reaches a different conclusion from the tribunal, the losing party in the arbitration can prejudice any potential enforcement in India
- Example: a party can seek injunction from Indian court enjoining Singapore-seated arbitration for purported lack of jurisdiction. Even though the Tribunal has yet issued its decision on jurisdiction. *See*, GMR Energy Limited vs Doosan Power Systems India (Delhi High Court, 2017)

- To counter such tactics, one must carefully consider pre-empting such tactical play by for e.g., seeking anti-suit injunction from the tribunal or court of the seat.

Prepared by:

June Junghye Yeum
Partner, Singapore

June is a senior equity partner in the Singapore and New York offices of Clyde & Co, specializing in cross-border disputes. She has extensive experience representing clients in international commercial arbitration and represents blue-chip Asian and multinational companies in large-scale cross-border disputes and international arbitrations.

June has been consistently recognized as one of her field's top practitioners. She has been singled out by Legal 500 Asia Pacific 2018 for her "outstanding quality of work and commitment to clients" and is recognized as a recommended lawyer in the Singapore International Arbitration category. June has also been described as "one of a handful of go-to individuals in the field" (Chambers Asia Pacific 2016), "an exceptional advocate" (Chambers Global 2015), and "a standout practitioner and fierce negotiator" (Chambers Asia Pacific 2015). Chambers Asia Pacific ranked her in Band 1 for Dispute Resolution-Arbitration category in South Korea (2015).

June is an arbitrator/panellist appointed by the SIAC, ICDR/AAA, Indonesia BANI Arbitration Center, KCAB, and WIPO. June has also served as arbitrator in the SIAC arbitration matters.

June has extensive experience in cases involving equipment defect and non-payment in project disputes. Among her many wins, she successfully represented an Asian contractor in arbitration over installation of power equipment; won an arbitration claim on behalf of a US electronics company over warranty and defect issues; obtained an early favorable settlement in favor of a multinational consortium in relation to delay and disruption damages, and has handled a USD 102 million claim on behalf of a multinational contractor relating to a power plant project in India.

Shaun Leong

Senior Associate, Singapore

Upon graduating with First Class Honours, Shaun served as a judge of the Supreme Court of Singapore for five years, where he heard and decided applications in a wide range of complex commercial cases.

Shaun published seminal judgments on international arbitration law. The decisions include *Firstlink Investments v GT Payment* on the applicable law governing an arbitration agreement, and *Titan Unity*, endorsed by the Singapore Court of Appeal, on the threshold to determine the existence of a valid arbitration agreement.

As a practitioner, Shaun was substantially engaged in all aspects of legal and strategic work on a mass tort product liability case arising out of South Korea; including work on mass civil claims filed by victims, mediation, settlement and compensation, forensic investigations work in cooperation with Korean authorities, criminal defence work in relation to charged individuals, and strategic / legal advice re communications with media and political stakeholders.

Shaun represented one of the world's largest Japanese car manufacturers in a Japan Commercial Arbitration Association arbitration on a contractual termination dispute, where a Middle Eastern claimant alleged failure to assist with fulfilling licensing requirements, and alleged breach of warranties.

In 2017, Shaun successfully represented a global energy client in an SIAC Emergency Arbitration in obtaining emergency relief to protect and preserve the client's assets in a multi-million dollar commodities dispute.

Shaun is a contributing author to two leading texts, first the Singapore International Arbitration Law and Practice (2nd Ed), and second the Singapore Civil Procedure ("The White Book"), in charge of the chapters relating to international arbitration, Singapore arbitration and the SICC.

Gerald Leong

Associate, Singapore

After obtaining his Bachelor of Laws (with First Class honours) from the National University of Singapore, and his Master of Laws from Boston University in the US, Gerald was admitted to the Singapore Bar. As an Associate in Clasis LLC (Clyde & Co's associated Singapore firm), Gerald has full rights of audience before the Singapore Courts.

Gerald frequently represents prominent Korean-headquartered multinational corporations across various sectors, such as construction, trading, commodities, marine, technology and consumer electronics.

He is well versed in complex arbitration-related issues, such as multi-party/ multi-contract disputes, jurisdictional challenges, alter ego claims, ancillary relief, choice of law, and curial intervention. Having attended the SIAC Academy in 2017, Gerald is also familiar with some of the latest innovations in SIAC arbitral procedure, such as joinder, consolidation, expedited procedure and early dismissal of claims.

Gerald represented a Korean-headquartered contractor in an SIAC arbitration (with ancillary court proceedings in New York and India) against the employer arising out of a power plant project in India. The disputed issues included allegations of defects and enforceability of a corporate guarantee.

Gerald also represented a prominent Korean-headquartered contractor in arbitration against a Thai bank in relation to the enforcement of performance bonds.

In addition, Gerald has advised on a number of construction-related matters, including the viability of delay claims and termination risks.

UNITED NATIONS CONFERENCE
ON INTERNATIONAL COMMERCIAL ARBITRATION

CONVENTION

ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

UNITED NATIONS
1958

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in

the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) the duly authenticated original award or a duly certified copy thereof;

(b) the original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) the recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent author referred to in article V (1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and

practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound ~~by~~ (to apply) the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

FOR AFGHANISTAN:
POUR L'AFGHANISTAN:
阿富汗
За Афганистан
POR EL AFGANISTÁN:

FOR ALBANIA:
POUR L'ALBANIE:
阿爾巴尼亞
За Албанию
POR ALBANIA:

FOR ARGENTINA: Subject to the declaration contained
POUR L'ARGENTINE: in the final act.
阿根廷
За Аргентину
POR LA ARGENTINA: 26 August 1958.

FOR AUSTRALIA:
POUR L'AUSTRALIE:
澳大利亞
За Австралию
POR AUSTRALIA:

FOR AUSTRIA:
POUR L'AUTRICHE:
奧地利
За Австрию
POR AUSTRIA:

FOR THE KINGDOM OF BELGIUM:
POUR LE ROYAUME DE BELGIQUE:
比利時王國
За Королевство Бельгии
POR EL REINO DE BÉLGICA:

Joseph Nisot.

FOR BOLIVIA:
POUR LA BOLIVIE:
玻利維亞
За Боливию
POR BOLIVIA:

FOR BRAZIL:
POUR LE BRÉSIL:
巴西
За Бразилию
POR EL BRASIL:

FOR BULGARIA:
POUR LA BULGARIE:
保加利亞
За Болгарию
POR BULGARIA:

Bulgaria will apply the Convention to recognition and enforcement of awards made in the territory of another contracting State. With regard to awards made in the territory of non-contracting States it will apply the Convention only to the extent to which these States grant reciprocal treatment.

Agenzier
17 XII 1958

FOR THE UNION OF BURMA:
POUR L'UNION BIRMANE:
緬甸聯邦
За Бирманский Союз
POR LA UNIÓN BIRMANA:

FOR THE BYELORUSSIAN SOVIET SOCIALIST REPUBLIC:
POUR LA RÉPUBLIQUE SOCIALISTE SOVIÉTIQUE DE BIÉLORUSSIE:
白俄羅斯蘇維埃社會主義共和國
За Белорусскую Советскую Социалистическую Республику
POR LA REPÚBLICA SOCIALISTA SOVIÉTICA DE BIELORRUSIA:

29/XII-1958 г.

FOR CAMBODIA:
POUR LE CAMBODGE:
高棉
За Камбоджу
POR CAMBOJA:

FOR CANADA:
POUR LE CANADA:
加拿大
За Канаду
POR EL CANADÁ:

FOR CEYLON:
POUR CEYLAN:
錫蘭
За Цейлон
POR CEILÁN:

N. T. D. Kamakaratne.

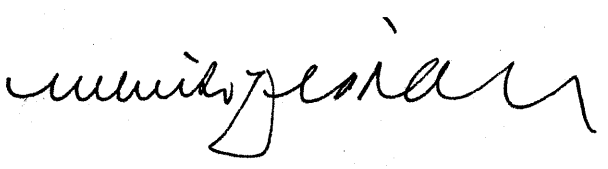
December 30th, 1958.

FOR CHILE:
POUR LE CHILI:
智利
За Чили
POR CHILE:

FOR CHINA:
POUR LA CHINE:
中國
За Китай
POR LA CHINA:

FOR COLOMBIA:
POUR LA COLOMBIE:
哥倫比亞
За Колумбию
POR COLOMBIA:

FOR COSTA RICA:
POUR LE COSTA-RICA:
哥斯大黎加
За Коста-Рику
POR COSTA RICA:



FOR CUBA:
POUR CUBA:
古巴
За Кубу
POR CUBA:

FOR CZECHOSLOVAKIA:
POUR LA TCHÉCOSLOVAQUIE:
捷克斯拉夫
За Чехословакию
POR CHECOESLOVAQUIA: Czechoslovakia will apply the Convention to recognition and enforcement of awards made in the territory of another contracting State. With regard to awards made in the territory of non-contracting States it will apply the Convention only to the extent to which these states grant reciprocal treatment.

Jaroslav Pšťolka
October 3, 1958

FOR DENMARK:
POUR LE DANEMARK:
丹麥
За Данию
POR DINAMARCA:

FOR THE DOMINICAN REPUBLIC:
POUR LA RÉPUBLIQUE DOMINICAINE:
多明尼加共和國
За Доминиканскую Республику
POR LA REPÚBLICA DOMINICANA:

FOR ECUADOR:
POUR L'EQUATEUR:
厄瓜多
За Эквадор
POR EL ECUADOR:

El Ecuador, a base de reciprocidad, aplicará la Convención al reconocimiento y a la ejecución de sentencias arbitrales dictadas en el territorio de otro Estado Contratante únicamente y sólo cuando tales sentencias se hayan pronunciado sobre litigios surgidos de relaciones jurídicas consideradas commerciales por el Derecho ecuatoriano

José A. Correa
Dec 17/1958

FOR EL SALVADOR:
POUR LE SALVADOR:
薩爾瓦多
За Сальвадор
POR EL SALVADOR:

M. Rafael Urquía
Jose Chin

FOR ETHIOPIA:
POUR L'ETHIOPIE:
阿比西尼亞
За Эфиопию
POR ETIOPÍA:

FOR THE FEDERATION OF MALAYA:
POUR LA FÉDÉRATION DE MALAISIE:
馬來亞聯邦
За Малайскую Федерацию
POR LA FEDERACIÓN MALAYA:

FOR FINLAND:
POUR LA FINLANDE:
芬蘭
За Финляндию
POR FINLANDIA:

L. A. Knutsberg. -
Dec. 29th, 1958.

FOR FRANCE:
POUR LA FRANCE:
法蘭西
За Францию
POR FRANCIA:

G. Gorse - Lecot
25 Novembre 1958

FOR THE FEDERAL REPUBLIC OF GERMANY:
POUR LA RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE:
德意志聯邦共和國
За Федеративную Республику Германии
POR LA REPÚBLICA FEDERAL ALEMANA:

H. Brion.

FOR GHANA:
POUR LE GHANA:
迦納
За Гану
POR GHANA:

FOR GREECE:
POUR LA GRÈCE:
希臘
За Грецию
POR GRECIA:

FOR GUATEMALA:
POUR LE GUATEMALA:
瓜地馬拉
За Гватемалу
POR GUATEMALA:

FOR HAITI:
POUR HAÏTI:
海地
За Гаити
POR HAITÍ:

FOR THE HOLY SEE:
POUR LE SAINT-SIÈGE:
教廷
За Святейший Престол
POR LA SANTA SEDE:

FOR HONDURAS:
POUR LE HONDURAS:
洪都拉斯
За Гондурас
POR HONDURAS:

FOR HUNGARY:
POUR LA HONGRIE:
匈牙利
За Венгрию
POR HUNGRÍA:

FOR ICELAND:
POUR L'ISLANDE:
冰島
За Исландию
POR ISLANDIA:

FOR INDIA:
POUR L'INDE:
印度
За Индию
POR LA INDIA:

FOR INDONESIA:
POUR L'INDONÉSIE:
印度尼西亞
За Индонезию
POR INDONESIA:

For Iran:
Pour l'Iran:
伊朗
За Иран
Por Irán:

For Iraq:
Pour l'Irak:
伊拉克
За Ирак
Por Irak:

For Ireland:
Pour l'Irlande:
愛爾蘭
За Ирландию
Por Irlanda:

For Israel:
Pour Israël:
以色列
За Израиль
Por Israel:

For Italy:
Pour l'Italie:
義大利
За Италию
Por Italia:

For Japan:
Pour le Japon:
日本
За Японию
Por el Japón:

FOR THE HASHEMITE KINGDOM OF JORDAN:
POUR LE ROYAUME DE LA JORDANIE HACHÉMITE:
約但哈希米德王國
За Хашемитское Королевство Иордании
POR EL REINO HACHEMITA DE JORDANIA:

FOR THE REPUBLIC OF KOREA:
POUR LA RÉPUBLIQUE DE CORÉE:
大韓民國
За Корейскую Республику
POR LA REPÚBLICA DE COREA:

FOR LAOS:
POUR LE LAOS:
寮國
За Лаос
POR LAOS:

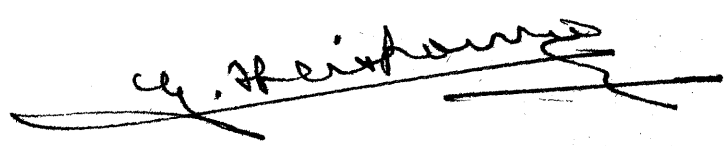
FOR LEBANON:
POUR LE LIBAN:
黎巴嫩
За Ливан
POR EL LÍBANO:

FOR LIBERIA:
POUR LE LIBÉRIA:
賴比瑞亞
За Либерию
POR LIBERIA:

FOR LIBYA:
POUR LA LIBYE:
利比亞
За Ливию
POR LIBIA:

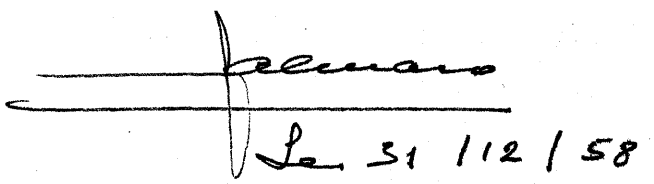
FOR LIECHTENSTEIN:
POUR LE LIECHTENSTEIN:
力喜騰斯坦因
За Лихтенштейн
POR LIECHTENSTEIN:

FOR THE GRAND DUCHY OF LUXEMBOURG:
POUR LE GRAND-DUCHÉ DE LUXEMBOURG:
盧森堡大公國
За Великое Герцогство Люксембург
POR EL GRAN DUCADO DE LUXEMBURGO:



FOR MEXICO:
POUR LE MEXIQUE:
墨西哥
За Мексику
POR MÉXICO:

FOR MONACO:
POUR MONACO:
摩納哥
За Монако
POR MÓNACO:



FOR MOROCCO:
POUR LE MAROC:
摩洛哥
За Марокко
POR MARRUECOS:

FOR NEPAL:
POUR LE NÉPAL:
尼泊爾
За Непал
POR NEPAL:

FOR THE KINGDOM OF THE NETHERLANDS:
POUR LE ROYAUME DES PAYS-BAS:
荷蘭王國
За Королевство Нидерландов
POR EL REINO DE LOS PAÍSES BAJOS:

FOR NEW ZEALAND:
POUR LA NOUVELLE-ZÉLANDE:
紐西蘭
За Новую Зеландию
POR NUEVA ZELANDIA:

FOR NICARAGUA:
POUR LE NICARAGUA:
尼加拉瓜
За Никарагуа
POR NICARAGUA:

FOR THE KINGDOM OF NORWAY:
POUR LE ROYAUME DE NORVÈGE:
挪威王國
За Королевство Норвегии
POR EL REINO DE NORUEGA:

FOR PAKISTAN:
POUR LE PAKISTAN:
巴基斯坦
За Пакистан
POR EL PAKISTÁN:

Khwaja Muhammad Kaiseruddin
30th of December 1958.

FOR PANAMA:
POUR LE PANAMA:
巴拿馬
За Панаму
POR PANAMÁ:

FOR PARAGUAY:
POUR LE PARAGUAY:
巴拉圭
За Парагвай
POR EL PARAGUAY:

FOR PERU:
POUR LE PÉROU:
祕魯
За Перу
POR EL PERÚ:

FOR THE PHILIPPINE REPUBLIC:
POUR LA RÉPUBLIQUE DES PHILIPPINES:
菲律賓共和國
За Филиппинскую Республику
POR LA REPÚBLICA DE FILIPINAS:

The Philippine delegation signs ad referendum this convention with the reservation that it does so on the basis of reciprocity and declares that the Philippines will apply the convention to the recognition and enforcement of awards made only in the territory of another contracting State pursuant to Art. 1, paragraph 3 of the

FOR POLAND:
POUR LA POLOGNE:
波蘭
За Польшу
POR POLONIA:

Joseph Machowski
with reservation as mentioned in Article I par. 3

FOR PORTUGAL:
POUR LE PORTUGAL:
葡萄牙
За Португалию
POR PORTUGAL:

FOR ROMANIA:
POUR LA ROUMANIE:
羅馬尼亞
За Румынию
POR RUMANIA:

FOR SAN MARINO:
POUR SAINT-MARIN:
聖馬利諾
За Сан-Марино
POR SAN MARINO:

FOR SAUDI ARABIA:
POUR L'ARABIE SAOUDITE:
沙烏地阿拉伯
За Саудовскую Аравию
POR ARABIA SAUDITA:

POUR L'ESPAGNE:
西班牙
За Испанию
POR ESPAÑA:

FOR THE SUDAN:
POUR LE SOUDAN:
蘇丹
За Судан
POR EL SUDÁN:

FOR SWEDEN:
POUR LA SUÈDE:
瑞典
За Швецию
POR SUECIA:

agda Rössel Dec. 23. 1958

FOR SWITZERLAND:
POUR LA SUISSE:
瑞士
За Швейцарию
POR SUIZA:

Felix Schnyder 29 dicembre 1958

FOR THAILAND:
POUR LA THAÏLANDE:
泰國
За Таиланд
POR TAILANDIA:

FOR TUNISIA:
POUR LA TUNISIE:
突尼西亞
За Тунис
POR TÚNEZ:

FOR TURKEY:
POUR LA TURQUIE:
土耳其
За Турцию
POR TURQUÍA:

FOR THE UKRAINIAN SOVIET SOCIALIST REPUBLIC:
POUR LA RÉPUBLIQUE SOCIALISTE SOVIÉTIQUE D'UKRAINE:
烏克蘭蘇維埃社會主義共和國
За Украинскую Советскую Социалистическую Республику
POR LA REPÚBLICA SOCIALISTA SOVIÉTICA DE UCRANIA:

29. XII. 1958 г.

FOR THE UNION OF SOUTH AFRICA:
POUR L'UNION SUD-AFRICAINE:
南非聯邦
За Южно-Африканский Союз
POR LA UNIÓN SUDAFRICANA:

FOR THE UNION OF SOVIET SOCIALIST REPUBLICS:
POUR L'UNION DES RÉPUBLIQUES SOCIALISTES SOVIÉTIQUES:
蘇維埃社會主義共和國聯邦
За Союз Советских Социалистических Республик
POR LA UNIÓN DE REPÚBLICAS SOCIALISTAS SOVIÉTICAS:

29-XII-58 г.

FOR THE UNITED ARAB REPUBLIC:
POUR LA RÉPUBLIQUE ARABE UNIE:
聯合阿拉伯共和國
За Объединенную Арабскую Республику
POR LA REPÚBLICA ARABE UNIDA:

FOR THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND:
POUR LE ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD:
大不列顛及北愛爾蘭聯合王國
За Соединенное Королевство Великобритании и Северной Ирландии
POR EL REINO UNIDO DE LA GRAN BRETAÑA E IRLANDA DEL NORTE:

FOR THE UNITED STATES OF AMERICA:
POUR LES ETATS-UNIS D'AMÉRIQUE:
美利堅合衆國
За Соединенные Штаты Америки
POR LOS ESTADOS UNIDOS DE AMÉRICA:

FOR URUGUAY:
POUR L'URUGUAY:
烏拉圭
За Уругвай
POR EL URUGUAY:

FOR VENEZUELA:
POUR LE VENEZUELA:
委內瑞拉
За Венесуэлу
POR VENEZUELA:

FOR VIET-NAM:
POUR LE VIETNAM:
越南
За Вьетнам
POR VIET-NAM:

FOR YEMEN:
POUR LE YÉMEN:
葉門
За Йемен
POR EL YEMEN:

FOR YUGOSLAVIA:
POUR LA YOUGOSLAVIE:
南斯拉夫
За Югославию
POR YUGOESLAVIA:

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Celgard, LLC v. SK Innovation Co., Ltd., Fed.Cir.(N.C.), July 6, 2015

134 S.Ct. 746
Supreme Court of the United States

DAIMLER AG, Petitioner
v.
Barbara BAUMAN et al.

No. 11–965.
|
Argued Oct. 15, 2013.
|
Decided Jan. 14, 2014.

Synopsis

Background: Argentinian residents brought suit against German corporation under the Alien Tort Statute (ATS), and the Torture Victims Protection Act (TVPA), alleging that its wholly-owned Argentinian subsidiary collaborated with state security forces to kidnap, detain, torture, and kill the plaintiffs or their relatives during Argentina's "Dirty War." The United States District Court for the Northern District of California, Ronald M. Whyte, J., 2007 WL 486389, dismissed the case for lack of personal jurisdiction, and plaintiffs appealed. The United States Court of Appeals for the Ninth Circuit, Reinhardt, Circuit Judge, 644 F.3d 909,reversed, and certiorari was granted.

[Holding:] The Supreme Court, Justice Ginsburg, held that due process did not permit exercise of general jurisdiction over the corporation in California.

Reversed.

Justice Sotomayor filed opinion concurring in judgment.

West Headnotes (12)

[1] Courts
Actions by or Against Nonresidents, Personal Jurisdiction In;"Long-Arm" Jurisdiction

California's long-arm statute allows the exercise of personal jurisdiction to the full extent permissible under the United States Constitution. West's Ann.Cal.C.C.P. § 410.10.

93 Cases that cite this headnote

[2] Federal Courts
Related contacts and activities;specific jurisdiction

Adjudicatory authority in which the suit arises out of or relates to the defendant's contacts with the forum is called "specific jurisdiction."

305 Cases that cite this headnote

[3] Federal Courts
Corporations and business organizations

Federal Courts
Particular Entities, Contexts, and Causes of Action

A court may assert general jurisdiction over foreign sister-state or foreign-country corporations to hear any and all claims against them when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State.

1131 Cases that cite this headnote

[4] Federal Courts
Manufacture, Distribution, and Sale of Products

Although the placement of a product into the stream of commerce may bolster an affiliation germane to specific jurisdiction, such contacts do not warrant a determination that, based on those ties, the forum has general jurisdiction over a defendant.

274 Cases that cite this headnote

[5] Federal Courts

Corporations and business organizations

A corporation's continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.

65 Cases that cite this headnote

[6] **Federal Courts**

Particular Entities, Contexts, and Causes of Action

General jurisdiction requires affiliations so continuous and systematic as to render the foreign corporation essentially at home in the forum State, i.e., comparable to a domestic enterprise in that State.

987 Cases that cite this headnote

[7] **Constitutional Law**

Business, business organizations, and corporations in general

Federal Courts

Related or affiliated entities;parent and subsidiary

Due process did not permit exercise of general jurisdiction over German corporation in California based on services performed there by its United States subsidiary that were "important" to it. U.S.C.A. Const.Amend. 14.

147 Cases that cite this headnote

[8] **Federal Courts**

Agents, Representatives, and Other Third Parties

Agency relationships may be relevant to the existence of specific jurisdiction.

51 Cases that cite this headnote

[9] **Federal Courts**

Corporations and business organizations

A corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there.

32 Cases that cite this headnote

[10] **Constitutional Law**

Business, business organizations, and corporations in general

Federal Courts

Related or affiliated entities;parent and subsidiary

Even assuming that German corporation's United States subsidiary was at home in California and that its contacts with California could be imputed to the corporation, due process did not permit exercise of general jurisdiction over the corporation in tort action brought in California by Argentinian citizens based on acts committed in Argentina by corporation's Argentinian subsidiary, where neither the parent nor the United States subsidiary was incorporated in California, nor did either entity have its principal place of business there. U.S.C.A. Const.Amend. 14.

222 Cases that cite this headnote

[11] **Federal Courts**

Corporations and business organizations

A corporation that operates in many places can scarcely be deemed at home for purposes of general jurisdiction in all of them; otherwise, "at home" would be synonymous with "doing business" tests framed before specific jurisdiction evolved in the United States.

162 Cases that cite this headnote

[12] **Federal Courts**

Related or affiliated entities;parent and subsidiary

Considerations of international comity weighed against subjecting German corporation to general jurisdiction in California in action under the Alien Tort Statute (ATS) and the Torture Victim Protection Act (TVPA) brought by Argentinian citizens based on acts

of its Argentinian subsidiary. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. § 1350.

1 Cases that cite this headnote

**748 *Syllabus* *

Plaintiffs (respondents here) are twenty-two residents of Argentina who filed suit in California Federal District Court, naming as a defendant DaimlerChrysler Aktiengesellschaft (Daimler), a German public stock company that is the predecessor to petitioner Daimler AG. Their complaint alleges that Mercedes–Benz Argentina (MB Argentina), an Argentinian subsidiary of Daimler, collaborated with state security forces during Argentina's 1976–1983 "Dirty War" to kidnap, detain, torture, and kill certain MB Argentina workers, among them, plaintiffs or persons closely related to plaintiffs. Based on those allegations, plaintiffs asserted claims under the Alien Tort Statute and the Torture Victim Protection Act of 1991, as well as under California and Argentina law. Personal jurisdiction over Daimler was predicated on the California contacts of Mercedes–Benz USA, LLC (MBUSA), another Daimler subsidiary, one incorporated in Delaware with its principal place of business in New Jersey. MBUSA distributes Daimler-manufactured vehicles to independent dealerships throughout the United States, including California. Daimler moved to dismiss the action for want of personal jurisdiction. Opposing that motion, plaintiffs argued that jurisdiction over Daimler could be founded on the California contacts of MBUSA. The District Court granted Daimler's motion to dismiss. Reversing the District Court's judgment, the Ninth Circuit held that MBUSA, which it assumed to fall within the California courts' all-purpose jurisdiction, was Daimler's "agent" for jurisdictional purposes, so that Daimler, too, should generally be answerable to suit in that State.

Held : Daimler is not amenable to suit in California for injuries allegedly caused by conduct of MB Argentina that took place entirely outside the United States. Pp. 753 – 763.

(a) California's long-arm statute allows the exercise of personal jurisdiction to the full extent permissible under the U.S. Constitution. Thus, the inquiry here is whether the Ninth Circuit's holding comports with the limits imposed by federal due process. See Fed. Rule Civ. Proc. 4(k)(1)(A). P. 753.

(b) For a time, this Court held that a tribunal's jurisdiction over persons was necessarily limited by the geographic bounds of the forum. See *Pennoyer v. Neff,* 95 U.S. 714, 24 L.Ed. 565. That rigidly territorial focus eventually yielded to a less wooden understanding, exemplified by the Court's pathmarking decision in *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. *International Shoe* presaged the recognition of two personal jurisdiction categories: One category, today called "specific jurisdiction," see *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. ——, ——, 131 S.Ct. 2846, 2853, 180 L.Ed.2d 796, **749 encompasses cases in which the suit "arise[s] out of or relate[s] to the defendant's contacts with the forum," *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414, n. 8, 104 S.Ct. 1868, 80 L.Ed.2d 404. *International Shoe* distinguished exercises of specific, case-based jurisdiction from a category today known as "general jurisdiction," exercisable when a foreign corporation's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." 326 U.S., at 318, 66 S.Ct. 154.

Since *International Shoe,* "specific jurisdiction has become the centerpiece of modern jurisdiction theory." *Goodyear,* 564 U.S., at ——, 131 S.Ct., at 2854. This Court's general jurisdiction opinions, in contrast, have been few. See *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485, *Helicopteros,* 466 U.S., at 416, 104 S.Ct. 1868, and *Goodyear,* 564 U.S., at ——, 131 S.Ct., at ——. As is evident from these post-*International Shoe* decisions, while specific jurisdiction has been cut loose from *Pennoyer* 's sway, general jurisdiction has not been stretched beyond limits traditionally recognized. Pp. 753 – 758.

(c) Even assuming, for purposes of this decision, that MBUSA qualifies as at home in California, Daimler's affiliations with California are not sufficient to subject it to the general jurisdiction of that State's courts. Pp. 758 – 763.

(1) Whatever role agency theory might play in the context of general jurisdiction, the Court of Appeals' analysis in this case cannot be sustained. The Ninth Circuit's

agency determination rested primarily on its observation that MBUSA's services were "important" to Daimler, as gauged by Daimler's hypothetical readiness to perform those services itself if MBUSA did not exist. But if "importan[ce]" in this sense were sufficient to justify jurisdictional attribution, foreign corporations would be amenable to suit on any or all claims wherever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the "sprawling view of general jurisdiction" rejected in *Goodyear*. 564 U.S., at ——, 131 S.Ct., at 2856. Pp. 758 – 760.

(2) Even assuming that MBUSA is at home in California and that MBUSA's contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California. The paradigm all-purpose forums for general jurisdiction are a corporation's place of incorporation and principal place of business. *Goodyear,* 564 U.S., at ——, 131 S.Ct., at 2853–2854. Plaintiffs' reasoning, however, would reach well beyond these exemplar bases to approve the exercise of general jurisdiction in every State in which a corporation "engages in a substantial, continuous, and systematic course of business." Brief for Respondents 16–17, and nn. 7–8. The words "continuous and systematic," plaintiffs and the Court of Appeals overlooked, were used in *International Shoe* to describe situations in which the exercise of *specific* jurisdiction would be appropriate. See 326 U.S., at 317, 66 S.Ct. 154. With respect to all-purpose jurisdiction, *International Shoe* spoke instead of "instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit ... on causes of action arising from dealings entirely distinct from those activities." *Id.,* at 318, 66 S.Ct. 154. Accordingly, the proper inquiry, this Court has explained, is whether a foreign corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Goodyear,* 564 U.S., at ——, 131 S.Ct., at 2851.

****750** Neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business there. If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA's sales are sizable. No decision of this Court sanctions a view of general jurisdiction so grasping. The Ninth Circuit, therefore, had no warrant to conclude that Daimler, even with MBUSA's contacts attributed to it, was at home in California, and hence subject to suit there on claims by foreign plaintiffs having nothing to do with anything that occurred or had its principal impact in California. Pp. 760 – 762.

(3) Finally, the transnational context of this dispute bears attention. This Court's recent precedents have rendered infirm plaintiffs' Alien Tort Statute and Torture Victim Protection Act claims. See *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. ——, ——, 133 S.Ct. 1659, ——, 185 L.Ed.2d 671 and *Mohamad v. Palestinian Authority,* 566 U.S. ——, ——, 132 S.Ct. 1702, ——, 182 L.Ed.2d 720. The Ninth Circuit, moreover, paid little heed to the risks to international comity posed by its expansive view of general jurisdiction. Pp. 762 – 763.

644 F.3d 909, reversed.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, THOMAS, BREYER, ALITO, and KAGAN, JJ., joined. SOTOMAYOR, J., filed an opinion concurring in the judgment.

Attorneys and Law Firms

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Edwin S. Kneedler, Washington, DC, for the United States as amicus curiae, by special leave of the Court, supporting the petitioner.

Kevin Russell, Washington, DC, for Respondents.

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Kevin K. Russell, Goldstein & Russell, P.C., Counsel of Record, Washington, DC, Pamela S. Karlan, Jeffrey L. Fisher, Stanford Law School, Supreme Court, Litigation Clinic, Stanford, Terrence P. Collingsworth, Christian Levesque, Conrad & Scherer, LLP, Washington, DC, for Respondents.

Opinion

Justice GINSBURG delivered the opinion of the Court.

***120** This case concerns the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States. The litigation commenced in 2004, when twenty-two Argentinian residents [1] filed a complaint in the United States District Court for the Northern District ***121** of California against DaimlerChrysler Aktiengesellschaft ****751** (Daimler), [2] a German public stock company, headquartered in Stuttgart, that manufactures Mercedes–Benz vehicles in Germany. The complaint alleged that during Argentina's 1976–1983 "Dirty War," Daimler's Argentinian subsidiary, Mercedes–Benz Argentina (MB Argentina) collaborated with state security forces to kidnap, detain, torture, and kill certain MB Argentina workers, among them, plaintiffs or persons closely related to plaintiffs. Damages for the alleged human-rights violations were sought from Daimler under the laws of the United States, California, and Argentina. Jurisdiction over the lawsuit was predicated on the California contacts of Mercedes–Benz USA, LLC (MBUSA), a subsidiary of Daimler incorporated in Delaware with its principal place of business in New Jersey. MBUSA distributes Daimler-manufactured vehicles to independent dealerships throughout the United States, including California.

The question presented is whether the Due Process Clause of the Fourteenth Amendment precludes the District Court from exercising jurisdiction over Daimler in this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint. Plaintiffs invoked the court's general or all-purpose jurisdiction. California, they urge, is a place where Daimler may be sued on any and all claims against it, wherever in the world the claims may arise. For example, as plaintiffs' counsel affirmed, under the proffered jurisdictional theory, if a Daimler-manufactured vehicle overturned in Poland, injuring a Polish driver and passenger, the injured parties could maintain a design defect suit in California. See Tr. of Oral Arg. 28–29. Exercises of personal jurisdiction so exorbitant, ***122** we hold, are barred by due process constraints on the assertion of adjudicatory authority.

In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. ——, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011), we addressed the distinction between general or all-purpose jurisdiction, and specific or conduct-linked jurisdiction. As to the former, we held that a court may assert jurisdiction over a foreign corporation "to hear any and all claims against [it]" only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive "as to render [it] essentially at home in the forum State." *Id.*, at ——, 131 S.Ct., at 2851. Instructed by *Goodyear*, we conclude Daimler is not "at home" in California, and cannot be sued there for injuries plaintiffs attribute to MB Argentina's conduct in Argentina.

I

In 2004, plaintiffs (respondents here) filed suit in the United States District Court for the Northern District of California, alleging that MB Argentina collaborated with Argentinian state security forces to kidnap, detain, torture, and kill plaintiffs and their relatives during the military dictatorship in place there from 1976 through 1983, a period known as Argentina's "Dirty War." Based on those allegations, plaintiffs asserted claims under the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991, 106 Stat. 73, note following 28 U.S.C. § 1350, as well as claims for wrongful death and intentional infliction of emotional distress under the laws of California and Argentina. The incidents recounted in the ****752** complaint center on MB Argentina's plant in Gonzalez Catan, Argentina; no part of MB Argentina's alleged collaboration with Argentinian authorities took place in California or anywhere else in the United States.

Plaintiffs' operative complaint names only one corporate defendant: Daimler, the petitioner here. Plaintiffs seek to hold Daimler vicariously liable for MB Argentina's alleged ***123** malfeasance. Daimler is a German *Aktiengesellschaft* (public stock company) that manufactures Mercedes–Benz vehicles primarily in Germany and has its headquarters in Stuttgart. At times relevant to this case, MB Argentina was a subsidiary wholly owned by Daimler's predecessor in interest.

Daimler moved to dismiss the action for want of personal jurisdiction. Opposing the motion, plaintiffs submitted declarations and exhibits purporting to demonstrate the presence of Daimler itself in California. Alternatively,

plaintiffs maintained that jurisdiction over Daimler could be founded on the California contacts of MBUSA, a distinct corporate entity that, according to plaintiffs, should be treated as Daimler's agent for jurisdictional purposes.

MBUSA, an indirect subsidiary of Daimler, is a Delaware limited liability corporation.[3] MBUSA serves as Daimler's exclusive importer and distributor in the United States, purchasing Mercedes–Benz automobiles from Daimler in Germany, then importing those vehicles, and ultimately distributing them to independent dealerships located throughout the Nation. Although MBUSA's principal place of business is in New Jersey, MBUSA has multiple California-based facilities, including a regional office in Costa Mesa, a Vehicle Preparation Center in Carson, and a Classic Center in Irvine. According to the record developed below, MBUSA is the largest supplier of luxury vehicles to the California market. In particular, over 10% of all sales of new vehicles in the United States take place in California, and MBUSA's California sales account for 2.4% of Daimler's worldwide sales.

The relationship between Daimler and MBUSA is delineated in a General Distributor Agreement, which sets forth requirements for MBUSA's distribution of Mercedes–Benz vehicles in the United States. That agreement established MBUSA as an "independent contracto[r]" that "buy[s] and ***124** sell[s] [vehicles] ... as an independent business for [its] own account." App. 179a. The agreement "does not make [MBUSA] ... a general or special agent, partner, joint venturer or employee of DAIMLERCHRYSLER or any DaimlerChrysler Group Company"; MBUSA "ha[s] no authority to make binding obligations for or act on behalf of DAIMLERCHRYSLER or any DaimlerChrysler Group Company." *Ibid.*

After allowing jurisdictional discovery on plaintiffs' agency allegations, the District Court granted Daimler's motion to dismiss. Daimler's own affiliations with California, the court first determined, were insufficient to support the exercise of all-purpose jurisdiction over the corporation. *Bauman v. DaimlerChrysler AG,* No. C–04–00194 RMW (N.D.Cal., Nov. 22, 2005), App. to Pet. for Cert. 111a–112a, 2005 WL 3157472, *9–*10. Next, the court declined to attribute MBUSA's California contacts to Daimler on an agency theory, concluding that plaintiffs failed to demonstrate that MBUSA acted as Daimler's agent. *Id.,* at 117a, 133a, 2005 WL 3157472, *12, *19; ****753** *Bauman v. DaimlerChrysler AG,* No. C–04–00194 RMW (N.D.Cal., Feb. 12, 2007), App. to Pet. for Cert. 83a–85a, 2007 WL 486389, *2.

The Ninth Circuit at first affirmed the District Court's judgment. Addressing solely the question of agency, the Court of Appeals held that plaintiffs had not shown the existence of an agency relationship of the kind that might warrant attribution of MBUSA's contacts to Daimler. *Bauman v. DaimlerChrysler Corp.,* 579 F.3d 1088, 1096–1097 (2009). Judge Reinhardt dissented. In his view, the agency test was satisfied and considerations of "reasonableness" did not bar the exercise of jurisdiction. *Id.,* at 1098–1106. Granting plaintiffs' petition for rehearing, the panel withdrew its initial opinion and replaced it with one authored by Judge Reinhardt, which elaborated on reasoning he initially expressed in dissent. *Bauman v. DaimlerChrysler Corp.,* 644 F.3d 909 (C.A.9 2011).

***125** Daimler petitioned for rehearing and rehearing en banc, urging that the exercise of personal jurisdiction over Daimler could not be reconciled with this Court's decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. ——, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011). Over the dissent of eight judges, the Ninth Circuit denied Daimler's petition. See *Bauman v. DaimlerChrysler Corp.,* 676 F.3d 774 (2011) (O'Scannlain, J., dissenting from denial of rehearing en banc).

We granted certiorari to decide whether, consistent with the Due Process Clause of the Fourteenth Amendment, Daimler is amenable to suit in California courts for claims involving only foreign plaintiffs and conduct occurring entirely abroad. 569 U.S. ——, 133 S.Ct. 1995, 185 L.Ed.2d 865 (2013).

II

[1] Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons. See Fed. Rule Civ. Proc. 4(k)(1)(A) (service of process is effective to establish personal jurisdiction over a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located"). Under California's long-arm statute, California

state courts may exercise personal jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." Cal. Civ. Proc. Code Ann. § 410.10 (West 2004). California's long-arm statute allows the exercise of personal jurisdiction to the full extent permissible under the U.S. Constitution. We therefore inquire whether the Ninth Circuit's holding comports with the limits imposed by federal due process. See, *e.g., Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 464, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

III

In *Pennoyer v. Neff,* 95 U.S. 714, 24 L.Ed. 565 (1878), decided shortly after the enactment of the Fourteenth Amendment, the Court held that a tribunal's jurisdiction over persons reaches no farther than the geographic bounds of the forum. See ***126** *id.,* at 720 ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."). See also *Shaffer v. Heitner,* 433 U.S. 186, 197, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) (Under *Pennoyer,* "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power."). In time, however, that strict territorial approach yielded to a less rigid understanding, spurred by "changes in the technology of transportation and communication, and the tremendous growth of interstate business activity." *Burnham v. Superior Court of Cal.,* ****754** *County of Marin,* 495 U.S. 604, 617, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990) (opinion of SCALIA, J.).

"The canonical opinion in this area remains *International Shoe* [*Co. v. Washington*], 326 U.S. 310 [66 S.Ct. 154, 90 L.Ed. 95 (1945)], in which we held that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has 'certain minimum contacts with [the State] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." ' " *Goodyear,* 564 U.S., at ——, 131 S.Ct., at 2853 (quoting *International Shoe,* 326 U.S., at 316, 66 S.Ct. 154). Following *International Shoe,* "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction." *Shaffer,* 433 U.S., at 204, 97 S.Ct. 2569.

[2] *International Shoe* 's conception of "fair play and substantial justice" presaged the development of two categories of personal jurisdiction. The first category is represented by *International Shoe* itself, a case in which the in-state activities of the corporate defendant "ha[d] not only been continuous and systematic, but also g[a]ve rise to the liabilities sued on." 326 U.S., at 317, 66 S.Ct. 154.[4] *International Shoe* recognized, as ***127** well, that "the commission of some single or occasional acts of the corporate agent in a state" may sometimes be enough to subject the corporation to jurisdiction in that State's tribunals with respect to suits relating to that in-state activity. *Id.,* at 318, 66 S.Ct. 154. Adjudicatory authority of this order, in which the suit "aris[es] out of or relate[s] to the defendant's contacts with the forum," *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414, n. 8, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984), is today called "specific jurisdiction." See *Goodyear,* 564 U.S., at ——, 131 S.Ct., at 2853 (citing von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L.Rev. 1121, 1144–1163 (1966) (hereinafter von Mehren & Trautman)).

[3] *International Shoe* distinguished between, on the one hand, exercises of specific jurisdiction, as just described, and on the other, situations where a foreign corporation's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." 326 U.S., at 318, 66 S.Ct. 154. As we have since explained, "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear,* 564 U.S., at ——, 131 S.Ct., at 2851; see *id.,* at ——, 131 S.Ct., at 2853–2854; *Helicopteros,* 466 U.S., at 414, n. 9, 104 S.Ct. 1868.[5]

****755** ***128** Since *International Shoe,* "specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role." *Goodyear,* 564 U.S., at ——, 131 S.Ct., at 2854 (quoting Twitchell, The Myth of General Jurisdiction, 101 Harv. L.Rev. 610, 628 (1988)). *International Shoe* 's momentous departure from *Pennoyer*

's rigidly territorial focus, we have noted, unleashed a rapid expansion of tribunals' ability to hear claims against out-of-state defendants when the episode-in-suit occurred in the forum or the defendant purposefully availed itself of the forum. [6] Our subsequent decisions have continued to bear out the prediction that "specific jurisdiction will come into sharper relief and form a considerably more significant part of the scene." von Mehren & Trautman 1164. [7]

***129** Our post-*International Shoe* opinions on general jurisdiction, by comparison, are few. "[The Court's] 1952 decision in *Perkins v. Benguet Consol. Mining Co.* remains the textbook case of general jurisdiction ****756** appropriately exercised over a foreign corporation that has not consented to suit in the forum." *Goodyear,* 564 U.S., at ——, 131 S.Ct., at 2856 (internal quotation marks and brackets omitted). The defendant in *Perkins*, Benguet, was a company incorporated under the laws of the Philippines, where it operated gold and silver mines. Benguet ceased its mining operations during the Japanese occupation of the Philippines in World War II; its president moved to Ohio, where he kept an office, maintained the company's files, and oversaw the company's activities. *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 448, 72 S.Ct. 413, 96 L.Ed. 485 (1952). The plaintiff, an Ohio resident, sued Benguet on a claim that neither arose in Ohio nor related to the corporation's activities in that State. We held that the Ohio courts could exercise general jurisdiction over Benguet without offending due ***130** process. *Ibid.* That was so, we later noted, because "Ohio was the corporation's principal, if temporary, place of business." *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 780, n. 11, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984). [8]

***131** The next case on point, *Helicopteros,* 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404, arose from a helicopter crash in Peru. Four U.S. citizens perished in that accident; their survivors and representatives brought suit in Texas state court against the helicopter's owner and operator, a Colombian corporation. That company's contacts with Texas were confined to " sending its chief executive officer to Houston for a ****757** contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from [a Texas-based helicopter company] for substantial sums; and sending personnel to [Texas] for training." *Id.,* at 416, 104 S.Ct. 1868. Notably, those contacts bore no apparent relationship to the accident that gave rise to the suit. We held that the company's Texas connections did not resemble the "continuous and systematic general business contacts ... found to exist in *Perkins*." *Ibid.* "[M]ere purchases, even if occurring at regular intervals," we clarified, "are not enough to warrant a State's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions." *Id.,* at 418, 104 S.Ct. 1868.

Most recently, in *Goodyear*, we answered the question: "Are foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State? " 564 U.S., at ——, 131 S.Ct., at 2850. That case arose from a bus accident outside Paris that killed two boys from North Carolina. The boys' parents brought a wrongful-death suit in North Carolina state court alleging that the bus's tire was defectively manufactured. The complaint named as defendants not only The Goodyear Tire and Rubber Company (Goodyear), an Ohio corporation, but also Goodyear's Turkish, French, and Luxembourgian subsidiaries. Those foreign subsidiaries, which manufactured tires for sale in Europe and Asia, lacked any affiliation with North Carolina. A small percentage of tires ***132** manufactured by the foreign subsidiaries were distributed in North Carolina, however, and on that ground, the North Carolina Court of Appeals held the subsidiaries amenable to the general jurisdiction of North Carolina courts.

[4] **[5]** We reversed, observing that the North Carolina court's analysis "elided the essential difference between case-specific and all-purpose (general) jurisdiction." *Id.,* at ——, 131 S.Ct., at 2855. Although the placement of a product into the stream of commerce "may bolster an affiliation germane to *specific* jurisdiction," we explained, such contacts "do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant." *Id.,* at ——, 131 S.Ct., at 2857. As *International Shoe* itself teaches, a corporation's "continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." 326 U.S., at 318, 66 S.Ct. 154. Because Goodyear's foreign subsidiaries were "in no sense at home in North Carolina," we held, those subsidiaries could not be required to submit to the

general jurisdiction of that State's courts. 564 U.S., at ——, 131 S.Ct., at 2857. See also *J. McIntyre Machinery, Ltd. v. Nicastro,* 564 U.S. ——, ——, 131 S.Ct. 2780, 2797–2798, 180 L.Ed.2d 765 (2011) (GINSBURG, J., dissenting) (noting unanimous agreement that a foreign manufacturer, which engaged an independent U.S.-based distributor to sell its machines throughout the United States, could not be exposed to all-purpose jurisdiction in New Jersey courts based on those contacts).

[6] As is evident from *Perkins*, *Helicopteros,* and *Goodyear*, general and specific jurisdiction have followed markedly different trajectories post-*International Shoe*. Specific jurisdiction has been cut loose from *Pennoyer* 's sway, but we have declined to stretch general jurisdiction beyond ****758** limits traditionally recognized.[9] As this Court has increasingly ***133** trained on the "relationship among the defendant, the forum, and the litigation," *Shaffer,* 433 U.S., at 204, 97 S.Ct. 2569, *i.e.,* specific jurisdiction,[10] general jurisdiction has come to occupy a less dominant place in the contemporary scheme.[11]

IV

With this background, we turn directly to the question whether Daimler's affiliations with California are sufficient to subject it to the general (all-purpose) personal jurisdiction of that State's courts. In the proceedings below, the parties agreed on, or failed to contest, certain points we now take as given. Plaintiffs have never attempted to fit this case into the *specific* jurisdiction category. Nor did plaintiffs challenge on appeal the District Court's holding that Daimler's ***134** own contacts with California were, by themselves, too sporadic to justify the exercise of general jurisdiction. While plaintiffs ultimately persuaded the Ninth Circuit to impute MBUSA's California contacts to Daimler on an agency theory, at no point have they maintained that MBUSA is an alter ego of Daimler.

Daimler, on the other hand, failed to object below to plaintiffs' assertion that the California courts could exercise all-purpose jurisdiction over MBUSA.[12] But see Brief for Petitioner 23, n. 4 (suggestion that in light of *Goodyear*, MBUSA may not be amenable to general jurisdiction in California); Brief for United States as *Amicus Curiae* 16, n. 5 (hereinafter U.S. Brief) (same). We will assume then, for purposes of this decision only, that MBUSA qualifies as at home in California.

A

[7] In sustaining the exercise of general jurisdiction over Daimler, the Ninth Circuit relied on an agency theory, determining that MBUSA acted as Daimler's agent for jurisdictional purposes and then ****759** attributing MBUSA's California contacts to Daimler. The Ninth Circuit's agency analysis derived from Circuit precedent considering principally whether the subsidiary "performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services." 644 F.3d, at 920 (quoting *Doe v. Unocal Corp.,* 248 F.3d 915, 928 (C.A.9 2001); emphasis deleted).

[8] **[9]** This Court has not yet addressed whether a foreign corporation may be subjected to a court's general jurisdiction based on the contacts of its in-state subsidiary. Daimler argues, and several Courts of Appeals have held, that a subsidiary's jurisdictional contacts can be imputed to its parent only when the former is so dominated by the latter as to be ***135** its alter ego. The Ninth Circuit adopted a less rigorous test based on what it described as an "agency" relationship. Agencies, we note, come in many sizes and shapes: "One may be an agent for some business purposes and not others so that the fact that one may be an agent for one purpose does not make him or her an agent for every purpose." 2A C. J. S., Agency § 43, p. 367 (2013) (footnote omitted).[13] A subsidiary, for example, might be its parent's agent for claims arising in the place where the subsidiary operates, yet not its agent regarding claims arising elsewhere. The Court of Appeals did not advert to that prospect. But we need not pass judgment on invocation of an agency theory in the context of general jurisdiction, for in no event can the appeals court's analysis be sustained.

The Ninth Circuit's agency finding rested primarily on its observation that MBUSA's services were "important" to Daimler, as gauged by Daimler's hypothetical readiness to perform those services itself if MBUSA did not exist. Formulated ***136** this way, the inquiry into importance stacks the deck, for it will always yield a pro-jurisdiction answer: "Anything a corporation does through an

independent contractor, subsidiary, or distributor is presumably something that the corporation would do 'by other means' if the independent contractor, subsidiary, or distributor did not exist." 676 F.3d, at 777 (O'Scannlain, J., dissenting from denial of rehearing en banc).[14] THE NINTH CIRCUIT'S AGENCY theory **760 thus appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the "sprawling view of general jurisdiction" we rejected in *Goodyear*. 564 U.S., at ——, 131 S.Ct., at 2856.[15]

B

[10] Even if we were to assume that MBUSA is at home in California, and further to assume MBUSA's contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the State hardly render it at home there.[16]

***137** *Goodyear* made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there. " For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." 564 U.S., at ——, 131 S.Ct., at 2853–2854 (citing Brilmayer et al., A General Look at General Jurisdiction, 66 Texas L.Rev. 721, 728 (1988)). With respect to a corporation, the place of incorporation and principal place of business are " paradig[m] ... bases for general jurisdiction." *Id.*, at 735. See also Twitchell, 101 Harv. L.Rev., at 633. Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable. Cf. *Hertz Corp. v. Friend,* 559 U.S. 77, 94, 130 S.Ct. 1181, 175 L.Ed.2d 1029 (2010) ("Simple jurisdictional rules ... promote greater predictability."). These bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.

Goodyear did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums. Plaintiffs would have us look beyond the exemplar bases *Goodyear* identified, **761 *138 and approve the exercise of general jurisdiction in every State in which a corporation "engages in a substantial, continuous, and systematic course of business." Brief for Respondents 16–17, and nn. 7–8. That formulation, we hold, is unacceptably grasping.

As noted, see *supra,* at 753 – 754, the words "continuous and systematic" were used in *International Shoe* to describe instances in which the exercise of *specific* jurisdiction would be appropriate. See 326 U.S., at 317, 66 S.Ct. 154 (jurisdiction can be asserted where a corporation's in-state activities are not only "continuous and systematic, but also give rise to the liabilities sued on").[17] Turning to all-purpose jurisdiction, in contrast, *International Shoe* speaks of "instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit ... *on causes of action arising from dealings entirely distinct from those activities*." *Id.,* at 318, 66 S.Ct. 154 (emphasis added). See also Twitchell, Why We Keep Doing Business With Doing–Business Jurisdiction, 2001 U. Chi. Legal Forum 171, 184 (*International Shoe* "is clearly not saying that dispute-blind jurisdiction exists whenever 'continuous and systematic' contacts are found.").[18] Accordingly, the inquiry under *Goodyear* is *139 not whether a foreign corporation's in-forum contacts can be said to be in some sense "continuous and systematic," it is whether that corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." 564 U.S., at ——, 131 S.Ct., at 2851.[19]

Here, neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business there. If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA's sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would **762 scarcely permit out-of-state defendants "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp.,* 471 U.S., at 472, 105 S.Ct. 2174 (internal quotation marks omitted).

[11] It was therefore error for the Ninth Circuit to conclude that Daimler, even with MBUSA's contacts attributed to it, was at home in California, and hence subject to suit there on claims by foreign plaintiffs having nothing to do with anything that occurred or had its principal impact in California. [20]

C

[12] ***140** Finally, the transnational context of this dispute bears attention. The Court of Appeals emphasized, as supportive of ***141** the exercise of general jurisdiction, plaintiffs' assertion of claims under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991 (TVPA), 106 Stat. 73, note following 28 U.S.C. § 1350. See 644 F.3d, at 927 ("American federal courts, be they in California or any other state, have a strong interest in adjudicating and redressing international human rights abuses."). Recent decisions of this Court, however, have ****763** rendered plaintiffs' ATS and TVPA claims infirm. See *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. ——, ——, 133 S.Ct. 1659, 1669, 185 L.Ed.2d 671 (2013) (presumption against extraterritorial application controls claims under the ATS); *Mohamad v. Palestinian Authority,* 566 U.S. ——, ——, 132 S.Ct. 1702, 1705, 182 L.Ed.2d 720 (2012) (only natural persons are subject to liability under the TVPA).

The Ninth Circuit, moreover, paid little heed to the risks to international comity its expansive view of general jurisdiction posed. Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case. In the European Union, for example, a corporation may generally be sued in the nation in which it is "domiciled," a term defined to refer only to the location of the corporation's "statutory seat," "central administration," or "principal place of business." European Parliament and Council Reg. 1215/2012, Arts. 4(1), and 63(1), 2012 O.J. (L. 351) 7, 18. See also *id.,* Art. 7(5), 2012 O.J. 7 (as to "a dispute *arising out of the operations of a branch, agency or other establishment,*" a corporation may be sued "in the courts for the place where the branch, agency or other establishment is situated" (emphasis added)). The Solicitor General informs us, in this regard, that "foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and ***142** enforcement of judgments." U.S. Brief 2 (citing Juenger, The American Law of General Jurisdiction, 2001 U. Chi. Legal Forum 141, 161–162). See also U.S. Brief 2 (expressing concern that unpredictable applications of general jurisdiction based on activities of U.S.-based subsidiaries could discourage foreign investors); Brief for Respondents 35 (acknowledging that " doing business" basis for general jurisdiction has led to "international friction"). Considerations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the "fair play and substantial justice" due process demands. *International Shoe,* 326 U.S., at 316, 66 S.Ct. 154 (quoting *Milliken v. Meyer,* 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)).

* * *

For the reasons stated, the judgment of the United States Court of Appeals for the Ninth Circuit is

Reversed.

Justice SOTOMAYOR, concurring in the judgment.
I agree with the Court's conclusion that the Due Process Clause prohibits the exercise of personal jurisdiction over Daimler in light of the unique circumstances of this case. I concur only in the judgment, however, because I cannot agree with the path the Court takes to arrive at that result.

The Court acknowledges that Mercedes–Benz USA, LLC (MBUSA), Daimler's wholly owned subsidiary, has considerable contacts with California. It has multiple facilities in the State, including a regional headquarters. Each year, it distributes in California tens of thousands of cars, the sale of which generated billions of dollars in the year this suit was brought. And it provides service and sales support to customers throughout the State. Daimler has conceded that California courts may exercise general jurisdiction over MBUSA on the basis of these contacts, and the Court assumes that MBUSA's contacts may be attributed to Daimler ***143** for the purpose of deciding whether Daimler is also subject to general jurisdiction.

Are these contacts sufficient to permit the exercise of general jurisdiction over ****764** Daimler? The Court

holds that they are not, for a reason wholly foreign to our due process jurisprudence. The problem, the Court says, is not that Daimler's contacts with California are too few, but that its contacts with other forums are too many. In other words, the Court does not dispute that the presence of multiple offices, the direct distribution of thousands of products accounting for billions of dollars in sales, and continuous interaction with customers throughout a State would be enough to support the exercise of general jurisdiction over some businesses. Daimler is just not one of those businesses, the Court concludes, because its California contacts must be viewed in the context of its extensive "nationwide and worldwide" operations. *Ante,* at 762, n. 20. In recent years, Americans have grown accustomed to the concept of multinational corporations that are supposedly "too big to fail"; today the Court deems Daimler "too big for general jurisdiction."

The Court's conclusion is wrong as a matter of both process and substance. As to process, the Court decides this case on a ground that was neither argued nor passed on below, and that Daimler raised for the first time in a footnote to its brief. Brief for Petitioner 31–32, n. 5. As to substance, the Court's focus on Daimler's operations outside of California ignores the lodestar of our personal jurisdiction jurisprudence: A State may subject a defendant to the burden of suit if the defendant has sufficiently taken advantage of the State's laws and protections through its contacts in the State; whether the defendant has contacts elsewhere is immaterial.

Regrettably, these errors are unforced. The Court can and should decide this case on the far simpler ground that, no matter how extensive Daimler's contacts with California, ***144** that State's exercise of jurisdiction would be unreasonable given that the case involves foreign plaintiffs suing a foreign defendant based on foreign conduct, and given that a more appropriate forum is available. Because I would reverse the judgment below on this ground, I concur in the judgment only.

I

I begin with the point on which the majority and I agree: The Ninth Circuit's decision should be reversed.

Our personal jurisdiction precedents call for a two-part analysis. The contacts prong asks whether the defendant has sufficient contacts with the forum State to support personal jurisdiction; the reasonableness prong asks whether the exercise of jurisdiction would be unreasonable under the circumstances. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475–478, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). As the majority points out, all of the cases in which we have applied the reasonableness prong have involved specific as opposed to general jurisdiction. *Ante,* at 762, n. 20. Whether the reasonableness prong should apply in the general jurisdiction context is therefore a question we have never decided, [1] and it is one on which I ***145** can appreciate ****765** the arguments on both sides. But it would be imprudent to decide that question in this case given that respondents have failed to argue against the application of the reasonableness prong during the entire 8–year history of this litigation. See Brief for Respondents 11, 12, 13, 16 (conceding application of the reasonableness inquiry); Plaintiffs' Opposition to Defendant's Motion to Quash Service of Process and to Dismiss for Lack of Personal Jurisdiction in No. 04–00194–RMW (ND Cal., May 16, 2005), pp. 14–23 (same). As a result, I would decide this case under the reasonableness prong without foreclosing future consideration of whether that prong should be limited to the specific jurisdiction context. [2]

We identified the factors that bear on reasonableness in *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.,* 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987): "the burden on the defendant, the interests of the forum State," "the plaintiff's interest in obtaining relief" in the forum State, and the interests of other sovereigns in resolving the dispute. *Id.,* at 113–114, 107 S.Ct. 1026. We held in *Asahi* that it would be "unreasonable and unfair" for a California court to exercise jurisdiction over a claim between a Taiwanese plaintiff and a Japanese defendant that arose out of a transaction in Taiwan, particularly where the Taiwanese plaintiff had not shown that it would be more convenient to litigate in California than in Taiwan or Japan. *Id.,* at 114, 107 S.Ct. 1026.

***146** The same considerations resolve this case. It involves Argentine plaintiffs suing a German defendant for conduct that took place in Argentina. Like the plaintiffs in *Asahi,* respondents have failed to show that it would be more convenient to litigate in California than in Germany, a sovereign with a far greater interest in resolving the dispute. *Asahi* thus makes clear that it would be unreasonable for a court in California to subject Daimler to its jurisdiction.

II

The majority evidently agrees that, if the reasonableness prong were to apply, it would be unreasonable for California courts to exercise jurisdiction over Daimler in this case. See *ante,* at 761 – 762 (noting that it would be "exorbitant" for California courts to exercise general jurisdiction over Daimler, a German defendant, in this "Argentina-rooted case" brought by "foreign plaintiffs"). But instead of resolving the case on this uncontroversial basis, the majority reaches out to decide it on a ground neither argued nor decided below. [3]

****766** We generally do not pass on arguments that lower courts have not addressed. See, *e.g., Cutter v. Wilkinson,* 544 U.S. 709, 718, n. 7, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005). After all, "we are a court of review, not of first view." *Ibid.* This principle carries even greater force where the argument at issue was never pressed ***147** below. See *Glover v. United States,* 531 U.S. 198, 205, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001). Yet the majority disregards this principle, basing its decision on an argument raised for the first time in a footnote of Daimler's merits brief before this Court. Brief for Petitioner 32, n. 5 ("Even if MBUSA were a division of Daimler AG rather than a separate corporation, Daimler AG would still ... not be 'at home' in California").

The majority's decision is troubling all the more because the parties were not asked to brief this issue. We granted certiorari on the question "whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State." Pet. for Cert. i. At no point in Daimler's petition for certiorari did the company contend that, even if this attribution question were decided against it, its contacts in California would still be insufficient to support general jurisdiction. The parties' merits briefs accordingly focused on the attribution-of-contacts question, addressing the reasonableness inquiry (which had been litigated and decided below) in most of the space that remained. See Brief for Petitioner 17–37, 37–43; Brief for Respondents 18–47, 47–59.

In bypassing the question on which we granted certiorari to decide an issue not litigated below, the Court leaves respondents "without an unclouded opportunity to air the issue the Court today decides against them," *Comcast Corp. v. Behrend,* 569 U.S. ——, ——, 133 S.Ct. 1426, 1436, 185 L.Ed.2d 515 (2013) (GINSBURG and BREYER, JJ., dissenting). Doing so "does 'not reflect well on the processes of the Court.' " *Ibid.* (quoting *Redrup v. New York,* 386 U.S. 767, 772, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967) (Harlan, J., dissenting)). "And by resolving a complex and fact-intensive question without the benefit of full briefing, the Court invites the error into which it has fallen." 569 U.S., at ——, 133 S.Ct., at 1436.

The relevant facts are undeveloped because Daimler conceded at the start of this litigation that MBUSA is subject ***148** to general jurisdiction based on its California contacts. We therefore do not know the full extent of those contacts, though what little we do know suggests that Daimler was wise to concede what it did. MBUSA imports more than 200,000 vehicles into the United States and distributes many of them to independent dealerships in California, where they are sold. Declaration of Dr. Peter Waskönig in *Bauman v. DaimlerChrysler Corp.*, No. 04–00194–RMW (N.D.Cal.), ¶ 10, p. 2. MBUSA's California sales account for 2.4% of Daimler's worldwide sales, which were $192 billion in ****767** 2004. [4] And 2.4% of $192 billion is $4.6 billion, a considerable sum by any measure. MBUSA also has multiple offices and facilities in California, including a regional headquarters.

But the record does not answer a number of other important questions. Are any of Daimler's key files maintained in MBUSA's California offices? How many employees work in those offices? Do those employees make important strategic decisions or oversee in any manner Daimler's activities? These questions could well affect whether Daimler is subject to general jurisdiction. After all, this Court upheld the exercise of general jurisdiction in *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 447–448, 72 S.Ct. 413, 96 L.Ed. 485 (1952)—which the majority refers to as a "textbook case" of general jurisdiction, *ante,* at 755 – 756 —on the basis that the foreign defendant maintained an office in Ohio, kept corporate files there, and oversaw the company's activities from the State. California-based MBUSA employees may well have done similar things on Daimler's behalf. [5] But because the Court ***149** decides the issue without a developed record, we will never know.

III

While the majority's decisional process is problematic enough, I fear that process leads it to an even more troubling result.

A

Until today, our precedents had established a straightforward test for general jurisdiction: Does the defendant have "continuous corporate operations within a state" that are "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities"? *International Shoe Co. v. Washington,* 326 U.S. 310, 318, 66 S.Ct. 154, 90 L.Ed. 95 (1945); see also *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 416, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984) (asking whether defendant had "continuous and systematic general business contacts"). [6] In every case where we have applied this test, we have focused solely on the magnitude of the defendant's in-state contacts, not the relative magnitude of those contacts in comparison to the defendant's contacts with other States.

***150** In *Perkins*, for example, we found an Ohio court's exercise of general jurisdiction ****768** permissible where the president of the foreign defendant "maintained an office," "drew and distributed ... salary checks," used "two active bank accounts," "supervised ... the rehabilitation of the corporation's properties in the Philippines," and held "directors' meetings," in Ohio. 342 U.S., at 447–448, 72 S.Ct. 413. At no point did we attempt to catalog the company's contacts in forums other than Ohio or to compare them with its Ohio contacts. If anything, we intimated that the defendant's Ohio contacts were *not* substantial in comparison to its contacts elsewhere. See *id.*, at 438, 72 S.Ct. 413 (noting that the defendant's Ohio contacts, while "continuous and systematic," were but a "limited ... part of its general business"). [7]

We engaged in the same inquiry in *Helicopteros.* There, we held that a Colombian corporation was not subject to general jurisdiction in Texas simply because it occasionally sent its employees into the State, accepted checks drawn on a Texas bank, and purchased equipment and services from a ***151** Texas company. In no sense did our analysis turn on the extent of the company's operations beyond Texas.

Most recently, in *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. ——, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011), our analysis again focused on the defendant's in-state contacts. *Goodyear* involved a suit against foreign tire manufacturers by North Carolina residents whose children had died in a bus accident in France. We held that North Carolina courts could not exercise general jurisdiction over the foreign defendants. Just as in *Perkins* and *Helicopteros,* our opinion in *Goodyear* did not identify the defendants' contacts outside of the forum State, but focused instead on the defendants' lack of offices, employees, direct sales, and business operations within the State.

This approach follows from the touchstone principle of due process in this field, the concept of reciprocal fairness. When a corporation chooses to invoke the benefits and protections of a State in which it operates, the State acquires the authority to subject the company to suit in its courts. See *International Shoe,* 326 U.S., at 319, 66 S.Ct. 154 ("[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state" such that an "obligatio[n] arise[s]" to respond there to suit); *J. McIntyre Machinery, Ltd. v. Nicastro,* 564 U.S. ——, ——, 131 S.Ct. 2780, 2796–2797, 180 L.Ed.2d 765 (2011) (plurality opinion) (same principle for general jurisdiction). The majority's focus on the extent of a corporate defendant's out-of-forum contacts is untethered from this rationale. After all, the degree to which a company ****769** intentionally benefits from a forum State depends on its interactions with that State, not its interactions elsewhere. An article on which the majority relies (and on which *Goodyear* relied as well, 564 U.S., at ——, 131 S.Ct., at 2853–2854) expresses the point well: "We should not treat defendants as less amenable to suit merely because they carry on more substantial business in other states.... [T]he amount of activity elsewhere seems virtually irrelevant to ... the imposition ***152** of general jurisdiction over a defendant." Brilmayer et al., A General Look at General Jurisdiction, 66 Texas L.Rev. 721, 742 (1988).

Had the majority applied our settled approach, it would have had little trouble concluding that Daimler's

California contacts rise to the requisite level, given the majority's assumption that MBUSA's contacts may be attributed to Daimler and given Daimler's concession that those contacts render MBUSA "at home" in California. Our cases have long stated the rule that a defendant's contacts with a forum State must be continuous, substantial, and systematic in order for the defendant to be subject to that State's general jurisdiction. See *Perkins,* 342 U.S., at 446, 72 S.Ct. 413. We offered additional guidance in *Goodyear*, adding the phrase "essentially at home" to our prior formulation of the rule. 564 U.S., at ——, 131 S.Ct., at 2851 (a State may exercise general jurisdiction where a defendant's "affiliations with the State are so 'continuous and systematic' as to render [the defendant] essentially at home in the forum State"). We used the phrase "at home" to signify that in order for an out-of-state defendant to be subject to general jurisdiction, its continuous and substantial contacts with a forum State must be akin to those of a local enterprise that actually is "at home" in the State. See Brilmayer, *supra,* at 742. [8]

****770** ***153** Under this standard, Daimler's concession that MBUSA is subject to general jurisdiction in California (a concession the Court accepts, *ante,*at 758, 759) should be dispositive. For if MBUSA's California contacts are so substantial and the resulting benefits to MBUSA so significant as to make MBUSA "at home" in California, the same must be true of Daimler when MBUSA's contacts and benefits are viewed as its own. Indeed, until a footnote in its brief before this Court, even Daimler did not dispute this conclusion for eight years of the litigation.

B

The majority today concludes otherwise. Referring to the "continuous and systematic" contacts inquiry that has ***154** been taught to generations of first-year law students as "unacceptably grasping," *ante,* at 760, the majority announces the new rule that in order for a foreign defendant to be subject to general jurisdiction, it must not only possess continuous and systematic contacts with a forum State, but those contacts must also surpass some unspecified level when viewed in comparison to the company's "nationwide and worldwide" activities. *Ante,* at 762, n. 20. [9]

Neither of the majority's two rationales for this proportionality requirement is persuasive. First, the majority suggests that its approach is necessary for the sake of predictability. Permitting general jurisdiction in every State where a corporation has continuous and substantial contacts, the majority asserts, would "scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.' " *Ante,* at 762 (quoting *Burger King Corp.,* 471 U.S., at 472, 105 S.Ct. 2174). But there is nothing unpredictable about a rule that instructs multinational corporations that if they engage in continuous and substantial contacts with more than one State, they will be subject to general jurisdiction in each one. The majority may not favor that rule as a matter of policy, but such disagreement does not render an otherwise routine test unpredictable.

Nor is the majority's proportionality inquiry any more predictable than the approach it rejects. If anything, the majority's ***155** approach injects an additional layer of uncertainty because a corporate defendant must now try to foretell a court's analysis as to both the sufficiency of its contacts with the forum State itself, as well as the relative sufficiency of those contacts in light of the company's operations elsewhere. Moreover, the majority does not even try to explain just how extensive the company's in-state contacts must be in the context of its global operations in order for general jurisdiction to be proper.

The majority's approach will also lead to greater unpredictability by radically expanding the scope of jurisdictional discovery. ****771** Rather than ascertaining the extent of a corporate defendant's forum-state contacts alone, courts will now have to identify the extent of a company's contacts in every other forum where it does business in order to compare them against the company's in-state contacts. That considerable burden runs headlong into the majority's recitation of the familiar principle that " '[s]imple jurisdictional rules ... promote greater predictability.' " *Ante,* at 760 – 761 (quoting *Hertz Corp. v. Friend,* 559 U.S. 77, 94, 130 S.Ct. 1181, 175 L.Ed.2d 1029 (2010)).

Absent the predictability rationale, the majority's sole remaining justification for its proportionality approach is its unadorned concern for the consequences. "If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California," the majority

laments, "the same global reach would presumably be available in every other State in which MBUSA's sales are sizable." *Ante,* at 761.

The majority characterizes this result as "exorbitant," *ibid.,* but in reality it is an inevitable consequence of the rule of due process we set forth nearly 70 years ago, that there are "instances in which [a company's] continuous corporate operations within a state" are "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities," *International Shoe,* 326 U.S., at 318, 66 S.Ct. 154. In the era of *International* ***156** *Shoe,* it was rare for a corporation to have such substantial nationwide contacts that it would be subject to general jurisdiction in a large number of States. Today, that circumstance is less rare. But that is as it should be. What has changed since *International Shoe* is not the due process principle of fundamental fairness but rather the nature of the global economy. Just as it was fair to say in the 1940's that an out-of-state company could enjoy the benefits of a forum State enough to make it "essentially at home" in the State, it is fair to say today that a multinational conglomerate can enjoy such extensive benefits in multiple forum States that it is "essentially at home" in each one.

In any event, to the extent the majority is concerned with the modern-day consequences of *International Shoe* 's conception of personal jurisdiction, there remain other judicial doctrines available to mitigate any resulting unfairness to large corporate defendants. Here, for instance, the reasonableness prong may afford petitioner relief. See *supra,* at 764 – 765. In other cases, a defendant can assert the doctrine of *forum non conveniens* if a given State is a highly inconvenient place to litigate a dispute. See *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508–509, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). In still other cases, the federal change of venue statute can provide protection. See 28 U.S.C. § 1404(a) (permitting transfers to other districts "[f]or the convenience of parties and witnesses" and "in the interests of justice"). And to the degree that the majority worries these doctrines are not enough to protect the economic interests of multinational businesses (or that our longstanding approach to general jurisdiction poses "risks to international comity," *ante,* at 762), the task of weighing those policy concerns belongs ultimately to legislators, who may amend state and federal long-arm statutes in accordance with the democratic process. Unfortunately, the majority short circuits that process by enshrining today's narrow rule of general jurisdiction as a matter of constitutional law.

C

***157** The majority's concern for the consequences of its decision should have led it ****772** the other way, because the rule that it adopts will produce deep injustice in at least four respects.

First, the majority's approach unduly curtails the States' sovereign authority to adjudicate disputes against corporate defendants who have engaged in continuous and substantial business operations within their boundaries. [10] The majority does not dispute that a State can exercise general jurisdiction where a corporate defendant has its corporate headquarters, and hence its principal place of business within the State. Cf. *Hertz Corp.,* 559 U.S., at 93, 130 S.Ct. 1181. Yet it never explains why the State should lose that power when, as is increasingly common, a corporation "divide[s] [its] command and coordinating functions among officers who work at several different locations." *Id.,* at 95–96, 130 S.Ct. 1181. Suppose a company divides its management functions equally among three offices in different States, with one office nominally deemed the company's corporate headquarters. If the State where the headquarters is located can exercise general jurisdiction, why should the other two States be constitutionally forbidden to do the same? Indeed, under the majority's approach, the result would be unchanged even if the company has substantial operations within the latter two States (and even if the company has no sales or other business operations in the first State). Put simply, the majority's rule defines the Due Process Clause so narrowly and arbitrarily as to contravene the States' sovereign prerogative to subject to judgment defendants who have manifested an unqualified "intention ***158** to benefit from and thus an intention to submit to the[ir] laws," *J. McIntyre,* 564 U.S., at ——, 131 S.Ct., at 2787 (plurality opinion).

Second, the proportionality approach will treat small businesses unfairly in comparison to national and multinational conglomerates. Whereas a larger company will often be immunized from general jurisdiction in a State on account of its extensive contacts outside the forum, a small business will not be. For instance,

the majority holds today that Daimler is not subject to general jurisdiction in California despite its multiple offices, continuous operations, and billions of dollars' worth of sales there. But imagine a small business that manufactures luxury vehicles principally targeting the California market and that has substantially all of its sales and operations in the State—even though those sales and operations may amount to one-thousandth of Daimler's. Under the majority's rule, that small business will be subject to suit in California on any cause of action involving any of its activities anywhere in the world, while its far more pervasive competitor, Daimler, will not be. That will be so even if the small business incorporates and sets up its headquarters elsewhere (as Daimler does), since the small business' California sales and operations would still predominate when "apprais[ed]" in proportion to its minimal "nationwide and worldwide" operations, *ante,* at 762, n. 20.

Third, the majority's approach creates the incongruous result that an individual defendant whose only contact with a forum State is a one-time visit will be subject to general jurisdiction if served with process during that visit, ****773** *Burnham v. Superior Court of Cal., County of Marin,* 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990), but a large corporation that owns property, employs workers, and does billions of dollars' worth of business in the State will not be, simply because the corporation has similar contacts elsewhere (though the visiting individual surely does as well).

Finally, it should be obvious that the ultimate effect of the majority's approach will be to shift the risk of loss from multinational corporations to the individuals harmed by ***159** their actions. Under the majority's rule, for example, a parent whose child is maimed due to the negligence of a foreign hotel owned by a multinational conglomerate will be unable to hold the hotel to account in a single U.S. court, even if the hotel company has a massive presence in multiple States. See, *e.g., Meier v. Sun Int'l Hotels, Ltd.,* 288 F.3d 1264 (C.A.11 2002). [11] Similarly, a U.S. business that enters into a contract in a foreign country to sell its products to a multinational company there may be unable to seek relief in any U.S. court if the multinational company breaches the contract, even if that company has considerable operations in numerous U.S. forums. See, *e.g., Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivianos,* 712 F.Supp. 383 (S.D.N.Y.1989). [12] Indeed, the majority's approach would preclude the plaintiffs in these examples from seeking recourse anywhere in the United States even if no other judicial system was available to provide relief. I cannot agree with the majority's conclusion that the Due Process Clause requires these results.

The Court rules against respondents today on a ground that no court has considered in the history of this case, that ***160** this Court did not grant certiorari to decide, and that Daimler raised only in a footnote of its brief. In doing so, the Court adopts a new rule of constitutional law that is unmoored from decades of precedent. Because I would reverse the Ninth Circuit's decision on the narrower ground that the exercise of jurisdiction over Daimler would be unreasonable in any event, I respectfully concur in the judgment only.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 One plaintiff is a resident of Argentina and a citizen of Chile; all other plaintiffs are residents and citizens of Argentina.

2 Daimler was restructured in 2007 and is now known as Daimler AG. No party contends that any postsuit corporate reorganization bears on our disposition of this case. This opinion refers to members of the Daimler corporate family by the names current at the time plaintiffs filed suit.

3 At times relevant to this suit, MBUSA was wholly owned by DaimlerChrysler North America Holding Corporation, a Daimler subsidiary.

4 *International Shoe* was an action by the State of Washington to collect payments to the State's unemployment fund. Liability for the payments rested on in-state activities of resident sales solicitors engaged by the corporation to promote its wares in Washington. See 326 U.S., at 313–314, 66 S.Ct. 154.

5 Colloquy at oral argument illustrated the respective provinces of general and specific jurisdiction over persons. Two hypothetical scenarios were posed: *First,* if a California plaintiff, injured in a California accident involving a Daimler-manufactured vehicle, sued Daimler in California court alleging that the vehicle was defectively designed, that court's adjudicatory authority would be premised on specific jurisdiction. See Tr. of Oral Arg. 11 (Daimler's counsel acknowledged that specific jurisdiction "may well be ... available" in such a case, depending on whether Daimler purposefully availed itself of the forum). *Second,* if a similar accident took place in Poland and injured Polish plaintiffs sued Daimler in California court, the question would be one of general jurisdiction. See *id.,* at 29 (on plaintiffs' view, Daimler would be amenable to such a suit in California).

6 See *Shaffer v. Heitner,* 433 U.S. 186, 204, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) ("The immediate effect of [*International Shoe* 's] departure from *Pennoyer* 's conceptual apparatus was to increase the ability of the state courts to obtain personal jurisdiction over nonresident defendants."); *McGee v. International Life Ins. Co.,* 355 U.S. 220, 222, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957) ("[A] trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents."). For an early codification, see Uniform Interstate and International Procedure Act § 1.02 (describing jurisdiction based on "[e]nduring [r]elationship" to encompass a person's domicile or a corporation's place of incorporation or principal place of business, and providing that "any ... claim for relief" may be brought in such a place), § 1.03 (describing jurisdiction "[b]ased upon [c]onduct," limited to claims arising from the enumerated acts, *e.g.,* "transacting any business in th[e] state," "contracting to supply services or things in th[e] state," or "causing tortious injury by an act or omission in th[e] state"), 9B U.L.A. 308, 310 (1966).

7 See, *e.g., Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.,* 480 U.S. 102, 112, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) (opinion of O'Connor, J.) (specific jurisdiction may lie over a foreign defendant that places a product into the "stream of commerce" while also "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State"); *World–Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980) ("[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others."); *Calder v. Jones,* 465 U.S. 783, 789–790, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984) (California court had specific jurisdiction to hear suit brought by California plaintiff where Florida-based publisher of a newspaper having its largest circulation in California published an article allegedly defaming the complaining Californian; under those circumstances, defendants "must 'reasonably anticipate being haled into [a California] court' "); *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 780–781, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984) (New York resident may maintain suit for libel in New Hampshire state court against California-based magazine that sold 10,000 to 15,000 copies in New Hampshire each month; as long as the defendant "continuously and deliberately exploited the New Hampshire market," it could reasonably be expected to answer a libel suit there).

8 Selectively referring to the trial court record in *Perkins* (as summarized in an opinion of the intermediate appellate court), Justice SOTOMAYOR posits that Benguet may have had extensive operations in places other than Ohio. See *post,* at 769 – 770, n. 8 (opinion concurring in judgment) ("By the time the suit [in *Perkins*] was commenced, the company had resumed its considerable operations in the Philippines," "rebuilding its properties there" and "purchasing machinery, supplies and equipment." (internal quotation marks omitted)). See also *post,* at 767, n. 5 (many of the corporation's "key management decisions" were made by the out-of-state purchasing agent and chief of staff). Justice SOTOMAYOR's account overlooks this Court's opinion in *Perkins* and the point on which that opinion turned: All of Benguet's activities were directed by the company's president from within Ohio. See *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 447–448, 72 S.Ct. 413, 96 L.Ed. 485 (1952) (company's Philippine mining operations "were completely halted during the occupation ... by the Japanese"; and the company's president, from his Ohio office, "supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines and ... dispatched funds to cover purchases of machinery for such rehabilitation"). On another day, Justice SOTOMAYOR joined a unanimous Court in recognizing: "To the extent that the company was conducting any business during and immediately after the Japanese occupation of the Philippines, it was doing so in Ohio...." *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. ——, ——, 131 S.Ct. 2846, 2856, 180 L.Ed.2d 796 (2011). Given the wartime circumstances, Ohio could be considered "a surrogate for the place of

incorporation or head office." von Mehren & Trautman 1144. See also *ibid.* (*Perkins* "should be regarded as a decision on its exceptional facts, not as a significant reaffirmation of obsolescing notions of general jurisdiction" based on nothing more than a corporation's "doing business" in a forum).

Justice SOTOMAYOR emphasizes *Perkins* ' statement that Benguet's Ohio contacts, while "continuous and systematic," were but a "limited ... part of its general business." 342 U.S., at 438, 72 S.Ct. 413. Describing the company's "wartime activities" as "necessarily limited," *id.,* at 448, 72 S.Ct. 413, however, this Court had in mind the diminution in operations resulting from the Japanese occupation and the ensuing shutdown of the company's Philippine mines. No fair reader of the full opinion in *Perkins* could conclude that the Court meant to convey anything other than that Ohio was the center of the corporation's wartime activities. But cf. *post,* at 768 ("If anything, [*Perkins*] intimated that the defendant's Ohio contacts were *not* substantial in comparison to its contacts elsewhere.").

9 See generally von Mehren & Trautman 1177–1179. See also Twitchell, The Myth of General Jurisdiction, 101 Harv. L.Rev. 610, 676 (1988) ("[W]e do not need to justify broad exercises of dispute-blind jurisdiction unless our interpretation of the scope of specific jurisdiction unreasonably limits state authority over nonresident defendants."); Borchers, The Problem With General Jurisdiction, 2001 U. Chi. Legal Forum 119, 139 ("[G]eneral jurisdiction exists as an imperfect safety valve that sometimes allows plaintiffs access to a reasonable forum in cases when specific jurisdiction would deny it.").

10 Remarkably, Justice SOTOMAYOR treats specific jurisdiction as though it were barely there. Given the many decades in which specific jurisdiction has flourished, it would be hard to conjure up an example of the "deep injustice" Justice SOTOMAYOR predicts as a consequence of our holding that California is not an all-purpose forum for suits against Daimler. *Post,* at 771. Justice SOTOMAYOR identifies "the concept of reciprocal fairness" as the "touchstone principle of due process in this field." *Post,* at 768 (citing *International Shoe,* 326 U.S., at 319, 66 S.Ct. 154). She overlooks, however, that in the very passage of *International Shoe* on which she relies, the Court left no doubt that it was addressing specific—not general—jurisdiction. See *id.,* at 319, 66 S.Ct. 154 ("The exercise of th[e] privilege [of conducting corporate activities within a State] may give rise to obligations, and, *so far as those obligations arise out of or are connected with the activities within the state,* a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." (emphasis added)).

11 As the Court made plain in *Goodyear* and repeats here, general jurisdiction requires affiliations "so 'continuous and systematic' as to render [the foreign corporation] essentially at home in the forum State." 564 U.S., at ——, 131 S.Ct., at 2851, *i.e.,* comparable to a domestic enterprise in that State.

12 MBUSA is not a defendant in this case.

13 Agency relationships, we have recognized, may be relevant to the existence of *specific* jurisdiction. "[T]he corporate personality," *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), observed, "is a fiction, although a fiction intended to be acted upon as though it were a fact." *Id.*, at 316, 66 S.Ct. 154. See generally 1 W. Fletcher, Cyclopedia of the Law of Corporations § 30, p. 30 (Supp.2012–2013) ("A corporation is a distinct legal entity that can act only through its agents."). As such, a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there. See, *e.g., Asahi,* 480 U.S., at 112, 107 S.Ct. 1026 (opinion of O'Connor, J.) (defendant's act of "marketing [a] product through a distributor who has agreed to serve as the sales agent in the forum State" may amount to purposeful availment); *International Shoe,* 326 U.S., at 318, 66 S.Ct. 154 ("the commission of some single or occasional acts of the corporate agent in a state" may sometimes "be deemed sufficient to render the corporation liable to suit" on related claims). See also Brief for Petitioner 24 (acknowledging that "an agency relationship may be sufficient in some circumstances to give rise to *specific* jurisdiction"). It does not inevitably follow, however, that similar reasoning applies to *general* jurisdiction. Cf. *Goodyear,* 564 U.S., at ——, 131 S.Ct., at 2855 (faulting analysis that "elided the essential difference between case-specific and all-purpose (general) jurisdiction").

14 Indeed, plaintiffs do not defend this aspect of the Ninth Circuit's analysis. See Brief for Respondents 39, n. 18 ("We do not believe that this gloss is particularly helpful.").

15 The Ninth Circuit's agency analysis also looked to whether the parent enjoys "the right to substantially control" the subsidiary's activities. *Bauman v. DaimlerChrysler Corp.,* 644 F.3d 909, 924 (2011). The Court of Appeals found the requisite "control" demonstrated by the General Distributor Agreement between Daimler and MBUSA, which gives Daimler the right to oversee certain of MBUSA's operations, even though that agreement expressly disavowed the creation of any agency relationship. Thus grounded, the separate inquiry into control hardly curtails the overbreadth of the Ninth Circuit's agency holding.

16 By addressing this point, Justice SOTOMAYOR asserts, we have strayed from the question on which we granted certiorari to decide an issue not argued below. *Post,* at 765 – 766. That assertion is doubly flawed. First, the question on which we granted certiorari, as stated in Daimler's petition, is "whether it violates due process for a court to exercise general

personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State." Pet. for Cert. i. That question fairly encompasses an inquiry into whether, in light of *Goodyear*, Daimler can be considered at home in California based on MBUSA's in-state activities. See also this Court's Rule 14.1(a) (a party's statement of the question presented "is deemed to comprise every subsidiary question fairly included therein"). Moreover, both in the Ninth Circuit, see, *e.g.,* Brief for Federation of German Industries et al. as *Amici Curiae* in No. 07–15386(CA9), p. 3, and in this Court, see, *e.g.,* U.S. Brief 13–18; Brief for Chamber of Commerce of United States of America et al. as *Amici Curiae* 6–23; Brief for Lea Brilmayer as *Amica Curiae* 10–12, *amici* in support of Daimler homed in on the insufficiency of Daimler's California contacts for general jurisdiction purposes. In short, and in light of our pathmarking opinion in *Goodyear*, we perceive no unfairness in deciding today that California is not an all-purpose forum for claims against Daimler.

17 *International Shoe* also recognized, as noted above, see *supra,* at 753 – 754, that "some single or occasional acts of the corporate agent in a state ..., because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit." 326 U.S., at 318, 66 S.Ct. 154.

18 Plaintiffs emphasize two decisions, *Barrow S.S. Co. v. Kane,* 170 U.S. 100, 18 S.Ct. 526, 42 L.Ed. 964 (1898), and *Tauza v. Susquehanna Coal Co.,* 220 N.Y. 259, 115 N.E. 915 (1917) (Cardozo, J.), both cited in *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952), just after the statement that a corporation's continuous operations in-state may suffice to establish general jurisdiction. *Id.,* at 446, and n. 6, 72 S.Ct. 413. See also *International Shoe,* 326 U.S., at 318, 66 S.Ct. 154 (citing *Tauza*). *Barrow* and *Tauza* indeed upheld the exercise of general jurisdiction based on the presence of a local office, which signaled that the corporation was "doing business" in the forum. *Perkins'* unadorned citations to these cases, both decided in the era dominated by *Pennoyer* 's territorial thinking, see *supra,* at 753 – 754, should not attract heavy reliance today. See generally Feder, *Goodyear*, "Home," and the Uncertain Future of Doing Business Jurisdiction, 63 S.C. L.Rev. 671 (2012) (questioning whether "doing business" should persist as a basis for general jurisdiction).

19 We do not foreclose the possibility that in an exceptional case, see, *e.g., Perkins*, described *supra,* at 755 – 757, and n. 8, a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State. But this case presents no occasion to explore that question, because Daimler's activities in California plainly do not approach that level. It is one thing to hold a corporation answerable for operations in the forum State, see *infra,* at 763, quite another to expose it to suit on claims having no connection whatever to the forum State.

20 To clarify in light of Justice SOTOMAYOR's opinion concurring in the judgment, the general jurisdiction inquiry does not "focu[s] solely on the magnitude of the defendant's in-state contacts." *Post,* at 767. General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, "at home" would be synonymous with "doing business" tests framed before specific jurisdiction evolved in the United States. See von Mehren & Trautman 1142–1144. Nothing in *International Shoe* and its progeny suggests that "a particular quantum of local activity" should give a State authority over a "far larger quantum of ... activity" having no connection to any in-state activity. Feder, *supra,* at 694.

Justice SOTOMAYOR would reach the same result, but for a different reason. Rather than concluding that Daimler is not at home in California, Justice SOTOMAYOR would hold that the exercise of general jurisdiction over Daimler would be unreasonable "in the unique circumstances of this case." *Post,* at 763. In other words, she favors a resolution fit for this day and case only. True, a multipronged reasonableness check was articulated in *Asahi,* 480 U.S., at 113–114, 107 S.Ct. 1026, but not as a free-floating test. Instead, the check was to be essayed when *specific* jurisdiction is at issue. See also *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 476–478, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). First, a court is to determine whether the connection between the forum and the episode-in-suit could justify the exercise of specific jurisdiction. Then, in a second step, the court is to consider several additional factors to assess the reasonableness of entertaining the case. When a corporation is genuinely at home in the forum State, however, any second-step inquiry would be superfluous.

Justice SOTOMAYOR fears that our holding will "lead to greater unpredictability by radically expanding the scope of jurisdictional discovery." *Post,* at 770 – 771. But it is hard to see why much in the way of discovery would be needed to determine where a corporation is at home. Justice SOTOMAYOR's proposal to import *Asahi* 's "reasonableness" check into the general jurisdiction determination, on the other hand, would indeed compound the jurisdictional inquiry. The reasonableness factors identified in *Asahi* include "the burden on the defendant," "the interests of the forum State," "the plaintiff's interest in obtaining relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," "the shared interest of the several States in furthering fundamental substantive social policies," and, in

the international context, "the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction." 480 U.S., at 113–115, 107 S.Ct. 1026 (some internal quotation marks omitted). Imposing such a checklist in cases of general jurisdiction would hardly promote the efficient disposition of an issue that should be resolved expeditiously at the outset of litigation.

1 The Courts of Appeals have uniformly held that the reasonableness prong does in fact apply in the general jurisdiction context. See *Metropolitan Life Ins. Co. v. Robertson–Ceco Corp.*, 84 F.3d 560, 573 (C.A.2 1996) ("[E]very circuit that has considered the question has held, implicitly or explicitly, that the reasonableness inquiry is applicable to *all* questions of personal jurisdiction, general or specific"); see also, *e.g., Lakin v. Prudential Securities, Inc.*, 348 F.3d 704, 713 (C.A.8 2003); *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory,"* 283 F.3d 208, 213–214 (C.A.4 2002); *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1533 (C.A.10 1996); *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 851, n. 2 (C.A.9 1993); *Donatelli v. National Hockey League*, 893 F.2d 459, 465 (C.A.1 1990); *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 377 (C.A.5 1987). Without the benefit of a single page of briefing on the issue, the majority casually adds each of these cases to the mounting list of decisions jettisoned as a consequence of today's ruling. See *ante,* at 762, n. 20.

2 While our decisions rejecting the exercise of personal jurisdiction have typically done so under the minimum-contacts prong, we have never required that prong to be decided first. See *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 121, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) (Stevens, J., concurring in part and concurring in judgment) (rejecting personal jurisdiction under the reasonableness prong and declining to consider the minimum-contacts prong because doing so would not be "necessary"). And although the majority frets that deciding this case on the reasonableness ground would be "a resolution fit for this day and case only," *ante,* at 762, n. 20, I do not understand our constitutional duty to require otherwise.

3 The majority appears to suggest that Daimler may have presented the argument in its petition for rehearing en banc before the Ninth Circuit. See *ante,* at 752 (stating that Daimler "urg[ed] that the exercise of personal jurisdiction ... could not be reconciled with this Court's decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. ——, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011)"). But Daimler's petition for rehearing did not argue what the Court holds today. The Court holds that Daimler's California contacts would be insufficient for general jurisdiction even assuming that MBUSA's contacts may be attributed to Daimler. Daimler's rehearing petition made a distinct argument—that attribution of MBUSA's contacts should not be permitted under an " 'agency' theory" because doing so would "rais[e] significant constitutional concerns" under *Goodyear*. Petition for Rehearing or Rehearing En Banc in No. 07–15386(CA9), p. 9.

4 See DaimlerChrysler, Innovations for our Customers: Annual Report 2004, p. 22, http://www.daimler.com/Projects/c2c/channel/documents/1364377_2004_DaimlerChrysler_Annual_Report.pdf (as visited on Jan. 8, 2014, and available in Clerk of Court's case file).

5 To be sure, many of Daimler's key management decisions are undoubtedly made by employees outside California. But the same was true in *Perkins*. See *Perkins v. Benguet Consol. Min. Co.*, 88 Ohio App. 118, 124, 95 N.E.2d 5, 8 (1950) (*per curiam*) (describing management decisions made by the company's chief of staff in Manila and a purchasing agent in California); see also n. 8, *infra.*

6 While *Helicopteros* formulated the general jurisdiction inquiry as asking whether a foreign defendant possesses "continuous and systematic general business contacts," 466 U.S., at 416, 104 S.Ct. 1868, the majority correctly notes, *ante,* at 760, that *International Shoe* used the phrase "continuous and systematic" in the context of discussing specific jurisdiction, 326 U.S., at 317, 66 S.Ct. 154. But the majority recognizes that *International Shoe* separately described the type of contacts needed for general jurisdiction as "continuous corporate operations" that are "so substantial" as to justify suit on unrelated causes of action. *Id.*, at 318, 66 S.Ct. 154. It is unclear why our precedents departed from *International Shoe* 's "continuous and substantial" formulation in favor of the "continuous and systematic" formulation, but the majority does not contend—nor do I perceive—that there is a material difference between the two.

7 The majority suggests that I misinterpret language in *Perkins* that I do not even cite. *Ante,* at 756, n. 8. The majority is quite correct that it has found a sentence in *Perkins* that does not address whether most of the Philippine corporation's activities took place outside of Ohio. See *ante,* at 756, n. 8 (noting that *Perkins* described the company's "wartime activities" as "necessarily limited," 342 U.S., at 448, 72 S.Ct. 413). That is why I did not mention it. I instead rely on a sentence in *Perkins* ' opening paragraph: "The [Philippine] corporation has been carrying on in Ohio a continuous and systematic, but limited, part of its general business." *Id.,* at 438, 72 S.Ct. 413. That sentence obviously does convey that most of the corporation's activities occurred in "places other than Ohio," *ante,* at 756, n. 8. This is not surprising given that the company's Ohio contacts involved a single officer working from a home office, while its non-Ohio contacts included significant mining properties and machinery operated throughout the Philippines, Philippine employees (including a chief

of staff), a purchasing agent based in California, and board of directors meetings held in Washington, New York, and San Francisco. *Perkins,* 88 Ohio App., at 123–124, 95 N.E.2d, at 8; see also n. 8, *infra.*

8 The majority views the phrase "at home" as serving a different purpose—that of requiring a comparison between a defendant's in-state and out-of-state contacts. *Ante,* at 761, n. 20. That cannot be the correct understanding though, because among other things it would cast grave doubt on *Perkins*—a case that *Goodyear* pointed to as an exemplar of general jurisdiction, 564 U.S., at ——, 131 S.Ct., at 2855–2856. For if *Perkins* had applied the majority's newly minted proportionality test, it would have come out the other way.

The majority apparently thinks that the Philippine corporate defendant in *Perkins* did not have meaningful operations in places other than Ohio. See *ante,* at 755 – 756, and n. 8. But one cannot get past the second sentence of *Perkins* before realizing that is wrong. That sentence reads: "The corporation has been carrying on in Ohio a continuous and systematic, but limited, part of its general business." 342 U.S., at 438, 72 S.Ct. 413. Indeed, the facts of the case set forth by the Ohio Court of Appeals show just how "limited" the company's Ohio contacts—which included a single officer keeping files and managing affairs from his Ohio home office—were in comparison with its "general business" operations elsewhere. By the time the suit was commenced, the company had resumed its considerable mining operations in the Philippines, " 'rebuilding its properties' " there and purchasing " 'machinery, supplies and equipment.' " 88 Ohio App., at 123–124, 95 N.E.2d, at 8. Moreover, the company employed key managers in other forums, including a purchasing agent in San Francisco and a chief of staff in the Philippines. *Id.,* at 124, 95 N.E.2d, at 8. The San Francisco purchasing agent negotiated the purchase of the company's machinery and supplies " 'on the direction of the Company's Chief of Staff in Manila,' " *ibid.,* a fact that squarely refutes the majority's assertion that "[a]ll of Benguet's activities were directed by the company's president from within Ohio," *ante,* at 756, n. 8. And the vast majority of the company's board of directors meetings took place outside Ohio, in locations such as Washington, New York, and San Francisco. 88 Ohio App., at 125, 95 N.E.2d, at 8.

In light of these facts, it is all but impossible to reconcile the result in *Perkins* with the proportionality test the majority announces today. *Goodyear* 's use of the phrase "at home" is thus better understood to require the same general jurisdiction inquiry that *Perkins* required: An out-of-state business must have the kind of continuous and substantial in-state presence that a parallel local company would have.

9 I accept at face value the majority's declaration that general jurisdiction is not limited to a corporation's place of incorporation and principal place of business because "a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State." *Ante,* at 761, n. 19; see also *ante,* at 761. Were that not so, our analysis of the defendants' in-state contacts in *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952), *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984), and *Goodyear* would have been irrelevant, as none of the defendants in those cases was sued in its place of incorporation or principal place of business.

10 States will of course continue to exercise specific jurisdiction in many cases, but we have never held that to be the outer limit of the States' authority under the Due Process Clause. That is because the two forms of jurisdiction address different concerns. Whereas specific jurisdiction focuses on the relationship between a defendant's challenged conduct and the forum State, general jurisdiction focuses on the defendant's substantial presence in the State irrespective of the location of the challenged conduct.

11 See also, *e.g., Woods v. Nova Companies Belize Ltd.,* 739 So.2d 617, 620–621 (Fla.App.1999) (estate of decedent killed in an overseas plane crash permitted to sue responsible Belizean corporate defendant in Florida courts, rather than Belizean courts, based on defendant's continuous and systematic business contacts in Florida).

12 The present case and the examples posited involve foreign corporate defendants, but the principle announced by the majority would apply equally to preclude general jurisdiction over a U.S. company that is incorporated and has its principal place of business in another U.S. State. Under the majority's rule, for example, a General Motors autoworker who retires to Florida would be unable to sue GM in that State for disabilities that develop from the retiree's labor at a Michigan parts plant, even though GM undertakes considerable business operations in Florida. See Twitchell, The Myth of General Jurisdiction, 101 Harv. L.Rev. 610, 670 (1988).

* * *

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

(Added Pub. L. 100–702, title X, § 1019(a), Nov. 19, 1988, 102 Stat. 4670, § 15; renumbered § 16, Pub. L. 101–650, title III, § 325(a)(1), Dec. 1, 1990, 104 Stat. 5120.)

AMENDMENTS

1990—Pub. L. 101–650 renumbered the second section 15 of this title as this section.

CHAPTER 2—CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

AMENDMENTS

1970—Pub. L. 91–368, § 1, July 31, 1970, 84 Stat. 692, added heading for chapter 2 and analysis of sections for such chapter.

§ 201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

(Added Pub. L. 91–368, § 1, July 31, 1970, 84 Stat. 692.)

EFFECTIVE DATE

Pub. L. 91–368, § 4, July 31, 1970, 84 Stat. 693, provided that: ''This Act [enacting this chapter] shall be effective upon the entry into force of the Convention on Recognition and Enforcement of Foreign Arbitral Awards with respect to the United States.'' The Convention was entered into force for the United States on Dec. 29, 1970.

§ 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

(Added Pub. L. 91–368, § 1, July 31, 1970, 84 Stat. 692.)

§ 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

(Added Pub. L. 91–368, § 1, July 31, 1970, 84 Stat. 692.)

§ 204. Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

(Added Pub. L. 91–368, § 1, July 31, 1970, 84 Stat. 692.)

§ 205. Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

(Added Pub. L. 91–368, § 1, July 31, 1970, 84 Stat. 692.)

§ 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accord-

ance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

(Added Pub. L. 91–368, §1, July 31, 1970, 84 Stat. 693.)

§ 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

(Added Pub. L. 91–368, §1, July 31, 1970, 84 Stat. 693.)

§ 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

(Added Pub. L. 91–368, §1, July 31, 1970, 84 Stat. 693.)

CHAPTER 3—INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION

Sec.

§ 301. Enforcement of Convention

The Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in United States courts in accordance with this chapter.

(Added Pub. L. 101–369, §1, Aug. 15, 1990, 104 Stat. 448.)

EFFECTIVE DATE

Pub. L. 101–369, §3, Aug. 15, 1990, 104 Stat. 450, provided that: ''This Act [enacting this chapter] shall take effect upon the entry into force of the Inter-American Convention on International Commercial Arbitration of January 30, 1975, with respect to the United States.'' The Convention entered into force for the United States on Oct. 27, 1990.

§ 302. Incorporation by reference

Sections 202, 203, 204, 205, and 207 of this title shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter ''the Convention'' shall mean the Inter-American Convention.

(Added Pub. L. 101–369, §1, Aug. 15, 1990, 104 Stat. 448.)

§ 303. Order to compel arbitration; appointment of arbitrators; locale

(a) A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. The court may also appoint arbitrators in accordance with the provisions of the agreement.

(b) In the event the agreement does not make provision for the place of arbitration or the appointment of arbitrators, the court shall direct that the arbitration shall be held and the arbitrators be appointed in accordance with Article 3 of the Inter-American Convention.

(Added Pub. L. 101–369, §1, Aug. 15, 1990, 104 Stat. 448.)

§ 304. Recognition and enforcement of foreign arbitral decisions and awards; reciprocity

Arbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter only if that State has ratified or acceded to the Inter-American Convention.

(Added Pub. L. 101–369, §1, Aug. 15, 1990, 104 Stat. 449.)

§ 305. Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958

When the requirements for application of both the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows:

(1) If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply.

(2) In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply.

(Added Pub. L. 101–369, §1, Aug. 15, 1990, 104 Stat. 449.)

§ 306. Applicable rules of Inter-American Commercial Arbitration Commission

(a) For the purposes of this chapter the rules of procedure of the Inter-American Commercial Arbitration Commission referred to in Article 3 of the Inter-American Convention shall, subject to subsection (b) of this section, be those rules as promulgated by the Commission on July 1, 1988.

(b) In the event the rules of procedure of the Inter-American Commercial Arbitration Commission are modified or amended in accordance with the procedures for amendment of the rules

750 F.3d 221
United States Court of Appeals,
Second Circuit.

SONERA HOLDING B.V., Petitioner–Appellee,

v.

#CUKUROVA HOLDING A.Ş., Respondent–Appellant. *

Docket Nos. 12–4280–CV (L), 13–73–CV, 13–1880–CV.

|

Argued: Aug. 22, 2013.

|

Decided: April 25, 2014.

Synopsis

Background: A Dutch holding company brought action to confirm foreign arbitral award against a Turkish joint stock corporation. The United States District Court for the Southern District of New York, Denise L. Cote, J., 895 F.Supp.2d 513, held that it had personal jurisdiction over the Turkish corporate defendant, 2012 WL 6644636, denied a motion to reconsider, 2013 WL 4405382, granted a preliminary injunction, 2013 WL 1935325, and denied a request to stay the injunction pending appeal. The Turkish defendant appealed.

Holdings: The United States Court of Appeals held that:

[1] the Turkish corporation's contacts with New York were insufficient for the exercise of general jurisdiction, and

[2] the Turkish corporation did not waive the personal jurisdiction defense in a letter agreement with Dutch company.

Reversed, judgments vacated, and remanded.

West Headnotes (7)

[1] Constitutional Law
Non-residents in general

Federal Courts
Actions by or Against Nonresidents; "Long-Arm" Jurisdiction

Federal Courts
Personal jurisdiction

Personal jurisdiction over a foreign defendant in a federal-question case requires a two-step inquiry: first, a court determines whether the defendant is subject to jurisdiction under the law of the forum state, and second, a court considers whether the exercise of personal jurisdiction over the defendant comports with the Due Process Clause of the United States Constitution. U.S.C.A. Const.Amend. 14.

63 Cases that cite this headnote

[2] Constitutional Law
Non-residents in general

A State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has certain minimum contacts with the State such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. U.S.C.A. Const.Amend. 14.

17 Cases that cite this headnote

[3] Federal Courts
Related contacts and activities;specific jurisdiction

Specific or conduct-linked jurisdiction depends on an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum state and is therefore subject to the State's regulation. U.S.C.A. Const.Amend. 14.

17 Cases that cite this headnote

[4] **Federal Courts**
Unrelated contacts and activities;general jurisdiction

General jurisdiction exists only when a corporation's contacts with a state are so continuous and systematic as to render it essentially at home in the forum State. U.S.C.A. Const.Amend. 14.

56 Cases that cite this headnote

[5] **Federal Courts**
Corporations and business organizations

A court with general jurisdiction over a corporation may adjudicate all claims against that corporation, even those entirely unrelated to the defendant's contacts with the state. U.S.C.A. Const.Amend. 14.

20 Cases that cite this headnote

[6] **Federal Courts**
Particular Entities, Contexts, and Causes of Action

Federal Courts
Related or affiliated entities;parent and subsidiary

Even assuming that all of the contacts of a Turkish joint stock corporation's affiliates with New York should be imputed to the Turkish corporation, the corporation was not at home in New York, and thus New York lacked general jurisdiction over the corporation, even though the affiliates negotiated with companies in New York, contracted with American companies, and had offices in New York, where the corporation was organized under the laws of the Republic of Turkey, and the corporation had operations, properties, and assets predominantly located in Turkey.

37 Cases that cite this headnote

[7] **Federal Courts**
Waiver, estoppel, and consent

A provision in letter agreement, that provided for binding arbitration between a Dutch holding company and a Turkish joint stock corporation and allowed for enforcement "in any court having jurisdiction over the award or over the person or the assets of the owing party or parties," did not constitute a waiver by the Turkish corporation of any defense based on lack of personal jurisdiction; the provision appeared to be a standard entry-of-judgment clause that did not speak to personal jurisdiction.

Cases that cite this headnote

Attorneys and Law Firms

***222** Richard J. Holwell (Michael Shuster, Dorit Ungar Black, Karen Andrea Grus, on the brief), Holwell Shuster & Goldberg LLP, New York, NY, for Respondent–Appellant.

Pieter Van Tol (Andrew M. Behrman, Erin Marie Meyer, on the brief), Hogan Lovells U.S. LLP, New York, NY, for Petitioner–Appellee.

Before: WINTER, WESLEY, and CARNEY, Circuit Judges.

Opinion

PER CURIAM:

Appeal from orders of the United States District Court for the Southern District of New York (Denise L. Cote, *Judge*) dated September 21, 2012; December 21, 2012; April 18, 2013; and May 10, 2013. The district court held that it had personal jurisdiction over Çukurova based primarily on the New York contacts of several companies with which Çukurova is affiliated. ***223** The Supreme Court's decision in *Daimler AG v. Bauman,* —— U.S. ——, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014), reaffirms that general jurisdiction extends beyond an entity's state of incorporation and principal place of business only in the exceptional case where its contacts with another forum are so substantial as to render it "at home" in that state. For the reasons stated below, even assuming the activities of Çukurova's affiliates can be ascribed to it for the purposes of a general jurisdictional analysis,

Çukurova lacks sufficient contacts with New York to render it "at home" there. We therefore REVERSE the district court's judgment denying Çukurova's motion to dismiss for lack of personal jurisdiction, VACATE the subsequent judgments of the district court, REMAND the case to the district court, and direct the court to DISMISS the action for lack of personal jurisdiction.

BACKGROUND

Sonera Holding B.V. ("Sonera"), a Dutch holding corporation, brought suit in the United States District Court for the Southern District of New York to enforce a final arbitration award against Çukurova Holding A.#. ("Çukurova"), the parent company of a large Turkish conglomerate. The parties' underlying dispute arose out of negotiations for Çukurova's sale to Sonera of shares in Turkcell Holding A.#. ("Turkcell Holding"), a Turkish joint stock company that owns a controlling stake in Turkey's largest mobile phone operator. Following failed negotiations and a protracted proceeding before an arbitral tribunal in Geneva, Switzerland, the tribunal found that the parties concluded a share purchase agreement and ordered Çukurova to pay Sonera $932 million in damages for its failure to deliver the shares.

Sonera filed applications for enforcement in jurisdictions across the world, including the British Virgin Islands, Switzerland, the Netherlands, and, as relevant here, the Southern District of New York.

Rejecting Çukurova's contention that New York lacked personal jurisdiction over it, the district court issued four orders, from which Çukurova now appeals, confirming the arbitration award in favor of Sonera; denying a motion to reconsider; issuing a preliminary injunction preventing Çukurova from engaging in transactions to shield its assets; and denying dissolution of the preliminary injunction. [1]

Çukurova is a Turkish holding company with its registered office in Istanbul, Turkey. It holds investments in other companies and has no operations and owns no property in New York or any of the United States. Sonera asserts that Çukurova is nonetheless subject to general jurisdiction in New York based on Çukurova's own actions and the actions of Çukurova's affiliates, which, according to Sonera, should be imputed to Çukurova.

The actions on which Sonera predicates its assertion of general jurisdiction include (1) negotiations by Çukurova or one of its affiliates (which occurred outside the United States and were ultimately unsuccessful) to sell an interest in Show TV, a Turkish television broadcaster, to two New York—based private equity funds; (2) Çukurova's sale of American Depository Shares ("ADS") in Turkcell to an underwriter in London, which subsequently offered the ADS for sale on the New York Stock Exchange; (3) the agreement of Digiturk, ***224** a Turkish Çukurova affiliate, to provide digital television content to a U.S.-based company; (4) use of a New York office used by Baytur Insaat Taahhüt A.#. ("Baytur") and Equipment and Parts Export, Inc. ("EPE"), two Turkish companies affiliated with Çukurova; and (5) statements on EPE's website describing itself as having been "[f]ounded in New York City in 1979" and as Çukurova's "gateway to the Americas."

On appeal, Çukurova (1) challenges the district court's denial of its motions to dismiss for lack of personal jurisdiction and for forum non conveniens; (2) seeks reversal of the district court's decision deferring to the jurisdictional determinations of the arbitral tribunal; and (3) challenges the district court's refusal, on Çukurova's motion to vacate, to reconsider its finding of personal jurisdiction. Because we find Çukurova's contacts with New York insufficient to subject it to general jurisdiction and accordingly reverse the district court's judgment denying Çukurova's motion to dismiss for lack of personal jurisdiction, there is no need to reach Çukurova's remaining arguments.

DISCUSSION

A. Personal Jurisdiction

[1] Personal jurisdiction over a foreign defendant in a federal-question case requires a two-step inquiry. *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL,* 732 F.3d 161, 168 (2d Cir.2013). First, we determine whether the defendant is subject to jurisdiction under the law of the forum state—here, New York. Second, we consider whether the exercise of personal jurisdiction over the defendant comports with the Due Process Clause of the United States Constitution. *Id.*

Sonera asserts that Çukurova is subject to general jurisdiction in New York pursuant to N.Y. C.P.L.R. 301, which confers jurisdiction where a company "has engaged in such a continuous and systematic course of 'doing business' [in New York] that a finding of its 'presence' [in New York] is warranted." *Landoil Res. Corp. v. Alexander & Alexander Servs.,* 77 N.Y.2d 28, 33, 563 N.Y.S.2d 739, 565 N.E.2d 488 (1990) (citations omitted). In *Wiwa v. Royal Dutch Petroleum Co.,* we reasoned that the continuous course of "doing business" in New York "do[es] not necessarily need to be conducted by the foreign corporation itself." 226 F.3d 88, 95 (2d. Cir.2000). Rather, we interpreted New York law to include an agency theory of jurisdiction that subjects a corporation to general jurisdiction when it relies on a New York representative entity to render services on its behalf "that go beyond mere solicitation and are sufficiently important to the foreign entity that the corporation itself would perform equivalent services if no agent were available." *Id.*

According to Sonera, even if Çukurova's own contacts with New York are insufficient for general jurisdiction, the contacts of Digiturk, Baytur, and EPE should be imputed to Çukurova, and these combined contacts with New York render Çukurova subject to the general jurisdiction of New York. Çukurova contends that New York law does not permit personal jurisdiction on these facts and that even if it did, the agency theory of personal jurisdiction is incompatible with due process.

B. Due Process

In light of the Supreme Court's decision in *Daimler AG v. Bauman,* ——U.S. ——, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014), we need not determine whether the district court correctly found Çukurova subject to its general jurisdiction under New York law.[2] Whatever the purported scope of ***225** N.Y. C.P.L.R. 301 and the agency-based theory of jurisdiction articulated in *Wiwa, Daimler* confirmed that subjecting Çukurova to general jurisdiction in New York would be incompatible with due process.

[2] In the area of personal jurisdiction, "[t]he canonical opinion ... remains *International Shoe,* in which [the Supreme Court] held that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has 'certain minimum contacts with [the State] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Goodyear Dunlop Tires Operations, S.A. v. Brown,* —— U.S. ——, 131 S.Ct. 2846, 2853, 180 L.Ed.2d 796 (2011) (second alteration in original) (internal quotation marks omitted) (quoting *Int'l Shoe Co. v. Wash.,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)).

[3] **[4]** **[5]** There are two types of personal jurisdiction: specific and general. Specific or conduct-linked jurisdiction, which Sonera does not assert, "depends on an affiliation[n] between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum state and is therefore subject to the State's regulation." *Id.* at 2851 (alteration in original) (internal quotation marks omitted). By contrast, general jurisdiction exists only when a corporation's contacts with a state are "so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Id.* A court with general jurisdiction over a corporation may adjudicate *all* claims against that corporation—even those entirely unrelated to the defendant's contacts with the state.

The natural result of general jurisdiction's "at home" requirement is that "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there." *Daimler,* 134 S.Ct. at 760. "A corporation that operates in many places can scarcely be deemed at home in all of them." *Id.* at 762 n. 20. The paradigm forum for general jurisdiction over an individual is the individual's domicile, his home. For a corporation, it is an equivalent place, with the place of incorporation and the principal place of business being the paradigm bases. "Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable." *Id.* at 760.

C. Çukurova's Contacts with New York

[6] *Daimler* expressed doubts as to the usefulness of an agency analysis, like that espoused in *Wiwa,* that focuses on a forum-state affiliate's importance to the defendant rather than on whether the affiliate is so dominated by the defendant as to be its alter ego. "[T]he inquiry into importance stacks the deck, for it will always yield a pro-jurisdiction answer: Anything a corporation does through [its affiliate] is presumably something that the corporation would do 'by other means' if the [affiliate] did not exist." *Id.* at 759. (internal quotation marks omitted).

***226** For our purposes, we need not consider whether the agency principles announced in *Wiwa* survive in light of *Daimler.* Even assuming that all of Digiturk's, Baytur's, and EPE's contacts should be imputed to Çukurova, the company's contacts with New York do not come close to making it "at home" there.

As noted above, Sonera would predicate general jurisdiction on (1) Çukurova's unsuccessful negotiations to sell a portion of Show TV to two New York-based private equity funds; (2) Çukurova's sale of ADS in Turkcell to an underwriter in London, which subsequently offered the ADS for sale on the New York Stock Exchange; (3) Digiturk's agreement with a U.S.-based company to provide digital television content; (4) a New York office location used by Baytur and EPE; and (5) statements on EPE's website promoting it as Çukurova's connection to the United States.

Çukurova is organized under the laws of the Republic of Turkey, with operations, properties, and assets predominantly located in Turkey. New York is neither Çukurova's place of incorporation nor its primary place of business. Even assuming Digiturk's, Baytur's, and EPE's New York contacts should be imputed to Çukurova, they do not shift the company's primary place of business (or place of incorporation) away from Turkey. And although *Daimler* and *Goodyear* "d[o] not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business," *Daimler,* 134 S.Ct. at 760, those cases make clear that even a company's "engage[ment] in a substantial, continuous, and systematic course of business" is alone insufficient to render it at home in a forum, *id.* at 761. Çukurova's contacts fall short of those required to render it at home in New York. To subject it to all-purpose general jurisdiction in that state would deny it due process.

D. Contractual Consent to Personal Jurisdiction

[7] Lastly, Sonera argues that even if Çukurova's contacts with New York are insufficient to support personal jurisdiction, we should still affirm the District Court's decision because Çukurova expressly consented to the forum's jurisdiction.

In March 2005, Sonera and Çukurova entered into an agreement (the "Letter Agreement") that required the parties to make good faith efforts to execute a final share purchase agreement allowing Sonera to purchase Çukurova's interests in Turkcell Holding. The Letter Agreement specifies that any disputes arising out of it are to be settled by arbitration under the rules of the International Chamber of Commerce in Geneva, Switzerland, and that any award of the tribunal shall be final and binding on the parties. As relevant here, Article 5.4(e) of the Letter Agreement further provides as follows:

> Any award of the arbitral tribunal may be enforced by judgment or otherwise in any court having jurisdiction over the award or over the person or the assets of the owing Party or Parties. Applications may be made to such court for judicial recognition of the award and/or an order for enforcement, as the case may be.

Sonera reads this provision as an implicit agreement to waive any defense based on lack of personal jurisdiction and to consent to the jurisdiction of any court in any country in the world with subject matter jurisdiction over enforcement actions brought pursuant to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards—including, under 9 U.S.C. § 203, ***227** the United States District Court for the Southern District of New York.

We do not read the provision so broadly. Article 5.4(e) appears to be a standard entry-of-judgment clause designed to clarify that, following any arbitration award, a court of the arbitral venue or in any jurisdiction in which the parties' persons or assets are located would have jurisdiction to enter judgment on that award.[3] Article 5.4(e) does not speak to personal jurisdiction, and we decline to interpret the provision as Çukurova's consent to personal jurisdiction in New York.

CONCLUSION

We have considered all of Sonera's arguments in support of jurisdiction and find them to be without merit. We therefore REVERSE the district court's judgment denying Çukurova's motion to dismiss for lack of personal jurisdiction, VACATE the subsequent judgments of the district court, REMAND the case to the district court,

and direct the court to DISMISS the action for lack of personal jurisdiction.

All Citations

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Footnotes

* The Clerk of the Court is directed to amend the official caption as noted above.

1 *Sonera Holding B.V. v. Çukurova Holding A. S,* 895 F.Supp.2d 513 (S.D.N.Y.2012); No. 11 Civ. 8909(DLC), 2012 WL 6644636 (S.D.N.Y. Dec. 21, 2012); No. 11–CV–08909(DLC)(FM), 2013 WL 4405382 (S.D.N.Y. Apr. 18, 2013); No. 11 Civ. 8909(DLC), 2013 WL 1935325 (S.D.N.Y. May 10, 2013).

2 There is no need to address the scope of general jurisdiction under New York law because the exercise of general jurisdiction over Çukurova is clearly inconsistent with *Daimler.* However, we note some tension between *Daimler* 's "at home" requirement and New York's "doing business" test for corporate "presence," which subjects a corporation to general jurisdiction if it does business there "not occasionally or casually, but with a fair measure of permanence and continuity." *Tauza v. Susquehanna Coal Co.,* 220 N.Y. 259, 267, 115 N.E. 915 (1917) (Cardozo, J.) (codified along with other "doing business" case law by N.Y. C.P.L.R. 301). Not every company that regularly "does business" in New York is "at home" there. *Daimler* 's gloss on due process may lead New York courts to revisit Judge Cardozo's well-known and oft-repeated jurisdictional incantation.

3 Although a jurisdictional stipulation to entry of judgment in international arbitration contracts is technically unnecessary given 9 U.S.C. § 203's conferral on U.S. district courts of original subject matter jurisdiction over Convention awards, consent to entry of judgment is required, under 9 U.S.C. § 9, for enforcement of domestic arbitration awards, and authorities on international arbitration recommend such clauses be included even in international agreements out of an abundance of caution. *See, e.g.,* R. Doak Bishop, *Drafting the ICC Arbitral Clause, in* Transnational Litigation § 41:8 (J. Fellas ed., Westlaw 2014).

VACATING AN INTERNATIONAL ARBITRATION AWARD RENDERED IN THE UNITED STATES: DOES THE NEW YORK CONVENTION, THE FEDERAL ARBITRATION ACT OR STATE LAW APPLY?

By
Lea Haber Kuck and Amanda Raymond Kalantirsky*

I. INTRODUCTION

When an international arbitration award is issued in the United States, and one party wants to have the award confirmed, enforced or vacated, three different bodies of law are potentially implicated: (1) the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"),[1] (2) the Federal Arbitration Act ("FAA"),[2] and (3) state law. A recent decision by the United States Court of Appeals for the Third Circuit in *Ario v. Underwriting Members of Syndicate 53 at Lloyds*[3] highlights the complex interaction of these laws in the context of an attempt to vacate an international award. The case demonstrates both why the parties' selection of the seat of an arbitration is critical and why parties must take care in drafting arbitration clauses.

This article begins by examining the relevant provisions of the Convention, the FAA, and the role of state law. For an illustration of the interplay of these provisions, it then discusses the Third Circuit's decision in *Ario*, where the Third Circuit held that the grounds for vacatur of an international arbitration award issued in the United States are the same grounds as those applied to a domestic arbitration award. By this decision, the Third Circuit joined other circuits that have

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1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

2 9 U.S.C. §§ 1-16, 201-08, 301-07 (2011).

3 Ario v. Underwriting Members of Syndicate 53 at Lloyds, 618 F.3d 277 (3d Cir. 2010).

held that the grounds for vacatur set forth in the FAA applicable to domestic arbitration awards also apply to international arbitration awards rendered within the United States. However, a few courts have held that a motion to vacate an international award rendered in the United States should be decided only under the New York Convention's more limited grounds for review. The result of this split in the case law is that parties and practitioners must be aware of the jurisdiction within the United States where a motion to vacate an award is likely to be brought. As discussed below, whether the New York Convention or the FAA governs also has important implications with respect to certain procedural rules that apply to the application to vacate.

II. THE THREE BODIES OF LAW IMPLICATED BY A MOTION TO VACATE

A. The New York Convention

The New York Convention, which has been in force in the United States for almost 40 years and has been ratified or acceded to by more than 140 countries, provides a relatively straightforward and effective mechanism for the enforcement of arbitral awards throughout the world. The goal of the New York Convention is "to encourage the recognition and enforcement of *international* arbitration awards and agreements";[4] its "'underlying theme . . . as a whole is clearly the autonomy of international arbitration.'"[5]

The New York Convention applies to (a) arbitral awards that are made in a country which is a party to the Convention other than the country where enforcement is sought, or (b) awards that are "not considered as domestic awards

[4] Jacada (Europe) Ltd. v. Int'l Mktg. Strategies, Inc., 401 F.3d 701, 705 (6th Cir. 2005).
[5] Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp., 512 F.3d 742, 746 (5th Cir. 2008) (quoting PHILIPPE FOUCHARD, EMMANUEL GAILLARD & BERTHOLD GOLDMAN, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION para. 250 (Emmanuel Gaillard & John Savage eds., 1999)).

in the [country] where their recognition and enforcement is sought."[6] Thus, whether an award is considered international or domestic is determined by the law of the country where recognition or enforcement is sought, rather than the Convention.

B. The FAA

In the United States, the New York Convention is implemented through the FAA. As the Supreme Court has explained, "Congress enacted the FAA to replace judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts."[7] The FAA consists of three chapters. Chapter 1[8] contains "a set of default rules 'designed "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate"'";[9] Chapter 2 implements the New York Convention and governs international or non-domestic awards; [10] and Chapter 3 provides for the enforcement of the Inter-American Convention on International Commercial Arbitration, also known as the Panama Convention,[11] and sets forth the interplay between the New York Convention and the Panama Convention. [12]

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[6] New York Convention, *supra* note 1, art. I, 21 U.S.T. at 2519. This approach was adopted to accommodate a divergence of opinion between civil law countries, which considered "'the nationality of an award [to be] determined by the law governing the procedure,'" *Jacada (Europe)*, 401 F.3d at 705 (quoting Bergesen v. Joseph Muller Corp., 710 F.2d 928, 931 (2d Cir. 1983)), and common law countries, which "favored a simple rule under which an award was domestic in the country it was entered and foreign elsewhere." *Id.*

[7] Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 581 (2008) (alterations in original) (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)).

[8] 9 U.S.C. §§ 1-16.

[9] Ario v. Underwriting Members of Syndicate 53 at Lloyds, 618 F.3d 277, 288 (3d Cir. 2010) (quoting Volt Info. Scis., Inc. v. Bd. of Trs.. of Leland Stanford Jr. Univ., 489 U.S. 468, 474 (1989)).

[10] 9 U.S.C. §§ 201-208.

[11] Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, S. Treaty Doc. No. 97-12, O.A.S.T.S. No. 42, 14 I.L.M. 336 [hereinafter Panama Convention]. The following states have ratified the Panama Convention: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, United States, Uruguay and Venezuela. The only OAS

Chapter 2 defines what awards constitute international or non-domestic arbitration awards and are thus covered by the New York Convention:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial . . . falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.[13]

Application of Chapter 2 of the FAA is not limited to awards rendered outside the United States. Rather, under the FAA, an arbitration award issued in New York, in a commercial dispute governed by New York law, in favor of a New York citizen, would nevertheless be considered an international award if another party to the arbitration was not a U.S. citizen, or alternatively, if it involved a dispute relating to property or performance outside of the United States.[14]

The FAA also provides, however, that "Chapter 1 [of the FAA, governing domestic disputes,] applies to actions and proceedings brought under [Chapter 2] to the extent that chapter is not in conflict with [Chapter 2] or the Convention as

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member states that have not ratified the Convention are the Dominican Republic and Nicaragua.

[12] 9 U.S.C. §§ 301-307.

[13] 9 U.S.C. § 202.

[14] *See, e.g.*, Lander Co. v. MMP Invs., Inc., 107 F.3d 476-78, 481-82 (7th Cir. 1997) (award issued in New York in dispute between two U.S. firms for distribution of U.S.-manufactured products in Poland found to be non-domestic under 9 U.S.C. § 202). *See also* Zeiler v. Deitsch, 500 F.3d 157, 164 (2d Cir. 2007) (arbitration was non-domestic, even though it took place in New York, where assets were located in Israel, some parties resided in Israel and governing law was based on a foreign system).

ratified by the United States."[15] Thus, the federal law governing domestic arbitrations may also be implicated in connection with the judicial review of an international award. Then, as a result, state law may also come into play because, as discussed below, the FAA also permits parties to agree that state arbitration law will apply to certain aspects of their arbitration.

C. Recognition or Enforcement of an Award Under the New York Convention

As discussed above, the New York Convention may apply to arbitration awards issued in the United States because some of these awards will be considered to be international or non-domestic under the FAA.[16]

While the New York Convention sets forth the grounds on which a court may refuse to recognize or enforce an international award, it does not explicitly deal with the grounds that are available on a motion to vacate or set aside an arbitral award. The New York Convention provides that a court "shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon"[17] unless the party against whom the award is invoked provides "proof" that one of seven limited grounds for non-recognition exists.[18] One of the seven grounds set forth in Article V(1)(e) is

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[15] 9 U.S.C. § 208.

[16] *See* 9 U.S.C. § 202; New York Convention, *supra* note 1, art. I(1), 21 U.S.T. at 2519.

[17] New York Convention, *supra* note 1, art. III, 21 U.S.T. at 2519.

[18] *See id.*, art. V, 21 U.S.T. at 2520. Article V provides:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the

that the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."[19]

Article V(1)(e) appears to draw a distinction between courts of the country "in which, or under the law of which, that award was made,"[20] and courts of countries where enforcement of the award is sought. This divide has been recognized as creating a distinction between courts with "primary" jurisdiction (i.e., jurisdiction to set aside or vacate an arbitral award), and "secondary" jurisdiction (i.e., without jurisdiction to set aside or vacate an award, but with jurisdiction to deny enforcement of an award). As the Fifth Circuit has recognized,

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> arbitration proceedings or was otherwise unable to present his case; or
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> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
>
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
>
> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Id. The grounds to refuse recognition of a foreign award under the New York Convention are identical to the grounds contained in the Panama Convention. *See* Panama Convention, *supra* note 12, art. 5.

[19] New York Convention, *supra* note 1, art. V(1)(e), 21 U.S.T. at 2520; *see also* 9 U.S.C. § 207.

[20] New York Convention, *supra* note 1, art. V(1)(e), 21 U.S.T. at 2520.

"[o]nly a court in a country with primary jurisdiction over an arbitral award may annul that award."[21]

The Convention contains no description of or limitation on the capacity of the jurisdiction where the award was rendered to apply its own law vacating the award.[22] This means that the parties' choice of the seat of arbitration can have significant consequences for any judicial review of the award. According to one scholar, the Convention "entrusts the place of arbitration with significant power to enhance, or to impair, the international effectiveness of an award rendered within its territory. The ways courts at the arbitral seat exercise, or fail to exercise, their power to set an award aside generally will determine the award's international currency."[23]

D. Vacating an Arbitral Award in the United States

For the reasons discussed above, in order for a party to invoke Article V(1)(e) of the New York Convention as a ground for denying enforcement of the award, an international award made in the United States would need to be vacated by a U.S. court under U.S. law.[24] Under U.S. law, a threshold question arises as to whether a motion to vacate an award is governed by the FAA standards for vacatur or by the arbitration law of the state in which the award was made, or of the state whose law governs the parties' contract. Although the Supreme Court held in a

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[21] Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 287 (5th Cir. 2004); *See also* M & C Corp. v. Erwin Behr GmbH & Co., 87 F.3d 844, 849 (6th Cir. 1996) ("We hold . . . that such a motion to vacate may be heard only in the courts of the country where the arbitration occurred or in the courts of any country whose *procedural* law was specifically invoked in the contract calling for arbitration of contractual disputes.").

[22] *See* William W. Park, *The International Currency of Arbitral Awards*, *in* INTERNATIONAL ARBITRATION 2007 309, 333 (PLI Litig. & Admin. Practice, Course Handbook Series No. 756, 2007); *see also* George A. Bermann, *Jurisdiction: Courts vs. Arbitrators*, *in* INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 135, 169 (James H. Carter & John Fellas eds., 2010).

[23] WILLIAM W. PARK, INTERNATIONAL FORUM SELECTION 127 (1995).

[24] *See* Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 21-23 (2d Cir. 1997).

case involving a domestic arbitration that, as a general matter, the FAA does not preempt state law,[25] in this specific context, the FAA standards for vacatur are widely recognized to preempt state grounds for vacatur unless the parties clearly provide otherwise in their agreement.[26]

In *Hall Street Associates, L.L.C. v. Mattel, Inc.*,[27] the Supreme Court expressly left open the possibility that parties may select state law to govern enforcement or vacatur of an arbitral award, stating:

> The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious judicial review under §§ 9, 10, and 11 [of the FAA], deciding nothing about other possible avenues for judicial enforcement of arbitration awards.[28]

Several Courts of Appeals have also contemplated that parties may displace the federal standard for vacatur with a state law standard, but only if they do so explicitly in their agreements.[29]

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[25] *See* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 477 (1989) ("The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration").

[26] *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2565 (2009) ("It is well-settled that federal standards for vacatur under the FAA are preemptive under U.S. law, superseding more expansive grounds for vacatur under state law."); Ario v. Underwriting Members of Syndicate 53 at Lloyds, 618 F.3d 277, 292 (3d Cir. 2010) ("'[T]he FAA standards control "in the absence of contractual intent to the contrary."'" (alteration in original) (quoting Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 296 (3d Cir. 2001) (quoting Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 59 (1995)))).

[27] Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008).

[28] *Id.* at 590.

[29] *See, e.g.*, Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account, 618 F.3d 277, 292-93 (3d Cir. 2010); Jacada (Europe) Ltd. v. Int'l Mktg.

Assuming that the parties have not explicitly chosen a state law regime for vacatur, parties may move to vacate arbitral awards made in the United States under Section 10 of the FAA,[30] which provides the exclusive grounds for vacatur of awards under the FAA.[31] Under Section 10, a court may vacate an award for the following reasons:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[32]

These grounds to vacate under the FAA overlap to a large extent with the grounds to deny enforcement contained in Article V of the Convention, but are also

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Strategies, Inc., 401 F.3d 701, 711-12 (6th Cir. 2005) (generic choice of law clause was not sufficient evidence to demonstrate that the parties intended to displace the federal standard for vacatur); Action Indus., Inc. v. U.S. Fid. & Guar. Co., 358 F.3d 337, 342-43 (5th Cir. 2004) (holding that agreement at issue's "choice-of-law provision [did] not express the parties' clear intent to depart from the FAA's vacatur standard").

[30] 9 U.S.C. § 10.

[31] *See Hall St. Assocs.*, 552 U.S. at 583-84. In *Hall Street Associates*, the Court held that parties could not expand the scope of judicial review under the FAA by contract. *See id.* at 583-84 & n.5, 586-87.

[32] 9 U.S.C. § 10(a).

somewhat broader.[33] For example, the FAA authorizes vacatur of an award for an arbitrator's refusal to postpone a hearing or refusal to hear pertinent evidence.[34] By contrast, the New York Convention permits a court to deny recognition only where "the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."[35] The inability to present one's case is a somewhat narrower ground than the ground for vacatur enunciated in the FAA.[36] Additionally, while there is currently a debate about whether "manifest disregard for the law" remains a viable ground for vacatur under the FAA after the Supreme Court's decision in *Hall Street Associates*,[37] it is undoubtedly not a ground on which to deny enforcement under the Convention.[38]

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[33] *See Ario*, 618 F.3d at 290 n.9.

[34] 9 U.S.C. § 10(a)(3).

[35] New York Convention, *supra* note 1, art. V(1)(b), 21 U.S.T. at 2520.

[36] On the other hand, because the grounds for vacating an arbitral award under the FAA and denying the recognition and enforcement of an award under the New York Convention are similar in some respects, whether the FAA or the New York Convention govern a motion to vacate may not have significant practical consequences in certain cases. *See* John V.H. Pierce & David N. Cinotti, *Challenging and Enforcing International Arbitral Awards in New York Courts*, *in* INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 357, 396 (James H. Carter & John Fellas eds., 2010).

[37] Some courts have taken the view that "manifest disregard" is a non-statutory ground for review which is inconsistent with *Hall Street Associates*. *See, e.g.*, Coffee Beanery, Ltd. v. WW, L.L.C., 300 F. App'x 415, 418-19 (6th Cir. 2008). Others have concluded that "manifest disregard" refers collectively to the grounds for review in the FAA, and is therefore a "judicial gloss" on the statutory grounds for review which is no longer viable after *Hall Street Associates*. *See, e.g.*, Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 94-95 (2d Cir. 2008), *rev'd on other grounds*, 130 S. Ct. 1758 (2010).

[38] *See, e.g.*, M & C Corp. v. Erwin Behr GmbH & Co., KG, 87 F.3d 844, 850-51 (6th Cir. 1996); Int'l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech., No. 09-791 (RBW), 2011 WL 192517, at *8-13 (D.D.C. Jan. 21, 2011). As the United States District Court for the District of Columbia has recently observed:

> It should be no surprise, then, that [respondent] DynCorp has failed to cite any case law where the "manifest disregard for the law" standard has been considered an express or implied basis for *denying recognition* of an arbitral award under the New York Convention. Instead, the cases that DynCorp cites . . . all involve arbitral awards that have been rendered in the United States, thereby allowing the non-prevailing parties in those cases to seek *vacatur* of the award under Article V(1)(e) of the Convention.

In addition, Section 12 of the FAA contains other rules governing a notice of a motion to vacate an award. Importantly, Section 12 requires that notice of a motion to vacate an award "must be served upon the adverse party or his attorney within three months after the award is filed or delivered."[39]

III. INTERPLAY BETWEEN THE NEW YORK CONVENTION AND U.S. DOMESTIC LAW

A. The Third Circuit's Decision in Ario

The Third Circuit's recent decision in *Ario v. Underwriting Members of Syndicate 53 at Lloyds*[40] illustrates the interplay between the principles discussed above as well as the importance of carefully drafting arbitration agreements.[41] The case involved four reinsurance contracts, or "treaties," between two Pennsylvania insurance companies (the "Insurers") and the Underwriting Members of Syndicate 53 at Lloyd's for the 1998 Year of Account (the "Reinsurers"), who were mostly British.[42] At the time of the lawsuit, the Insurers were in liquidation and represented by Joel Ario, the Insurance Commissioner of the Commonwealth of Pennsylvania as statutory liquidator.[43]

The arbitration clause provided that "[a]rbitration hereunder shall take place in Philadelphia, Pennsylvania unless both parties otherwise agree. Except as hereinabove provided, the arbitration shall be in accordance with the rules and procedures established by the Uniform Arbitration Act as enacted in Pennsylvania."[44] The arbitrators issued an "unreasoned award" rescinding three of the four reinsurance treaties, which did not provide a rationale or identify the

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Int'l Trading & Indus. Inv. Co., 2011 WL 192517, at *11.
[39] 9 U.S.C. § 12.
[40] 618 F.3d 277 (3d Cir. 2010).
[41] *See id.* at 288-96.
[42] *Id.* at 283 & n.2.
[43] *Id.* at 283.
[44] *Id.* at 284.

evidence on which it was based.[45] The Insurers then filed a motion to confirm in part and vacate in part the award in Pennsylvania state court. The Reinsurers removed the case to federal district court and filed a motion to confirm the award.[46] The parties agreed that the award was subject to the New York Convention, but they disagreed about the applicability of the FAA and Pennsylvania state law.[47]

Ario argued that the parties had opted out of the FAA entirely by their choice of the rules and procedures established by the Pennsylvania Uniform Arbitration Act ("PUAA")[48] to govern the arbitration, and that the federal court thus lacked subject matter jurisdiction.[49] The district court held that it had jurisdiction over the case because the case related to an arbitration award falling under the Convention.[50] After the district court denied his motion to remand, Ario argued that his motion to vacate was governed by the standards in PUAA rather than the more stringent vacatur standards in the FAA. The district court concluded that its review was governed by the FAA rather than PUAA, denied the motion to vacate, and confirmed the award.[51]

The Third Circuit affirmed, with one dissent, the judgment confirming the award,[52] holding that (1) parties may not "opt out" of the FAA, but the FAA permits the parties to waive the right of removal as long as they do so in "clear and unambiguous language" (although the court concluded the parties did not do so in this case);[53] and (2) that the FAA, rather than the Convention or PUAA, provided the standards for vacatur.[54]

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[45] *Ario*, 618 F.3d at 286.
[46] *Id.*
[47] *Id.*
[48] 42 PA. CONS. STAT. ANN. §§ 7301-7320 (West 2007).
[49] *Ario*, 618 F.3d at 286.
[50] *Id.*
[51] *Id.* at 287.
[52] It reversed, however, the district court's award of sanctions under Federal Rule of Civil Procedure 11 against Ario and his counsel. *Id.* at 283.
[53] *Id.* at 288-90.
[54] *Ario*, 618 F.3d at 290-95.

On the first point, the Third Circuit quoted the Supreme Court's statement that "when 'parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA.'"[55] Thus, it held:

> An agreement by parties to apply the rules and procedures of state law operates neither as an "opt out" of the domestic FAA nor as an "opt out" of the Convention's implementing legislation. It is federal law that allows the parties to make and enforce agreements that fall under the FAA or the Convention.[56]

It held that "although *Volt* [and a later Supreme Court decision] addressed only the domestic FAA, the principles undergirding those decisions apply to the Convention's implementing legislation."[57] However, because of the "'strong and clear preference for a federal forum,'" the Third Circuit applied a "strict standard," requiring "'clear and unambiguous language'" evidencing a waiver of the right to remove.[58]

After concluding that the parties in the case before it did not "clearly and unambiguously" agree to waive the right of removal, the Third Circuit considered whether the FAA "domestic" vacatur standards applied to a "Convention award rendered and enforced in the United States."[59] It recognized that "if vacatur is limited to the grounds listed in the Convention, Ario would have little chance of success."[60]

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[55] *Id.* at 288 (quoting Volt Info. Scia., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 479 (1989)).
[56] *Id.* at 289.
[57] *Id.*
[58] *Id.* (quoting Suter v. Munich Reinsurance Co., 223 F.3d 150, 158 (3d Cir. 2000)).
[59] *Ario*, 618 F.3d at 290-92.
[60] *Id.* at 291.

The Third Circuit adopted the reasoning and holding of the Second Circuit in *Yusuf Ahmed Alghanim & Sons Co., W.L.L. v. Toys "R" Us, Inc.*,[61] the seminal case on the issue of the law applicable to a motion to vacate a non-domestic arbitration award rendered in the United States. *Toys "R" Us* has been widely cited for the proposition that a motion to vacate an international or non-domestic arbitral award rendered in the United States is governed by Chapter 1 of the FAA.[62]

In *Toys "R" Us*, the Second Circuit reasoned: "We read Article V(1)(e) of the Convention to allow a court in the country under whose law the arbitration was conducted to apply domestic arbitral law, in this case the FAA, to a motion to set aside or vacate that arbitral award."[63] The Second Circuit summarized the framework of the New York Convention by concluding that the Convention:

> mandates very different regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought. The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief.[64]

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[61] Yusuf Ahmed Alghanim & Sons Co., W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15 (2d Cir. 1997) [hereinafter *Toys "R" Us*].

[62] The *Toys "R" Us* case arose out of a contract between Toys "R" Us and a Kuwaiti company, Yusuf Ahmed Alghanim & Sons Co., W.L.L. ("Alghanim"), to open Toys "R" Us stores around the Middle East. When a dispute arose after Toys "R" Us attempted to terminate the agreement, the parties initiated arbitration under the auspices of the American Arbitration Association. The arbitrator rendered an award in favor of Alghanim. Alghanim petitioned the district court to confirm the award under the New York Convention, and Toys "R" Us cross-moved to vacate or modify the award. *Id.* at 17-18.

[63] *Id.* at 21.

[64] *Id.* at 23.

It drew support from scholarly literature interpreting Article V(1)(e), noting that "[t]here appears to be no dispute among these authorities that an action to set aside an international arbitral award, as contemplated by Article V(1)(e), is controlled by the domestic law of the rendering state."[65] The court also reasoned from the history of the New York Convention that it was not meant "to deprive the rendering state of its supervisory authority over an arbitral award, including its authority to set aside that award under domestic law."[66]

In *Ario,* the Third Circuit agreed with the Second Circuit that Article V of the Convention specifically contemplates that the country in which the award is made is free to vacate or set aside an arbitral award in accordance with its domestic

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[65] *Id.* at 21; *see also id.* at 22 ("'[T]he Convention is not applicable in the action for setting aside the award.'" (quoting ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 20 (1981))); *id.* ("'[T]he fact is that setting aside awards under the New York Convention can take place only in the country in which the award was made.'" (quoting Jan Paulsson, *The Role of Swedish Courts in Transnational Commercial Arbitration*, 21 VA. J. INT'L L. 211, 242 (1981))); *id.* at 22-23:

> [Article V(1)(e)] fails to specify the grounds upon which the rendering State may set aside or suspend the award. While it would have provided greater reliability to the enforcement of awards under the Convention had the available grounds been defined in some way, such action would have constituted meddling with national procedure for handling domestic awards, a subject beyond the competence of the Conference.

quoting Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1070 (1961).

[66] *Toys "R" Us, Inc.*,126 F.3d at 22. The Second Circuit reaffirmed its holding *Zeiler v. Deitsch*, 500 F.3d 157 (2d Cir. 2007). In *Zeiler*, the court reviewed a district court decision vacating certain arbitration awards and confirming other awards made by the same tribunal. The lower court appeared to have considered only Article V in its decision. On review, the Second Circuit commented on the "double role" of the reviewing court where the court was asked to confirm a non-domestic arbitration award falling under the Convention, as well as serving as an authority under Article V(1)(e) "authorized under Chapter 1 of the FAA to vacate arbitration awards entered in the United States." *Id.* at 165 n.6. The Second Circuit explained that the district court should not have vacated the awards on the basis of Article V(1)(d) because neither the Convention nor Chapter 2 of the FAA grant the power to vacate non-domestic awards. *Id.* Rather, the lower court should have analyzed the vacatur motion under Section 10 of the FAA. *Id.*

arbitration law.[67] Because Article V(1)(e) incorporates the domestic FAA with respect to motions to set aside awards, the court concluded that there is no conflict between the Convention and the FAA.[68]

The Third Circuit then turned to the question of whether, under the FAA, the parties could displace the federal vacatur standards with the state law standards in the PUAA. As the dissent recognized, the answer to this question was significant. The dissent explained: The FAA standards still rigorously limit judicial intervention, requiring challengers to show the award was "completely irrational," a near prohibitive burden. Under the PUAA by contrast, a court may modify or correct an award that is "contrary to the law." [69]

The Third Circuit ruled that parties could do so: [T]he domestic FAA allows parties to agree to apply state law enforcement mechanisms in lieu of the FAA default rules. Of course, "[t]he FAA is not the only way into court for parties wanting review of arbitration awards," and parties "may contemplate enforcement under state statutory or common law." [70] It held, however, that in order to displace the "'FAA standards [which] control in the absence of contractual intent to contrary[,]'"[71] it would "require the parties to express a 'clear intent' to apply state law vacatur standards instead of those of the FAA."[72]

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[67] *Ario*, 618 F.3d at 292.
[68] *Id.* at 292.
[69] *Id.* at 298 (Aldisert, J., dissenting in part) (citations omitted) (citing Mut. Fire, Marine & Inland Ins. Co. v. Norad Reinsurance Co., 868 F.2d 52, 56 (3d Cir.1989); 42 Pa. Cons.Stat. Ann. §§ 7301(d)(2) & 7314(a)). The Third Circuit recognized that in Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576, 590 (2008), the "Supreme Court addressed only the narrow question of whether the parties could agree to modify the FAA's confirmation, vacatur and modification standards [set forth in 9 U.S.C. §§ 9, 10 and 11], concluding that they 'provide exclusive regimes for the review provided by statute,' and thus could not be altered by the parties." *Id.* at 292 n.11 (majority opinion) (quoting *Hall St. Assocs.*, 522 U.S. at 590). The court in *Ario* held, however, that "*Hall Street* says nothing about using the alternate avenue of 9 U.S.C. § 205 for judicial enforcement of an arbitration award falling under the Convention, and does not support Ario's arguments that the FAA is entirely displaced." *Id.*
[70] *Id.* at 292 (second alteration in original) (quoting *Hall St. Assocs.*, 522 U.S. at 590).
[71] *Id*. (quoting Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287, 296 (3d Cir. 2001)).
[72] *Ario,* 618 F.3d at 293 (citing *Roadway Package Sys.*, 257 F.3d at 288, 293, 295).

The majority of the court then determined that the arbitration agreement in issue did not evince a "clear intent" to apply the vacatur standards in the PUAA to the exclusion of the FAA.[73] It concluded that while "there is a plausible argument that the parties may have agreed to apply PUAA standards, it falls short of the 'clear intent' we demand."[74] It interpreted the arbitration provisions, which stated that the arbitration "shall be in accordance with the rules and procedures established by the Uniform Arbitration Act as enacted in Pennsylvania,"[75] "[to be] concerned with only the conduct of the arbitration itself, not judicial enforcement of a resulting award."[76] The dissent agreed with the majority's recitation of the law, but disagreed with the majority's interpretation of the arbitration agreement, reasoning that the PUAA's "rules and procedures" included rules of judicial vacatur.[77]

B. Ario Reflects the Majority View

The holding of the Third Circuit in *Ario* and the Second Circuit in *Toys "R" Us* that a motion to vacate an international award rendered in the United States is governed by the domestic standards for vacatur set forth in Chapter 1 of the FAA reflects the majority view.

The Sixth Circuit likewise decided in *Jacada (Europe) Ltd. v. International Marketing Strategies, Inc. (Europe)*[78] that the FAA grounds for domestic vacatur development company from the United Kingdom and a marketing firm from Michigan. After arbitration in Michigan under the auspices of the American Arbitration Association, the tribunal issued an award in which it expressly disregarded a limitation on liability provision in the contract and issued

[73] *Id.*
[74] *Id.*
[75] *Id.* at 284.
[76] *Id.* at 294.
[77] *Ario,* 618 F.3d at 299 (Aldisert, J., dissenting in part).
[78] 401 F.3d 701 (6th Cir. 2005).

an award in favor of IMS.[79] Jacada filed a petition to vacate the award in state court, and a few hours later IMS filed a petition to confirm the award in federal court.[80] The federal case was stayed, and the state case was transferred and then removed to federal district court.[81]

The federal district court ruled that the Convention was applicable to the dispute and therefore that the action was properly removed, a decision upheld by the Sixth Circuit.[82] The court then addressed Jacada's petition to vacate the award. It began its analysis with the language of Article V(1)(e) and held that "[b]ecause this award was made in the United States, we can apply domestic law, found in the FAA, to vacate the award."[83]

The Sixth Circuit distinguished its prior holding in *M & C Corp. v. Erwin Behr GmbH & Co., KG*,[84] which "held that a party seeking to vacate an arbitral award was limited to raising the exclusive grounds found in Article V of the Convention because the FAA does not apply to cases under the Convention if the FAA is 'in conflict' with the Convention or its implementing legislation."[85] The court distinguished this holding on the grounds that *M & C* dealt with an award that had been rendered in the United Kingdom. In *Jacada*, the award was rendered in the United States and Article V(1)(e) therefore authorized the application of domestic law.[86]

Other circuits have stated in dicta that motions to vacate international arbitral awards are reviewed under the FAA vacatur standards, rather than under the grounds in Article V of the New York Convention for denying enforcement of

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[79] *Id.* at 703-04.
[80] *Id.* at 704.
[81] *Id.*
[82] *Id.* at 704-09.
[83] *Id.* at 709.
[84] 87 F.3d 844 (6th Cir. 1996).
[85] 401 F.3d at 709 n.8.
[86] *Id.* The court also addressed whether the parties had agreed to "opt out" of the FAA in favor of Michigan's law, which provided a "more thorough standard of review," and concluded that the "generic choice-of-law provision" in the contract was insufficient to opt out of the federal vacatur standard of review. *Id.* at 710.

an award. For example, the Seventh Circuit noted in passing in *Lander Co. v. MMP Investments, Inc.* that the New York Convention "contemplates the possibility of the award's being set aside in a proceeding under local law."[87]

The Fifth Circuit Court addressed the interaction of the New York Convention and the FAA in greater detail in the *Gulf Petro Trading Co.* case.[88] That case involved a dispute over a joint venture between Nigerian National Petroleum Corporation (NNPC), owned by the government of Nigeria, and Petrec, a division of a U.S. company.[89] The arbitral tribunal rendered two decisions: a "Partial Award" finding that Petrec had standing to submit its claims and that NNPC had not fulfilled its obligation under the joint venture agreement, and a "Final Award," finding that Petrec in fact did not have standing to sustain its claims against NNPC.[90] Petrec made an application before the Swiss Federal Court to set aside the Final Award, but the Swiss court confirmed the award.[91] Petrec then filed a claim in the Northern District of Texas to enforce the Partial Award and set aside or modify the Final Award. The district court determined that by seeking to enforce the Partial Award, Petrec was really seeking to annul the Final Award, because the findings of the Partial Award had been essentially vacated by the arbitral tribunal in the Final Award. Because the New York Convention does not authorize secondary jurisdictions – i.e., jurisdictions other than the jurisdiction where the award was made – to vacate or annul awards, the district court held that it was precluded from granting the relief sought by Petrec.[92] The district court held that "United States federal courts cannot set aside or modify an arbitral award

[87] 107 F.3d 476, 478 (7th Cir. 1997).
[88] Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp., 512 F.3d 742 (5th Cir. 2008); Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp., 288 F. Supp. 2d 783 (N.D. Tex. 2003), *aff'd*, 115 F. App'x 201 (5th Cir. 2004).
[89] *Gulf Petro Trading Co.*, 512 F.3d at 744.
[90] *Id.*
[91] *Id*.
[92] *Gulf Petro Trading Co.*, 288 F. Supp. 2d at 792.

made in another nation," and therefore do not have subject matter jurisdiction over such claims.[93]

After the Fifth Circuit upheld the district court's determination that it could not set aside or modify the Final Award because it had only secondary jurisdiction, Petrec filed suit in the Eastern District of Texas, claiming that the arbitral award was the result of bribery and fraud,[94] and asserting statutory claims under the U.S. Racketeer Influenced and Corrupt Organizations Act (RICO) and the Texas Deceptive Trade Practices Consumer Protection Act, and common law claims for fraud and civil conspiracy.[95] The district court determined, and the Fifth Circuit agreed, that all of Gulf Petro's claims in this second lawsuit constituted a collateral attack on the Final Award, because the harm that Gulf Petro suffered was a result of the arbitral award against it, not the alleged bribery itself.[96] Because a "court sitting in secondary jurisdiction lacks subject matter jurisdiction over claims seeking to vacate, set aside, or modify a foreign arbitral award," the Fifth Circuit dismissed all of Gulf Petro's claims.[97]

Finally, the D.C. Circuit held in *TermoRio S.A. E.S.P. v. Electranta S.P.* that "[u]nder the [New York] Convention, the power and authority of the local courts of the rendering state remain of paramount importance.'"[98] It noted that the New York Convention did not '"'"provide any international mechanism to insure the validity of the award where rendered. This was left to the provisions of local law. The Convention provides no restraint whatsoever on the control functions of local courts at the seat of arbitration.'"'"[99]

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[93] *Id*.
[94] *Gulf Petro Trading Co.*, 512 F.3d at 745.
[95] *Id*. at 749.
[96] *Id*. at 750.
[97] *Id*. at 747.
[98] TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 939 (D.C. Cir. 2007) (quoting *Alghanim*, 126 F.3d at 22).
[99] *Id.* (quoting *Alghanim*, 126 F.3d at 22).

C. The Eleventh Circuit's Contrary View

The Eleventh Circuit has taken a different approach than the cases discussed above. In *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*,[100] it considered an appeal from a denial of a motion to vacate the arbitral award made in the United States that it concluded was a non-domestic award governed by the Convention because one of the parties was a non-U.S. party.[101]

The court then addressed the appellant's three theories for why the award should be vacated, and used the terminology for *vacating* an award and *denying enforcement* of an award interchangeably. Although the appeal was of the denial of a motion to *vacate* an award, the court began its analysis by stating: "The Tampa panel's arbitral award *must be confirmed* unless appellants can successfully assert one of the seven defenses against enforcement of the award enumerated in Article V of the New York Convention."[102]

The Eleventh Circuit declined to vacate the arbitral award because the ground advanced by the party seeking vacatur was not contained in Article V of the Convention.[103] The court analyzed the distinction between the regime governing vacatur of domestic arbitration awards and non-domestic awards. It concluded that the reasons for vacatur of domestic awards included the four grounds enumerated in the FAA and two non-statutory defenses against enforcement, namely that an award is "arbitrary and capricious" or enforcement would be against public policy.[104] The court contrasted this regime for vacatur with the defenses against enforcement of an award contained in the Convention, and quoted the Second Circuit's opinion in *Toys "R" Us* for the proposition that the grounds to deny enforcement of an award "'enumerated in Article V of the

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[100] Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH, 141 F.3d 1434 (11th Cir. 1998).
[101] *Id.* at 1441.
[102] *Id.* (emphasis added).
[103] *Id.* at 1445.
[104] *Id.* at 1445-46.

Convention are the only grounds available for setting aside an arbitral award.'"[105] It held that "the Convention's enumeration of defenses is exclusive," and that Chapter 1 of the FAA was inapplicable to a motion to vacate an arbitral award that falls under the New York Convention.[106]

A district court within the Eleventh Circuit has noted that *Industrial Risk Insurers* and *Toys "R" Us* appear to be at odds with each other.[107] The court noted that *Toys "R" Us* recognized "that grounds other than those set forth in the New York Convention may apply to a motion to set aside or vacate a foreign arbitral award rendered in the United States," but declined to rely on *Toys "R" Us* because it was "not binding law . . . and appears to be contrary to [*Industrial Risk Insurers*]."[108]

Another federal district court sitting in Virginia similarly held, in *RZS Holdings AVV v. PDVSA Petroleos S.A.*, [109] that Chapter 1 of the FAA does not apply to international awards rendered in the United States. The court was presented with a petition to vacate an award on the basis that one or both parties had received a draft of the award prior to its publication, one of the arbitrators attended a conference with an attorney from the prevailing party, and the prevailing party paid the entire cost of the arbitration.[110] The court denied the petition because none of the grounds presented in support of the petition were contained in Article V of the Panama Convention, which is nearly identical to Article V of the New York Convention.[111] It held that there was a conflict between Chapter 1 and Chapter 3 of the FAA, which implements the Panama Convention, based upon its "reading of the language of 9 U.S.C. § 207 that indicates that the

[105] *Id.* at 1446 (quoting *Toys "R" Us*, 126 F.3d at 20).
[106] *Id.*
[107] *See* Nicor Int'l Corp. v. El Paso Corp., 318 F. Supp. 2d 1160, 1168 n.7 (S.D. Fla. 2004).
[108] *Id.*
[109] RZS Holdings AVV v. PDVSA Petroleos S.A., 598 F. Supp. 2d 762 (E.D. Va. 2009), *aff'd*, 383 F. App'x 281 (4th Cir. 2010).
[110] *Id.* at 768.
[111] *Id.* at 767.

reasons enumerated in Article V of the [Panama] Convention provide the exclusive list of grounds to vacate international arbitration awards."[112]

D. Practical Considerations in Seeking To Vacate an Award: The Timing Trap

The FAA contains a strict three-month deadline for parties to move to vacate arbitral awards: "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered."[113] If Chapter 1 of the FAA applies to awards covered by the New York Convention, then this limitations period likewise applies.[114] Many state statutes also have very short deadlines for seeking vacatur.[115] This is in contrast to the three years permitted under the Convention for a party to seek confirmation of an award.[116]

If a party does not move to vacate an award within the three-month time frame, it cannot seek to do so later when faced with a motion to confirm the award.[117] Accordingly, a party who intends to seek to vacate an international award rendered in the United States must move quickly and may not wait until the prevailing party seeks confirmation of the award.

If a party chooses not to vacate or misses the deadline, then its only option is to wait for the opposing party to attempt to confirm or enforce that award under the New York Convention, and attempt to resist confirmation or enforcement. As discussed above, however, under the New York Convention, a court must confirm

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[112] *Id.* at 766-67.
[113] 9 U.S.C. § 12.
[114] *See* Republic of Arg. v. BG Group PLC, 715 F. Supp. 2d 108, 120 n.10 (D.D.C. 2010).
[115] *See, e.g.*, 42 PA. CONS. STAT. ANN. § 7314(b) (2007) (30 days); FLA. STAT. § 682.13(2) (2003) (90 days); N.Y. C.P.L.R. § 7511(a) (McKinney Supp. 2011) (90 days).
[116] 9 U.S.C. § 207 ("Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration.").
[117] *See* Lander Co. v. MMP Invs., Inc., 107 F.3d 476, 478 (7th Cir. 1997); *see also* Taylor v. Nelson, 788 F.2d 220, 225 (4th Cir. 1986); Florasynth v. Pickholz, 750 F.2d 171, 174-77 (2d Cir. 1984).

the award unless the party opposing confirmation proves "one of the grounds for refusal or denial of recognition or enforcement of the award specified" in the New York Convention exists.[118] If a party does not move to vacate an award within the three-month time limit, then it would only have available the Article V grounds to resist enforcement of the award, not the Chapter 1 grounds under the FAA to vacate the award.

Moreover, it is not necessary for a party to confirm the award in the United States before seeking to enforce the award elsewhere. [119] As the Second Circuit has explained: "While the distinction between vacation of an arbitration award and refusal to confirm an award may be of negligible significance within the United States, it can affect the remaining force of an unconfirmed award outside this country, if a party seeks to confirm and enforce the award under the Convention abroad."[120]

IV. CONCLUSION

Parties choosing the United States as the place of their international commercial arbitrations need to understand the interplay between the Convention, the FAA and state law and to consider the issues discussed above both at the time they draft their arbitration agreements and after an award is entered. Parties who are not aware of these issues may lose their opportunity to have an award entered against them vacated based on grounds in the FAA, or on more lenient state law grounds, which may not be available under the New York Convention.

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[118] *See* 9 U.S.C. § 207.

[119] *See*, *e.g.*, Oriental Commercial & Shipping Co., (U.K.), Ltd. v. Rosseel, N.V., 769 F. Supp. 514, 516-17 (S.D.N.Y. 1991). In *Oriental Commercial*, the court noted that parties obtaining an international arbitral award in the United States have two options. They can seek to have the award confirmed by a U.S. court and enforce it elsewhere as a foreign judgment. Alternatively, they can go directly to a court outside of the United States and seek enforcement of the award under the New York Convention. *Id.*

[120] Zeiler v. Deitsch, 500 F.3d 157, 165 n.6 (2d Cir. 2007).

The Evolving Landscape for Enforcement of International Arbitral Awards in the United States

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Introduction

Parties seeking to enforce international arbitration awards in the United States should be aware of two potential procedural defences that may be available to parties seeking to resist such enforcement. Although the United States is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and the 1975 Inter-American Convention on International Commercial Arbitration ("Panama Convention")[1] which limit the grounds on which courts may decline recognition and enforcement of international arbitral awards, several U.S. federal courts have held that confirmation may also be refused (1) on the grounds that the court lacks jurisdiction over either the debtor or the debtor's assets, or (2) on the basis of the doctrine of *forum non conveniens*. This chapter discusses the current state of the law with respect to these two evolving issues.

The Personal Jurisdiction Requirement

Several federal appellate courts have held that in order to satisfy the requirements of the Due Process Clause of the U.S. Constitution, a court must possess jurisdiction over either the debtor (personal jurisdiction) or the debtor's property (*quasi in rem* jurisdiction) as a prerequisite to the enforcement of an international arbitral award. These courts have distinguished between the substantive grounds for recognition set forth in the New York Convention and the procedural prerequisites that must be satisfied for a U.S. court to exercise its authority.

As the Ninth Circuit has explained, "neither the [New York] Convention nor its implementing legislation removed the district courts' obligation to find jurisdiction over the defendant in suits to confirm arbitration awards".[2] Thus, the Courts of Appeals for the Second, Third, Fourth, Fifth, Ninth and D.C. Circuits have all held that the federal courts must have jurisdiction over the defendant in order for the courts to confirm or recognise an award under the New York Convention.[3]

The U.S. Supreme Court's Most Recent Articulation of the Test for Personal Jurisdictional over Corporate Entities

In order to comply with the Due Process Clause, it has long been established that a defendant must have "certain minimum contacts" with the forum "such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'".[4] In 2014, in its landmark decision in *Daimler AG v. Bauman*,[5] the U.S. Supreme Court provided guidance on how this standard must be applied to determine whether the Due Process Clause has been satisfied for corporate entities.

In *Daimler*, a group of 22 Argentine residents brought tort and statutory claims against Daimler AG (a German company) in the U.S. District Court for the Northern District of California, alleging that they and/or their relatives were victims of mistreatment and torture by Argentine police and military forces.[6] These plaintiffs alleged that Daimler AG's Argentinian subsidiary, Mercedes-Benz Argentina, collaborated with state security forces to injure the plaintiffs and/or their relatives.[7]

The *Daimler* plaintiffs attempted to establish general personal jurisdiction over Daimler AG in California, based on alleged contacts that one of its U.S. subsidiaries had with California.[8] That U.S. subsidiary was incorporated in Delaware with its headquarters in New Jersey.[9] The plaintiffs contended, however, that because the U.S. subsidiary undertook the distribution and sale in California of Mercedes-Benz vehicles allegedly manufactured by Daimler AG, the U.S. subsidiary was the "agent" in California of Daimler AG, and thus Daimler AG itself should be viewed as being present in California.[10]

Notably, the *Daimler* plaintiffs were seeking to establish *general* jurisdiction over Daimler AG. Thus, even though the case involved "events occurring entirely outside the United States", the plaintiffs claimed that Daimler AG had a sufficient connection with California such that it could literally be subject to "any" claims in that forum.[11] The Supreme Court flatly rejected this theory.

In its opinion rendered on January 14, 2014, the Court unanimously held that the exercise of jurisdiction over Daimler AG by the California courts was "barred by due process constraints on the assertion of adjudicatory authority".[12] In order to reach this conclusion, the Court rejected the "doing business test" that had been in place for more than 50 years and that permitted courts to exercise general jurisdiction over a foreign corporation in any state where it "engages in a substantial, continuous, and systematic course of business".[13]

The Court instead established a new test for ascertaining whether general jurisdiction exists over corporate entities. That test requires a U.S. court to inquire whether the corporation must be viewed as "'essentially at home'" in the forum state; that is, a state court may exercise general jurisdiction over a foreign corporation "only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State'".[14] Under the new *Daimler* test, except in the "exceptional case" which the

Court did not clearly define, a defendant is "at home" only in the state where it is incorporated and in the state where it maintains its principal place of business.[15]

In the final section of its opinion, the Court discussed "the transnational context of th[e] dispute" and was plainly conscious that the previously expansive position taken by the U.S. courts on the issue of general jurisdiction was out of step with the views of other nations.[16] Indeed, *Daimler* should be seen as part of an ongoing effort by the Supreme Court to curtail the use of the U.S. courts in cases by foreign plaintiffs trying to gain redress from foreign defendants for events that took place outside of the United States.[17]

Implications for Enforcement of International Arbitral Awards

Because of the requirement that proceedings for confirmation or recognition under the New York Convention are subject to the Due Process limitations, *Daimler* may have a significant impact on such cases and limit parties' ability to confirm foreign awards in the United States. The impact is illustrated by the Second Circuit's decision in *Sonera Holding B.V. v. Çukurova Holding A.Ş.*[18] in which, only a few months after the *Daimler* decision, the Second Circuit applied the new *Daimler* test to dismiss an action seeking enforcement and recognition of a foreign arbitral award for lack of personal jurisdiction over the party against whom the award was entered.

The *Sonera* dispute arose from a $932 million arbitration award obtained by Sonera, a Dutch corporation, against Çukurova, a Turkish company headquartered in Turkey, from an ICC arbitral tribunal in Geneva, Switzerland.[19] Sonera sought enforcement of the Geneva award in several jurisdictions around the world, including the U.S. District Court for the Southern District of New York.[20] The district court held, prior to the *Daimler* decision, that it had general jurisdiction over Çukurova based on alleged contacts with New York by certain of its affiliates. Those contacts included the use of an office in New York by two affiliates of the debtor and statements on the website of one of those affiliates that it had been "[f]ounded in New York City in 1979" and was Çukurova's "gateway to the Americas".[21] The district court not only confirmed the award, but also granted post-judgment discovery in aid of judgment enforcement and enjoined Çukurova from engaging in certain property or assets transfers.[22]

Reversing in light of *Daimler*, the Second Circuit noted that "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there".[23] Under the new *Daimler* test, the Second Circuit concluded that Çukurova had insufficient contacts with New York because "even a company's 'engage[ment] in a substantial, continuous, and systematic course of business' is alone insufficient to render it at home in a forum", and, therefore, the exercise of general jurisdiction over Çukurova violated the Due Process Clause.[24] The result of finding that Çukurova was not subject to personal jurisdiction was that the Geneva award could not be enforced in New York courts.

Should other courts follow the Second Circuit's lead, U.S. courts will no longer provide a vehicle for many creditors to obtain the type of broad discovery and relief in aid of enforcement that was ordered by the lower court in *Sonera* prior to *Daimler*.

Application of the *Forum Non Conveniens* Doctrine

Even where a court has personal jurisdiction over the parties in an action, it may use its discretion to decline jurisdiction on the ground of *forum non conveniens*, a common law doctrine by which courts may, in some circumstances, decline jurisdiction. The U.S. Supreme Court has described the doctrine as "essentially, 'a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined'".[25] Several federal courts in the United States have accepted the argument that actions to confirm an international arbitral award may be dismissed under this doctrine, but in their application of the doctrine, the outcomes of the cases have been mixed.

The Second Circuit has denied enforcement of arbitral awards in two cases on the basis of *forum non conveniens*. In *Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, a case involving an $88 million award rendered in Moscow, the Second Circuit held that the doctrine of *forum non conveniens*, "a procedural rule", may be applied in enforcement actions under the New York Convention; it rejected the argument that Article V of the New York Convention "sets forth the only grounds for refusing to enforce a foreign award" and noted that Article III of the Convention "allow[s] for the application of the 'rules of procedure where the award is relied upon'".[26] Because the U.S. Supreme Court has classified *forum non conveniens* as "'procedural rather than substantive'", the Second Circuit concluded that the doctrine "may be applied under the provisions of the Convention".[27] It then affirmed the district court's dismissal because the creditor's choice of forum deserved little deference – an alternative forum (Ukraine) was available – and private as well as public interests weighed in favour of dismissal.[28]

In *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru*, the Second Circuit again considered the applicability of *forum non conveniens* to actions to enforce foreign awards, and the court's majority held that the district court erred in refusing dismissal on this ground.[29] *Figueiredo* involved a Peruvian arbitration award directing an agency of the Peruvian government to pay the creditor, a Brazilian company, $21 million.[30] The decisive factor with respect to the "public interest" at stake was a Peruvian statute that imposed a "limit" of three percent of the budget of a government entity on the amount the entity may pay annually to satisfy a judgment.[31] Although it was undisputed that the statute did not apply to Peru's assets located in the United States,[32] the majority stated that "the cap statute is a highly significant public factor warranting [*forum non conveniens*] dismissal".[33]

The dissenting judge, however, argued that "a strong case can be made" that the United States made *forum non conveniens* inapplicable to enforcement actions because it does not appear as a defence to enforcement in the New York or Panama Conventions.[34] In his view, the doctrine is inconsistent with the Conventions because the Conventions sought to unify the standards for non-enforcement in signatory countries; *forum non conveniens* "introduces a highly significant inconsistency into the international regime of reciprocal enforcement" and "would seem to dramatically undermine this country's obligations under the treaties to grant enforcement in most cases".[35] Further, he noted that "we should be especially wary of applying that doctrine expansively or in novel ways that suggest that enforcement plaintiffs should be referred back to the very courts they sought to avoid in resorting to arbitration".[36]

The Courts of Appeals for the Sixth, Ninth and D.C. Circuits have also considered the applicability of *forum non conveniens* in

actions to enforce international arbitral awards. The D.C. Circuit has both granted and refused dismissal when presented with this issue. In *TMR Energy Ltd. v. State Property Fund of Ukraine*, it affirmed a judgment enforcing a Swedish award against an entity which the court held was an "agent" of the State of Ukraine.[37] The court rejected the argument that the enforcement action should be dismissed on the ground that the debtor had no property in the United States, concluding that "[e]ven if the [debtor] currently has no attachable property in the United States, however, it may own property here in the future, and [creditors] having a judgment in hand will expedite the process of attachment".[38]

The D.C. Circuit then affirmed dismissal of an enforcement action in *TermoRio S.A. E.S.P. v. Electranta S.P.*[39] In that case, the appellate court upheld the district court's refusal to enforce an award that had been set aside at the seat (Colombia), but it did not decide whether the action "might have been dismissed on the ground of *forum non conveniens*, the alternative basis announced by the District Court".[40] The district court had indeed granted dismissal on that ground, noting that "[t]his matter is a peculiarly Colombian affair, and should properly be adjudicated in that country".[41]

In *Venture Global Engineering LLC v. Satyam Computer Services, Ltd.*,[42] the Sixth Circuit affirmed enforcement of an award rendered in England and refused to dismiss on the basis of *forum non conveniens*. Specifically, the Sixth Circuit appeared to endorse the district court's reasoning that no public interest of India (the purported adequate alternative forum) outweighed the interest in having the case resolved in Michigan: the debtor was a Michigan company, the award involved the transfer of the assets of a Michigan company, and the agreements at issue were governed by Michigan law.[43]

On the other hand, a majority of a Ninth Circuit panel affirmed dismissal of an enforcement action in *Melton v. Oy Nautor Ab*.[44] Because the defendant had not challenged the application of *forum non conveniens* in the district court, the majority found that the argument had been waived, and it issued its decision assuming that the doctrine was applicable, noting that "[o]ur decision is limited to the application of the doctrine of *forum non conveniens* to the specific facts of this case. We express no opinion as to interpretation of the [New York Convention]".[45] Upholding dismissal, the judges noted that an alternative forum existed (Finland, the seat of arbitration) and held that the district court did not abuse its discretion in concluding that the private and public interest factors weighed in favour of dismissal.[46]

The dissent, however, disagreed with the majority's refusal to consider the applicability of the doctrine. The dissenting judge then expressed his view that "[i]t seems unwise to apply *forum non conveniens* to an action to enforce a foreign arbitration award under the Convention, in the absence of any law that *forum non conveniens* applies to cases arising under the Convention".[47] He concluded that dismissal based on *forum non conveniens* was not appropriate, recognising that in a "summary proceeding to confirm an arbitration award . . . the proof and logistics factors attendant to trial are non-existent".[48]

The application of *forum non conveniens* in this context has been widely criticised by bar associations and commentators.[49] And even if the doctrine is applied, it does not necessarily result in dismissal even within the circuits in which the Courts of Appeals have found it applicable. For example, in *Thai-Lao Lignite (Thailand) Co. v. Government of the Lao People's Democratic Republic*,[50] a district court in the Southern District of New York acknowledged that the creditor's choice of forum was "entitled to a presumption of validity"; that despite the existence of an adequate alternative forum, the private and public interests weighed against dismissal because enforcement "is typically a summary proceeding"; and the case was "connected to the forum" (the parties had travelled to preliminary conferences in New York, retained New York counsel and did not identify any foreign law to be applied to decide the case).[51] As another example, in *Higgins v. SPX Corporation*, the U.S. District Court for the Western District of Michigan stayed an action pending *vacatur* proceedings in Brazil, but refused to dismiss on the basis of *forum non conveniens*.[52] That court acknowledged that "there will remain a second aspect of this suit, enforcement of the arbitration award, which will nevertheless be proper following the presumed confirmation of the arbitration award. In other words, Michigan, because of the location of [debtor's] assets, may be a proper and convenient forum for Plaintiff to enforce the arbitration award upon successful completion of the nullification suit".[53]

Conclusion: Other Avenues for Enforcement

While a lack of personal jurisdiction or the *forum non conveniens* doctrine may present hurdles for enforcement of certain international arbitral awards in the United States, they are not insurmountable. First, with some foresight, parties may dispose of these potential obstacles by specifically providing in their arbitration agreements for consent to the jurisdiction of the U.S. courts for purposes of recognition and enforcement of any arbitral award, and for a waiver of any defence of *forum non conveniens* in connection with any enforcement proceedings. The U.S. courts are likely to respect such an agreement between the parties. At the time of enforcement, the parties may also explore whether the potential defendant has taken some other action, or engaged in activities, that make it susceptible to general or specific jurisdiction in a particular U.S. forum.

Secondly, parties seeking to enforce an award may attempt to determine what assets a debtor may have in the jurisdiction and, assuming that there are some assets, whether the particular U.S. jurisdiction will consider the presence of those assets sufficient to satisfy the jurisdictional requirement.

Finally, a party seeking recognition might be able to circumvent these hurdles by converting its award to a judgment in a foreign jurisdiction and then seeking recognition of that foreign judgment in the United States. This may be possible because of an anomaly of U.S. law in certain jurisdictions in which a lack of personal jurisdiction and *forum non conveniens* may be invoked to prevent enforcement of foreign arbitral awards in the federal courts, but they are not applicable defences to the enforcement of foreign *judgments* in a state court.[54]

Endnotes

1. *See* New York Convention art. V, *opened for signature* June 10, 1958, 330 U.N.T.S. 3; Panama Convention art. 5, 1438 U.N.T.S. 249 (entered into force June 16, 1976).
2. *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1121 (9th Cir. 2002).
3. *See Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009); *Telcordia Tech Inc. v. Telkom SA Ltd.*, 458 F.3d 172, 177-79 (3d Cir. 2006), *cert. denied*, 549 U.S. 1206 (2007); *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208, 213 (4th Cir. 2002), *cert. denied*, 537 U.S. 822 (2002); *First Inv. Corp. of the Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 748-52 (5th Cir.

2012); *GSS Grp. Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 817 (D.C. Cir. 2012). *See also S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1303-05 (11th Cir. 2000) (assuming without discussion that personal jurisdiction is required).

4. *Frontera*, 582 F.3d at 396 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).
5. 134 S. Ct. 746 (2014).
6. *Id*. at 750-51.
7. *Id*. at 751.
8. *Id*.
9. *Id*.
10. *Id*. at 752.
11. As the Supreme Court discussed in *Daimler*, U.S. courts may exercise either "specific" jurisdiction or "general" jurisdiction over a party. *See id*. at 753-58. Specific jurisdiction may be exercised where the lawsuit arises out of or relates to the defendant's contacts with the forum; general jurisdiction may be exercised when a foreign corporation's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities". *Id*. at 754 (quoting *Int'l Shoe*, 326 U.S. at 318) (alteration in original).
12. *Id*. at 751.
13. *Id*. at 761.
14. *Id*.
15. *Id*. at 761 n.19.
16. *Id*. at 762-63.
17. Such cases have become known as "F-cubed" cases. In 2010, the Supreme Court limited the extraterritorial reach of the Exchange Act in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), to preclude F-cubed actions in the securities law context. In its 2012 decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), it dismissed on subject matter jurisdiction grounds a series of Alien Tort Act claims against Royal Dutch/Shell arising out of alleged human rights abuses in Nigeria. The Court then addressed the F-cubed issue again a year later in *Daimler*, but because it decided the case based on the constitutional limitations of personal jurisdiction, *Daimler* has far broader implications than the earlier cases that involved setting limitations on the reach of particular federal statutes.
18. 750 F.3d 221 (2d Cir. 2014), *cert. denied*, 134 S. Ct. 2888 (2014).
19. *Id*. at 223.
20. *Id*.
21. *Id*. at 223-24.
22. *Id*. at 223.
23. *Id*. at 225 (quoting *Daimler*, 134 S. Ct. at 760).
24. *Id*. at 226.
25. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp*., 549 U.S. 422, 429-30 (2007) (quoting *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994)).
26. 311 F.3d 488, 496 (2d Cir. 2002) (quoting New York Convention art. III) (alteration added). The Second Circuit stated that "the items listed in Article V as the exclusive defenses . . . pertain to substantive matters rather than procedure". *Id*.
27. *Id*. at 495, 496 (quoting *Am. Dredging*, 510 U.S. at 453).
28. *Id*. 498-501. The court noted, *inter alia*, that a trial might be required on the issue of the State of Ukraine's potential liability as a non-signatory and that "[t]he case before us simply has no connection with the United States other than the fact than the United States is a Convention signatory". *Id*.
29. 665 F.3d 384, 386 (2d Cir. 2011).
30. *Id*. at 386-87.
31. *Id*. at 387.
32. *Id*. at 389.
33. *Id*. at 392.
34. *Id*. at 397 (Lynch, J., dissenting).
35. *Id*. at 397-98.
36. *Id*. at 402.
37. 411 F.3d 296, 300-03 (D.C. Cir. 2005), *reh'g en banc denied* Aug. 29, 2005.
38. *Id*. at 303; *accord Belize Social Development Ltd. v. Gov't of Belize*, 5 F. Supp. 3d 25, 34 (D.D.C. 2013), *appeal filed* Jan. 14, 2014.
39. 487 F.3d 928 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1038 (2007).
40. *Id*. at 932.
41. *TermoRio S.A. E.S.P. v. Electranta del Atlantico S.A. E.S.P.*, 421 F. Supp. 2d 87, 103 (D.D.C. 2006), *aff'd*, 487 F.3d 928 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1038 (2007).
42. 233 F. App'x 517 (6th Cir. 2007).
43. *Id*. at 521.
44. 161 F.3d 13 (9th Cir. 1998) (unpublished).
45. *Id*. at *1.
46. *Id*.
47. *Id*. at *2.
48. *Id*. (also quoted in *Figueiredo*, 665 F.3d at 402 (Lynch, J., dissenting)).
49. *See, e.g.*, ABA Resolution 107C (adopted by the House of Delegates Aug. 12-13, 2013) (affirming that the "U.S. common law doctrine of *forum non conveniens* is not an appropriate basis for refusing to confirm or enforce arbitral awards that are subject to the provisions of the [New York Convention] or the [Panama Convention] and that refusal on that basis is not consistent with U.S. treaty obligations under these Conventions and U.S. supporting implementing legislation"); Report of the International Commercial Disputes Committee of the Association of the Bar of the City of New York, *Lack of Jurisdiction and Forum Non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards* (April 2005) (expressing the view that *forum non conveniens* should not be a ground for dismissal of an action to confirm or enforce an arbitral award because a convenient forum is not a requirement for constitutional due process); GARY B. BORN, 3 INTERNATIONAL COMMERCIAL ARBITRATION 2985 & n.508 (2d ed. 2014) (agreeing with *Figueiredo* dissent, and stating, *inter alia*, that it is "both inconsistent with the [New York] Convention and unjust to more broadly rely on the *forum non conveniens* doctrine to deny recognition of foreign awards where there are assets of an award-debtor within the recognition forum or reasonable grounds for believing that assets might be transferred to or through the recognition forum in the future"). *See also* RESTATEMENT OF THE LAW OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-29(a) (Tentative Draft No. 3 Apr. 16, 2013) ("An action to confirm a U.S. Convention award or enforce a foreign Convention award is not subject to a stay or dismissal in favour of a foreign court on forum non conveniens grounds".).
50. No. 10 Civ. 5256 (KMW), 2011 WL 3516154 (S.D.N.Y. Aug. 3, 2011), *aff'd*, 492 F. App'x 150 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1473 (2013).

51. *Id*. at 9-12 (internal quotation marks and citation omitted). *See also Constellation Energy Commodities Grp. Inc. v. Transfield ER Cape Ltd.*, 801 F. Supp. 2d 211, 218-21 (S.D.N.Y. 2011) (refusing to dismiss under *forum non conveniens* where award creditor was incorporated in the United States and adequate alternative fora were available in the United Kingdom and Hong Kong).
52. No. 1:05-CV-846, 2006 WL 1008677, at *4 (W.D. Mich. Apr. 18, 2006).
53. *Id*.
54. *See, e.g., Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting & Fin. Servs. Co.*, 117 A.D.3d 609, 611 (1st Dep't 2014) (affirming an order for the recognition and enforcement of a $40 million English judgment and holding that under New York law, a judgment creditor need not establish a basis of personal jurisdiction over the judgment debtor and rejecting application of *forum non conveniens* doctrine); *Lenchyshyn v. Pelko Elec., Inc.*, 281 A.D.2d 42, 50-51 (4th Dep't 2001) (holding that a party seeking recognition of a foreign money judgment need not establish a basis for personal jurisdiction over the debtor).

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Arbitration provides parties with a means to resolve disputes outside of litigation in the national courts of one country or another. However, absent voluntary compliance with a money award, prevailing in arbitration does not secure satisfaction for the winning party. When dealing with a recalcitrant opponent, the prevailing party may need to resort to the judicial enforcement remedies available in jurisdictions where the debtor or its assets may be found. In the United States, enforcement consists of recognition or confirmation of the award as a judgment, and execution against the assets of the debtor. We describe the process below, focusing on recent developments of US law.

Judicial recognition of arbitration awards

To have access to the US judicial system to enforce an award, the award must be recognised as a court judgment. US courts will recognise commercial arbitration awards and awards rendered in investor-state disputes, however, the procedures can vary depending on the type of award, and whether the award is foreign or domestic.

Recognition of international awards – the New York Convention

Judicial recognition of foreign arbitration awards in the United States is governed by treaty. Most often, recognition is governed by statutes implementing the New York Convention,[1] to which most nations in the world are signatories. The New York Convention is implicated when a foreign arbitral award sought to be enforced in the United States was made in a state that is a party to the treaty.[2]

The New York Convention provides that to have a court recognise a final arbitration award, the winner of the award shall supply the court with the original award or a certified copy.[3] The court then 'shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon'.[4] Thus, under the New York Convention, international arbitration awards are presumed valid provided the proper procedures are followed.

In the United States, the New York Convention is incorporated into Chapter 2 of the Federal Arbitration Act (FAA), which also gives US federal district courts subject matter jurisdiction over recognition and enforcement proceedings.[5] Pursuant to the New York Convention and the FAA, a party seeking recognition of an arbitration award can proceed on an expedited basis.[6] The party does not need to initiate a civil action in the ordinary way, by filing a complaint, but can instead file a petition to confirm the award.[7] In addition, the petition can be resolved on the papers without oral argument or discovery.[8]

Despite this summary process, the New York Convention and the FAA do provide several defences to recognition. Under the New York Convention, recognition may be refused on any one of the following grounds:

- a party is suffering from incapacity or the arbitration agreement is otherwise invalid;
- there is insufficient notice to the party against whom the award is invoked;
- the award is outside the scope of the arbitration agreement;
- the composition of the arbitral tribunal or procedure was not compliant with the parties' agreement or, absent such an agreement, the laws of the jurisdiction where the arbitration took place;
- the award has not yet become binding on the parties;
- the dispute was not arbitrable; or
- recognition of the award would be against public policy.[9]

The FAA provides that a 'court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention.'[10]

Although debtors may invoke public policy arguments to resist or delay recognition, US courts carry a presumption of validity into most recognition cases. For example, a US federal district court recently rejected a challenge by the Republic of Ecuador to the recognition of a US$96 million arbitration award rendered in favour of Chevron. Ecuador had argued the award was beyond the scope of the submission to arbitration and was contrary to US public policy.[11] The court rejected the arguments and reiterated that '[c]onsistent with the emphatic federal policy in favour of arbitral dispute resolution recognised by the Supreme Court [...] the FAA affords the district court little discretion in refusing or deferring enforcement of foreign arbitral awards.'[12] Ecuador's appeal of that decision met a similar fate.[13]

To be able to recognise an arbitration award, a court must have jurisdiction to do so. In the United States, a court ordinarily cannot adjudicate a matter unless it has jurisdiction over both the subject matter of the action and jurisdiction over the parties (or, in certain circumstances, over property that is the object of the dispute). In the recognition context, the FAA confers subject matter jurisdiction in the US district courts and, where the court does not have jurisdiction over the parties, it may nonetheless assert jurisdiction where it has jurisdiction over the award debtor's assets situated in the jurisdiction.[14] Indeed, several US federal courts have held that either jurisdiction over the person of the debtor or over property in which the debtor has an interest is required for a district court to recognise foreign arbitral awards pursuant to the New York Convention.[15] Thus, an award creditor, when seeking to have his or her award recognised as a US judgment, should generally opt to bring the petition in a jurisdiction where the defendant has a presence, or has some property that can be used to satisfy a resultant judgment. An award creditor should also be mindful that under the FAA, recognition of a foreign award must be sought within three years after the award was rendered.[16]

Recognition of international awards – the ICSID Convention

Many investor-state disputes are arbitrated before the World Bank's International Centre for Settlement of Investment Disputes (ICSID). The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), entered into force in 1966, created ICSID to resolve disputes between private investors from one state and a foreign state or state-owned enterprise.[17] Where ICSID has jurisdiction,[18] its decisions are final and are subject only to review within ICSID itself.[19]

The ICSID Convention is codified in US law under section 1650a of Title 22 of the United States Code.

Under the ICSID Convention and the US legislation implementing it, a final ICSID award is meant to be treated as a final judgment of a domestic court.[20] Thus, unlike an award subject to recognition under the New York Convention, which includes several defences to recognition that a party can invoke, US courts do not have the power to set aside, modify, or otherwise substantively review an ICSID award. Courts can review ICSID awards only to confirm their authenticity.

Neither the ICSID Convention nor the US federal legislation that codifies it sets forth procedures for the recognition process, and currently, there is disagreement among the US courts over what that process should be and which laws should govern it. The question is whether the procedures for recognition of an ICSID award should be determined by the law of the forum where the application is made (eg, the ordinary recognition procedures set forth in the state laws of New York or California, or wherever recognition is sought) or by reference to the federal sovereign immunity law, the US Foreign Sovereign Immunities Act (FSIA), since ICSID awards involve foreign sovereigns. That question is significant because the laws of some US states allow recognition to proceed on an ex parte basis, whereas initiating a plenary action pursuant to the FSIA would require that a foreign sovereign be served with process.[21]

The US District Court for the Southern District of New York (SDNY) has held in two recent cases that the law of the forum state should control, and thus allows for recognition of an ICSID award by an ex parte expedited proceeding available under New York law.[22] The SDNY rejected arguments of foreign sovereigns that a plenary proceeding with notice to the debtor was required under the FSIA, reasoning instead that 'the history and terms of the ICSID Convention unavoidably reveal that the contracting states to the ICSID Convention intended to put in place an expedited and automatic recognition procedure.'[23] Another court, the US District Court for the District of Columbia, reached the opposite result: that a petitioner 'must file a plenary action, subject to the ordinary requirements of process under the Foreign Sovereign Immunities Act, to convert its ICSID award [...] into an enforceable domestic judgment'.[24]

The requirement of a plenary action can have significant practical implications on an award creditor. A plenary proceeding would require international service of process on the sovereign, personal jurisdiction over the sovereign, and the selection of a proper venue.[25] International service of process alone can take up to six months or more to effectuate. In contrast, the ICSID awards that the SDNY recognised pursuant to the ex parte procedure available under New York law were recognised on the very same day the ex parte petitions were filed.

This issue is presently before a federal appeals court, the US Court of Appeals for the Second Circuit, and a ruling by that court may help settle the procedures for recognition of ICSID awards in the United States. In the meantime, ICSID award creditors should be aware of the possibility of important distinctions among applicable recognition procedures, particularly in relation to time and cost, depending on the forum within the United States where the proceedings are brought.

Recognition of domestic arbitration awards

Unlike international awards, the recognition of domestic arbitration awards in the United States is not governed by treaty, but rather by state and federal laws. Where the underlying arbitration case involves interstate commerce (ie, commerce in multiple states), Chapter 1 of the FAA governs recognition.[26] Otherwise, state law governs. Many states have adopted similar legislation, based on a model law entitled the Uniform Arbitration Act, some to govern the recognition of an arbitration award that is not subject to Chapter 1 of the FAA.

Chapter 1 of the FAA and the Uniform Arbitration Act both create a strong presumption in favour of the validity of arbitration awards. Upon application to the appropriate court, the court must grant the application and recognise the arbitration award as a judgment unless one of a limited number of bases for vacating the award exists.[27] Chapter 1 of the FAA includes four such bases, which are also contained within the Uniform Arbitration Act:

- where the award was procured by corruption, fraud, or undue means;
- where there was evident partiality or corruption;
- where the arbitrators were guilty of misconduct, such as refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; and
- where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.[28]

Parties seeking recognition of a domestic arbitration award should also be aware of limitations periods. Chapter 1 of the FAA states that a party seeking recognition of a domestic arbitration award must do so within one year after the award is issued.[29] The Uniform Arbitration Act does not include an express limitations period, but in some jurisdictions a court may choose to import a limitations period from a related statute – such as the statute of limitations that would govern the underlying claim.[30]

Execution against property

Having converted his or her arbitration award into a court judgment, the arbitration winner becomes a judgment creditor, and can utilise the post-judgment devices available to him or her under state and federal law to identify and seize non-exempt property of the debtor to satisfy the judgment.

Discovery in aid of execution

US state and federal law provide a judgment creditor with a variety of tools for locating the property of the judgment debtor.

When enforcing a US federal judgment, including a money judgment based on an arbitration award, the Federal Rules of Civil Procedure allow a judgment creditor to use all of the discovery devices available to ordinary civil litigants. Those include means for obtaining judicially compelled disclosure of financial records and other documents, answers to written questions, and sworn testimony from both the judgment debtor and from third parties. The substantive scope of post-judgment discovery is very broad, especially when compared to the disclosure regimes in civil

law countries. A judgment creditor may require the judgment debtor or any third party to disclose all information reasonably calculated to lead to evidence of the judgment debtor's assets.[31]

In addition, the federal rules allow a judgment creditor to utilise the post-judgment remedies, including discovery devices that are available under the laws of the US state in which the federal court sits. Some state laws provide for powerful discovery tools. For example, in certain states, a judgment creditor can compel the debtor to appear before the court to submit to an examination regarding the debtor's assets and affairs.[32]

When enforcing a US state court judgment (as opposed to a federal court judgment), a judgment creditor ordinarily must rely on the state's post-judgment laws and procedures, including those providing for discovery in aid of execution. State court procedures throughout the US, like the federal rules, support broad post-judgment discovery in aid of execution.[33]

Further, post-judgment disclosure in the United States can embrace information concerning a debtor's assets, wherever in the world those assets may be located and wherever in the world the information may be kept. If the court has personal jurisdiction over the judgment debtor or a third party from whom discovery is sought, the judgment creditor may seek any information relevant to the debtor's assets that the party has in its possession, custody, or control, regardless of the location of the debtor's assets or the location of the records or other information sought.[34] Where the information sought is subject to a foreign blocking statute, bank secrecy law or data privacy law, the discovery target may object to producing information on that basis, although US courts will not necessarily defer to those foreign legal protections.[35]

That a judgment creditor may seek discovery about assets outside the US applies even where the debtor is a foreign sovereign.[36] That is notable because under the FSIA, a judgment creditor can only execute against property of the sovereign that is used for commercial activity in the United States.[37] Similarly, although a judgment creditor cannot ordinarily execute on a debtor's bank deposits associated with a foreign branch,[38] the creditor is nonetheless entitled under current US law to obtain the account records, so long as the bank itself is subject to the court's jurisdiction (eg, because it is present in New York) and the bank has possession, custody, or control of the records sought.[39] Thus, US courts have the authority to compel discovery even regarding assets that would not be subject to execution under US law. Consequently, even if the debtor does not have readily seizable property in the United States, a judgment creditor may still benefit from taking enforcement steps in the United States to obtain information about assets that may be subject to execution elsewhere. For example, because US-dollar-denominated international wire transfers are ordinarily cleared through New York banks, serving post-judgment subpoenas on the banks can yield considerable information about the debtor's finances around the world.

Execution

In the United States, there is no general national law of execution (except in certain maritime matters). Whether an arbitration award is confirmed as a federal or state court judgment, the procedures for execution are supplied by the laws of the state in which enforcement or execution is sought.[40] Thus, except to the extent necessary to accommodate differences in specific court practices, the procedures followed in federal and state courts are generally the same.

Each US state has its own execution laws, and while there can be substantial overlap, a judgment creditor should be aware that the procedures available in different states can vary. Generally speaking, though, there are two broad categories of execution available to a judgment creditor: in personam remedies and remedies in rem.

In personam remedies

In personam remedies refer to court orders, or their equivalents, directed against either the debtor or a third party over which the court has jurisdiction, where noncompliance is ordinarily punishable by contempt. These can take the form of debtor or third-party turnover or conveyance orders, restraining orders or notices, or in personam garnishment or third-party debt orders. In personam remedies may be particularly useful when the property of the debtor is beyond the territorial jurisdiction of the court, precluding direct execution on the asset. In New York, for example, an attorney for a judgment creditor is authorised, without the need for approval from the court, to issue restraining notices to the debtor and to any third party holding assets of the debtor, having the effect of a court order prohibiting 'any sale, assignment, transfer or interference with any property in which [the judgment debtor] has an interest'.[41] The restraint operates on the person (in personam) and does not have an effect on title or priority among competing creditors. In certain other US jurisdictions, a restraint may only issue from the court upon application and hearing.

If the debtor's property cannot be reached directly through levy or execution (discussed below), the laws of many states provide that a judgment creditor may seek an order from the court directing the debtor or a third party in possession of the debtor's property to deliver or convey the property to the judgment creditor or to a sheriff. These types of orders are commonly known as 'turnover orders.' As with most court orders, compliance may be coerced through the threat of fines or even imprisonment for contempt.

Whether a court can order a party to turn over property situated outside of the territorial jurisdiction of the court depends on the state in which the post-judgment proceedings are brought. The courts of some states, most notably New York, have held that they may order a debtor or a third party (over whom the court has personal jurisdiction) to bring the debtor's personal property situated anywhere in the world into New York to turn it over to the creditor.[42] However, the courts of other states effectively limit turnover orders to property within the court's territorial jurisdiction.[43]

Even where a court's turnover orders can direct a debtor to deliver out-of-state property into the state, such as in New York, they are subject to common-law limitations. For example, the New York courts have recently confirmed the continuing effect of the common law 'separate entity rule,' a doctrine of New York banking law. The rule provides that even when a bank is present in New York and subject to the court's personal jurisdiction, the bank's foreign branches are to be treated as separate entities for purposes of attachment, execution and turnover orders. As a result, New York courts cannot order a bank to turn over a judgment debtor's deposits that are associated with foreign branches.[44]

Remedies in rem

In addition to in personam remedies, a judgment may be enforced against the debtor's property itself through execution by attachment, levy, garnishment or the appointment of a receiver. These are in rem proceedings where jurisdiction derives not from the court's personal jurisdiction over the judgment debtor or a third party, but rather from the court's jurisdiction over real or personal property located within its territorial jurisdiction.

Execution against the debtor's property is typically accomplished by a writ of execution or its functional equivalent,[45] issued by the court in the federal district or state where the property is situated. The writ empowers a levying officer, such as a sheriff in state court or a US marshal in federal court, to seize and liquidate non-exempt real or personal property located within the court's jurisdiction. The proceeds, subject to the claims of any secured or superior creditors, are then applied to satisfy the judgment. In cases where the debtor's property is difficult to value or cannot be readily liquidated, the courts in many jurisdictions can appoint a receiver to administer the assets for the benefit of a judgment creditor.

In the United States, the recognition of an award as a judgment does not create a lien such that the award creditor obtains a priority right in the debtor's property that could trump claims of other unsecured creditors, such as other parties that subsequently obtain an arbitration award or judgment against the same debtor. Instead, a lien on the debtor's property is created by certain execution devices. For example, under New York law, delivery of a writ of execution to the proper law enforcement officer creates a lien on the judgment debtor's personal property, regardless of whether or when the sheriff or marshal is able to actually levy on the property. By contrast, service of a restraining notice in New York does not confer a lien.[46] Priority among judgment creditors is determined based on the date the creditors obtained their liens.[47] Which execution devices create a lien and which do not depends on the law of the state in which execution is sought.

The creditor should be mindful not only of steps the debtor may take to frustrate his or her enforcement efforts, but also how the enforcement efforts of other creditors can impact his or her ability to satisfy his or her award or judgment.

Conclusion

In the United States, courts are receptive to applications for the recognition of arbitration awards. Once the award is converted into a US money judgment, the award creditor can take advantage of the broad discovery powers available to US litigants to identify the debtor's assets, whether they may be located in the United States or another jurisdiction. Although execution devices differ from state to state, and the applicable procedures must be carefully followed, the creditor can employ a large set of tools that exists under US state laws to seize assets located in the United States, and in some instances to obtain orders directing the delivery of assets into the country for turnover in satisfaction of a judgment. On the whole, the United States is a favourable jurisdiction for enforcing international and domestic arbitration awards.

Notes

1 The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38. The United States also recognises the Inter-American Convention on International Commercial Arbitration (the 'Panama Convention'), which applies instead of the New York Convention in certain cases. The process for recognising an award under either treaty is similar. See *Corporacion Mexicana de Mantenimiento Integral, S de RL de CV v Pemex-Exploracion y Produccion*, 962 F. Supp. 2d 642, 653 (SDNY 2013) ('The Panama Convention and the [New York Convention] are largely similar, and so precedents under one are generally applicable to the other.'); *Freaner v Valle*, 966 F. Supp. 2d 1068, 1076 (S.D. Cal. 2013) ('The two Conventions share many of the same features and characteristics and Congress has even indicated that the two conventions are "intended to achieve the same results".').

2 New York Convention article I.

3 Id. at article IV. An award is considered 'final' 'if it resolves the rights and obligations of the parties definitively enough to preclude the need for further adjudication with respect to the issue submitted to arbitration.' See *Ecopetro SA v Offshore Expl. and Prod.* LLC, 46 F. Supp. 3d 327, 336 (SDNY 2014). So called 'interim awards,' which only resolve certain of the claims brought before the arbitrator, can also qualify as 'final' if they finally and definitely resolve those claims. See id.

4 New York Convention article III.

5 9 U.S.C. sections 201, 203 (1970).

6 *Mobil Cerro Negro Ltd v Bol. Rep. of Venez.*, 87 F. Supp. 3d 573, 595 (SDNY 2015).

7 Id.

8 Id.

9 New York Convention article V.

10 9 U.S.C. section 207 (1970).

11 See *Chevron Corp v Ecuador*, 949 F. Supp. 2d 57, 60 (D.D.C. 2013), aff'd, 795 F.3d 200 (D.C. Cir. 2015), cert. denied, No. 15-1088, 2016 WL 776386 at *1 (US 6 June 2016). In addition to the grounds for non-recognition under the New York Convention, Ecuador also argued unsuccessfully that the Court did not have jurisdiction to recognise the award under the Foreign Sovereign Immunities Act.

12 See *Chevron*, 949 F. Supp. 2d at 64 (internal citations and quotations omitted).

13 *Chevron Corp v Ecuador,* 795 F.3d 200, 207 (D.C. Cir. 2015), cert. denied, *Rep. of Ecuador v Chevron Corp*, No. 15-1088, 2016 WL 776386 at *1 (US 6 June 2016).

14 For example, real or personal property located in the territorial jurisdiction of the court or intangible property rights with legal situs in the district (such as a debt owed to the award-debtor by a third party present in the district).

15 See, eg, *Frontera Res. Azer. Corp v State Oil Co. of the Azer. Rep.*, 582 F.3d 393, 398 (2d Cir. 2009) (holding that 'district court did not err by treating jurisdiction over either [debtor] or [debtor's] property as a prerequisite to the enforcement of [creditor's] petition'); *Glencore Grain BV v Shivnath Rai Harnarain Co*, 284 F.3d 1114, 1127 (9th Cir. 2002) ('Considerable authority supports [creditor's] position that it can enforce the award against [debtor's] property in the forum even if that property has no relationship to the underlying controversy between the parties.'); but see *Base Metal Trading Ltd v OJSC 'Novokuznetsky Aluminum Factory,'* 283 F.3d 208, 213 (4th Cir. 2002) ('Yet, when the property which serves as the basis for jurisdiction is completely unrelated to the plaintiff's cause of action, the presence of property alone will not support jurisdiction.').

16 9 U.S.C. section 207 (1970).

17 ICSID Convention, 18 March 1965, 17 U.S.T. 1270, T.I.A.S. 6090, 575 U.N.T.S. 159 at article 1.

18 ICSID has jurisdiction over investment-related legal disputes between a state party to the ICSID Convention and a national of another state that is also a party to the treaty, where the parties have consented ICSID's jurisdiction. Id., at article 25.

19 Id., at article 53 (ICSID awards 'shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.').

20 22 U.S.C. section 1650a(a) (1966) ('The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.').

21 See 28 U.S.C. section 1608 (1976).

22 *Mobil Cerro*, 87 F. Supp. 3d 573 (SDNY 2015); *Micula v Gov't of Rom.*, 2015 WL 5257013 (SDNY 2015).

23 *Mobil Cerro*, 87 F. Supp. 3d at 599 (emphasis added).

24 *Micula v Gov't of Rom.*, 104 F. Supp. 3d 42, 52 (D.D.C. 2015).

25 The FSIA provides that an action against a foreign sovereign can only be brought in certain judicial districts. The default district is the US District Court for the District of Columbia, but if the action has certain factual connections to another jurisdiction, then the action may be brought there instead. See 28 U.S.C. section 1391(f) (2011).

26 See 9 U.S.C. sections 2, 9 (1947).

27 See *Affymax, Inc v Ortho-McNeil-Janssen Pharm., Inc*, 660 F.3d 281, 284 (7th Cir. 2011); *Sch. City of E. Chi., Ind. v E. Chi. Fed'n of Teachers*, Local No. 511, A.F.T., 622 N.E. 2d 166, 168 (IN 1993).

28 9 U.S.C. section 10 (2002).

29 9 U.S.C. section 9 (1947).

30 See, eg, *Hanson v Larson*, 459 N.W.2d 339 (Minn. App. 1990) (applying statute of limitations for a breach of contract action to a recognition action).

31 See, eg, *E.M. Ltd v Rep. of Arg.*, 695 F.3d 201, 207 (2d Cir. 2012) ('The scope of discovery under Rule 69(a)(2) is constrained principally in that it must be calculated to assist in collecting on a judgment.') aff'd sub nom. *Rep. of Arg. v NML Capital, Ltd*, 134 S. Ct. 2250 (2014). We note that the Federal Rules of Civil Procedure governing the scope of discovery were amended in late 2015. The revised rules now provide that discovery must be 'proportional to the needs of the case.' Fed. R. Civ. P. 26(b)(1). It is unclear how, if at all, this new proportionality standard will affect the scope of discovery available in the post-judgment setting. Arguably any discovery aimed at identifying assets of the debtor is proportional to the needs of an enforcement case, although perhaps it may provide non-party discovery targets with an additional ground on which they can object to a burdensome discovery request. Thus, judgment creditors should, in the first instance, continue to conduct post-judgment discovery consistent with the broad scope that has been recognised by the courts.

32 For instance, Florida law provides, as part of its 'proceedings supplementary,' that upon motion by the judgment creditor 'the court shall require the judgment debtor to appear before it ... to be examined concerning property subject to execution.' Section 56.30, Fla. Stat. (Supp. 2016).

33 See, eg, *Vera v Rep. of Cuba*, 91 F. Supp. 3d 561, 569 (SDNY 2015) ('It is well-recognised that broad post-judgment discovery in aid of execution is the norm in federal and New York state courts' (internal citations and quotations omitted)).

34 See *EM Ltd*, 695 F.3d at 208 ('Thus, in a run-of-the-mill execution proceeding, we have no doubt that the district court would have been within its discretion to order the discovery from third-party banks about the judgment debtor's assets located outside the United States.'); see also NY C.P.L.R. 5224(a)(4)(a-1) (providing that a post-judgment subpoena subjects the target to disclosure of information 'whether the materials sought are in the possession, custody or control of the subpoenaed person, business or other entity within or without the state.').

35 See, eg, *Chevron Corp v Donziger*, 296 F.R.D. 168, 198 (SDNY 2013) ('[T]he [trial] court may 'impose discovery under the Federal Rules of Civil Procedure when it has personal jurisdiction over the foreign party,' notwithstanding provisions of foreign law that would prohibit production.').

36 See *Rep. of Arg.*, 134 S. Ct. 2250 (2014).

37 See 28 U.S.C. section 1610 (2012).

38 As discussed below in the context of execution, pursuant to a doctrine of New York banking law known as 'the separate entity rule,' even where the bank itself is subject to the court's jurisdiction, New York courts treat foreign branches of the bank as separate entities for purposes of execution on a judgment. Thus, the courts cannot order the bank to turn over assets that are associated with foreign branches.

39 See *B&M Kingstone, LLC v Mega Intern. Commercial Bank Co, Ltd*, 131 A.D.3d 259, 266, 15 NYS 3d 318, 323-34 (NY App. Div. 1st Dep. 2015) ('Thus, Motorola's expressly limited affirmation of the separate entity rule does not apply to the instant case, and the rule does not bar the court's exercise of jurisdiction over Mega to compel a full response to the information subpoena.').

40 See Fed. R. Civ. P. 69(a)(1) ('The procedure on execution – and in proceedings supplementary to and in aid of judgment or execution – must accord with the procedure of the state where the court is located... .').

41 NY C.P.L.R. 5222(b).

42 See *Koehler v Bank of Bermuda*, 911 N.E.2d 825, 829 (NY 2009).

43 See, eg, *Sargeant v Al-Saleh*, 137 So. 3d 432, 435 (Fla. Dist. Ct. App. 2014) ('[W]e emphasise that allowing trial courts to compel judgment debtors to bring out-of-state assets into Florida would effectively eviscerate the domestication of foreign judgment statutes.'); *Feltner v US Army Fin. and Accounting Ctr.*, 643 S.W.2d 648, 649 (Mo. Ct. App. 1982) (holding that court could not order third party garnishee to turn over debtor's property even where court had jurisdiction over the garnishee if court did not also have jurisdiction over the property itself). Note that the law in Florida on this issue is unsettled. The *Sargeant* decision was issued by an intermediate appellate court and appears directly contradictory to an earlier ruling of a different intermediate appellate court in Florida. See *Gen. Elec. Capital Corp v Advance Petroleum Inc*, 660 So. 2d 1139, 1142 (Fla. Dist. Ct. App. 1995) ('It has long been established in this and other jurisdictions that a court which has obtained in personam jurisdiction over a defendant may order that defendant to act on property that is outside of the court's jurisdiction, provided that the court does not directly affect the title to the property while it remains in the foreign jurisdiction.').

44 See *Motorola Credit Corp v Standard Chartered Bank*, 24 NY 3d 149, 162 (2014) ('Finally, we decline Motorola's invitation to cast aside the separate entity rule.'); *Shaheen Sports, Inc v Asia Ins. Co, Ltd*, No. 11-CV-920 LAP, 2012 WL 919664, at *3 (SDNY 2012) (denying turnover petition on the basis that separate entity rule remained in effect and precluded turnover of assets at a foreign branch).

45 In some US states, a writ of execution is operative in relation to property in the hands of the debtor or a third party, while in other states separate writs must issue depending on who has custody of the debtor's property. For example, in New York, a writ of execution can be used to levy against property whether it is in the possession of the judgment debtor or a third party. See NY C.P.L.R. 5230. Colorado, however, provides different procedures for execution against property held by a third party garnishee. See C. R. of C. P. sections 69(a), 103.

46 *Aspen Indus., Inc v Marine Midland Bank*, 421 N.E.2d 808, 810-11 (NY 1981)

47 See NY C.P.L.R. 5202 (providing that delivery of an execution to a sheriff generally establishes priority in personal property vis-à-vis any transferee). Further, where multiple judgment creditors deliver an execution to the same enforcement officer, priority will be determined by the order in which the executions were delivered (although where multiple executions were delivered to different enforcement officers, priority is determined by the moment of levy). See NY C.P.L.R. 5234(b).

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International Litigation

CPLR 7502(c): An Underused Weapon

Lawrence W. Newman and David Zaslowsky, New York Law Journal

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Section 7502(c) of the CPLR authorizes provisional remedies in aid of arbitration. It can be used in aid of arbitrations that take place both in and outside of New York, thus making the statute broader than its sister statute governing attachments in aid of litigation. Perhaps the most interesting question about the statute is how come it is not used more? This article looks at the history of the statute and some of the cases decided under it.

Reversing 'Cooper'

In 1982, the New York Court of Appeals decided Cooper v. Ateliers de la Motobecane, S.A. , 57 N.Y.2d 408 (1982), in which it held that pre-award attachments could not be issued in connection with an international arbitration that fell under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention). 9 U.S.C. Chapter 2. The court explained that attachments could be brought only in connection with a lawsuit seeking money damages and that a case to compel arbitration did not so qualify. In addition, the court held that, because the Convention authorized a court

to "refer" to arbitration any case falling under the Convention, a court could do nothing other than "refer." Inasmuch as granting an attachment order was more than just "referring" the case, it was forbidden.

In response to this decision, in 1985, the Arbitration Committee of the City Bar Association recommended the enactment of what would become §7502(c).[1] That report made clear that the purpose of §7502(c) was to reverse *Cooper*. However, somehow, without any explanation, the Memorandum of the Office of Court Administration accompanying the bill stated that the new statute would not affect international arbitration proceedings. Thus, the law with respect to international arbitration did not change and *Cooper* still precluded provisional remedies in aid of Convention arbitrations.

Twenty years later, another committee of the City Bar Association, the International Commercial Disputes Committee (ICDC), took another run at reversing *Cooper*.[2] In its report, the Committee explained that *Cooper* was an anomaly.[3] Other states (such as California, Connecticut, New Jersey and Texas) authorized provisional remedies in aid of international arbitration. Even within New York, there was a dichotomy because federal courts in New York rejected the *Cooper* reasoning and held that "[e]ntertaining an application for [a preliminary injunction] is not precluded by the Convention but rather is consistent with its provisions and its spirit." *Borden v. Meji Milk Products , 919 F.2d 822, 826* (2d Cir. 1990). Likewise, foreign countries (in places as diverse as Australia, France, Malta, Singapore and Zimbabwe) allowed provisional remedies in connection with arbitrations.

The ICDC recommended amendments to §7502(c) to achieve two objectives. First, provisional remedies would be available in connection with arbitrations under the Convention. And, second, a party could obtain a provisional remedy under §7502(c) even if the arbitration was taking place outside New York. In 2005, the legislature revised the statute in accordance with these recommendations, which now reads in relevant part:

The supreme court in the county in which an arbitration is pending or in a county specified in subdivision (a) of this section, may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state, whether or not it is subject to the United Nations convention on the recognition and enforcement of foreign arbitral awards, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.

The legislative history reiterated the objectives in the ICDC Report.[4]

Section 7502(c) Cases

Unlike what happened with the 1985 changes, this time, the courts interpreted the statute as intended by the Bar Committee. Thus, cases have held that the statute can be used for Convention arbitrations, even if the arbitrations are located outside New York. *Matter of Sojitz v. Prithvi Info. Solutions* , 82 A.D.3d 89 (1st Dep't 2011) was a case that granted an attachment in aid of an arbitration seated in Singapore. And, in Invar Int'l. v. Zorlu Enerji Elektrik Uretim Anonim Sirketi , 32 Misc. 3d 1216(A), 2010 N.Y. Misc. LEXIS 6649 (Sup. Ct. NY County, July 23, 2010), the court granted provisional relief under CPLR 7502(c) pending an arbitration in Switzerland.

The courts have been called on to address other issues as well. *Sierra USA Commc'ns v. Int'l Tel. & Satellite , 824 N.Y.S.2d 560* (Sup. Ct., N.Y. 2006) addressed the part of the statute that requires that the underlying arbitration be commenced within 30 days of the court's order or else the order "shall be null and void." Here, the court granted a temporary restraining order under §7502(c). When 30 days passed without an arbitration being commenced, the respondents moved to vacate, after which the Petitioner moved to extend the 30-day deadline. Respondent argued that the statute authorizes an extension of the 30 days but, because that request had not been made within the 30 days, the court was without authority to

extend the deadline of an order that had been rendered "null and void." The court disagreed and held that it had the discretion to extend the deadline, even after the 30 days.

The decision in *Sojitz* concerned the issue of jurisdiction under §7502(c). The case involved a Japanese petitioner, an Indian respondent, a contract governed by English law and a Singapore arbitration. The court granted an attachment order and the petitioner attached $18,000 owed to the respondent by a New York customer. The respondent argued that the court lacked personal jurisdiction. The court disagreed, relying on the well known "security exception" to the minimum contacts requirement applicable in quasi in rem cases, as the Supreme Court discussed in Shaffer v. Heitner , 433 U.S. 186 (1977). Thus, if an attachment is sought solely to enforce a potential arbitration award, location of the property alone in New York is a sufficient basis for jurisdiction.

Finally, *Great E. Sec. v. Goldendale Investments*, 2006 U.S. Dist. LEXIS 94271 (S.D.N.Y. Dec. 20, 2006) concerned the interesting issue of the intersection of §7502(c) and challenges to arbitration awards. In that case, an NASD arbitration panel entered an interim order in which, under §7502(c), they required the petitioner to place almost $500,000 in escrow pending the conclusion of the arbitration.

The petitioner then moved in court to vacate the interim order on the grounds that the tribunal had exceeded its authority and acted in manifest disregard of the law. Interestingly, the manifest disregard argument was based on the arbitrators' supposedly applying §7502 improperly. There is, of course an extremely high hurdle for proving manifest disregard and the court rejected the argument. But the case at least raised the issue of whether, when parties seek provisional remedies from arbitral tribunals in New York in aid of a New York arbitration, are the arbitrators bound by the provisions of §7502(c)? That question may be answered in future cases.

An Underused Statute

Perhaps the most interesting aspect of the revised version of §7502(c) is that it is a potentially powerful weapon that does not seem to be used anywhere near as much as might be expected. In that regard, it is interesting to compare this arbitration attachment statute with the attachment statute for lawsuits. CPLR §6201 provides:

Grounds for attachment. An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants …

Thus, when seeking an attachment in aid of a lawsuit, it must be brought in connection with a lawsuit in which the plaintiff is seeking a money judgment. There is no authority to seek an attachment in New York in aid of a lawsuit being conducted elsewhere. In contrast, §7502(c) specifically authorizes attachments in aid of arbitrations taking place outside of New York.

Considering the broader scope of §7502(c) as compared to §6201, and the fact that New York, as the financial center of the world, is home to untold assets, one would have expected a significant increase in the use of §7502(c) after the statute was amended. Although statistics are not available, based on the number of reported decisions concerning §7502(c), as well as anecdotal evidence, that increase has not yet occurred. Perhaps publicity about the statute will increase its use.

Endnotes:

1. 1985 Report of the Advisory Committee on Civil Practice, reprinted in McKinney's 1985 Session Laws at 3432.

2. The authors of this article were the Chairman and Secretary, respectively, of the Committee.

3. The report may be found at http://www.nycbar.org/pdf/report/international_arb_rpt_on_equit_remedies.pdf.

4. 2005 NY Senate Bill S 4837, Sponsor Memorandum in Support of Legislation.

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Errata

[2014] 1 SLR 372 at [138] line 8: replace "Tay Kay Kheng" with "Tan Kay Kheng".

PT First Media TBK (formerly known as PT Broadband Multimedia TBK)
v
Astro Nusantara International BV and others and another appeal

[2013] SGCA 57

Court of Appeal — Civil Appeals Nos 150 and 151 of 2012
Sundaresh Menon CJ, V K Rajah JA and Judith Prakash J
10–12 April; 31 October 2013

Arbitration *— Arbitral tribunal — Jurisdiction — Enforcement — Singapore award — Whether international arbitration award made in Singapore could be refused enforcement under s 19 International Arbitration Act (Cap 143A, 2002 Rev Ed) — Whether arbitral tribunal had improperly exercised its power to join third parties pursuant to r 24(b) 2007 Singapore International Arbitration Centre Rules — Section 19 International Arbitration Act (Cap 143A, 2002 Rev Ed) — Rule 24(b) 2007 Singapore International Arbitration Centre Rules*

Facts

The dispute arose out of a joint venture ("the JV") between on the one side, companies belonging to an Indonesian conglomerate ("the Lippo Group"), and on the other, certain companies within a Malaysian media group ("the Astro Group"), for the provision of multimedia and television services in Indonesia. The appellant ("the Appellant"), FM, is a member of the Lippo Group and was one of its guarantors in the joint venture. FM was also amongst the members of the Lippo Group who entered into a subscription and shareholders' agreement ("the SSA") with the first to fifth respondents ("1st to 5th Respondents"), which contained the terms of the JV. The sixth to eighth respondents ("6th to 8th Respondents"), who were not party to the SSA, provided funding and services to the JV in anticipation of its closing. As it became apparent that the closing of the JV would not materialise, a dispute arose over the continued provision of funding. One of the Lippo Group companies commenced court proceedings in Indonesia against the 6th to 8th Respondents in relation to this dispute. The Respondents, including the 6th to 8th Respondents, then commenced arbitration proceedings pursuant to cl 17.4 of the SSA ("the Arbitration") against the Lippo Group companies. At the same time that the notice of arbitration was filed, an application to join the 6th to 8th Respondents as parties to the arbitration was also filed by the 1st to 5th Respondents ("the Joinder Application").

The three-member arbitral tribunal ("the Tribunal") conducted a preliminary hearing to determine the Joinder Application and, pursuant to r 24(b) of the 2007 Singapore International Arbitration Centre Rules ("2007 SIAC Rules"), ordered the joinder of the 6th to 8th Respondents to the Arbitration, over the objections of the Lippo Group companies. The Tribunal's decision was contained in an award on preliminary issues. The Lippo Group companies did

not file an appeal to the Singapore court against the Award on Preliminary Issues as permitted by s 10 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") read with Art 16(3) of the 1985 Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law ("the Model Law"), though they did reserve their position on the Tribunal's jurisdiction over the dispute concerning the 6th to 8th Respondents. The Arbitration then proceeded to the determination of the substantive merits of the dispute, whereby the Tribunal rendered four further awards in favour of the Respondents. Subsequently, the Respondents sought to enforce all five awards in Singapore ("the Awards"). FM objected to the enforcement of the Awards on the basis that r 24(b) of the 2007 SIAC Rules did not permit the Tribunal to join the 6th to 8th Respondents to the Arbitration ("the Joinder Objection") and the Awards were therefore made in excess of jurisdiction.

Before the High Court, FM's application to set aside the enforcement of the Awards was dismissed on the ground that the provisions of the IAA read with the Model Law did not permit FM to resist enforcement of the Awards on the basis of the Joinder Objection. The High Court held that the Singapore courts had no power to refuse enforcement of an international arbitral award made in Singapore (hereinafter referred to as a "domestic international award") which had not been set aside or successfully challenged previously under Art 16(3) by the party resisting enforcement. FM appealed against the High Court's decision.

Held, allowing the appeal in part:

(1) Section 19 of the IAA, when construed in consonance with the underlying philosophy of the Model Law, permitted the award debtor to apply to resist enforcement of a domestic international award even if he had not actively challenged the award at an earlier opportunity. This system of "choice of remedies", as evidenced by the *travaux préparatoires* of the Model Law (*travaux* for short), was not just a facet of the Model Law enforcement regime; it was at the *heart* of its design: at [53] to [55] and [65] to [71].

(2) Given that de-emphasising the seat of arbitration by maintaining the award debtor's "choice of remedies" and alignment with the common grounds set out in the New York Convention were the pervading themes under the enforcement regime of the Model Law, the most efficacious method of giving full effect to the Model Law philosophy through the IAA was to recognise that the same *grounds* for resisting enforcement under Art 36(1) of the Model Law were equally available to a party resisting enforcement of a domestic international award under s 19 of the IAA: at [84].

(3) Section 3(1) of the IAA could not be understood as having incidentally derogated from the clear philosophy of "choice of remedies" under the Model Law. The exclusion of Arts 35 and 36 of the Model Law on account of s 3(1) of the IAA did not militate against the interpretation of s 19 as permitting a party resisting enforcement of a domestic international award to do so on the same grounds as those found in Art 36(1): at [86] to [90] and [99].

(4) Nothing in the *travaux* on Art 16(3) of the Model Law suggested that the remedy provided in Art 16(3) was either an exception to the system of "choice of

remedies" or intended to operate as a "one-shot remedy". The availability of recourse under Art 16(3) was for the purpose of rendering the arbitration process more efficient as compared to the alternative that had earlier been mooted of only being able to challenge jurisdictional rulings after the award on the merits had been rendered: at [109] to [123] and [125] to [132].

(5) Section 19B(1) of the IAA had everything to do with the doctrine of *res judicata* which resulted in the arbitral tribunal being *functus officio* in relation to awards already made, and nothing to do with the availability of curial remedies. Section 19B(4) of the IAA in fact clarified that awards which were final and binding might still be challenged by any recourse provided by law: at [137] to [142].

(6) The issue of whether an arbitration agreement existed was capable of being subsumed under Art 36(1)(*a*)(i) of the Model Law or Art V(1)(*a*) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In the course of determining if the ground for refusing enforcement was established, the enforcement court was entitled to undertake a fresh examination of the issues which were alleged to establish that ground of challenge: at [152] to [158] and [162] to [164].

(7) Rule 24(b) of the 2007 SIAC Rules did not confer on the Tribunal the power to join third parties who were not party to the arbitration agreement. Accordingly, the Tribunal's exercise of its power under r 24(b) to join the 6th to 8th Respondents who were not parties to the SSA to the Arbitration was improper with the corollary that no express agreement to arbitrate existed between the 6th to 8th Respondents and FM: at [178] to [185], [191] to [193] and [197] to [198].

(8) FM did not waive its rights or conduct itself in such a way that it was estopped from raising the Joinder Objection: at [205] to [222].

(9) An arbitral award bound the parties to the arbitration because the parties had consented to be bound by the consequences of agreeing to arbitrate their dispute. Their consent was evinced in the arbitration agreement. Therefore, in a multiparty arbitration agreement, the vitiation of consent between two parties did not *ipso facto* vitiate the consent between other parties. In the present case, partial enforcement was viable because the orders in the Awards did not intertwine in such a manner as to impede severance of the orders made in favour of the 6th to 8th Respondents from those made in favour of the 1st to 5th Respondents: at [226] to [228].

[Observation: It was doubtful whether an enforcement court might recognise and enforce a foreign award which had been set aside by the court in the seat of arbitration. The contemplated *erga omnes* effect of a successful application to set aside an award would generally lead to the conclusion that there was simply no award to enforce: at [76] and [77].]

Case(s) referred to

Albeko Schuhmaschinen AG v Kamborian Shoe Machine Co Ltd (1961) 111 LJ 519 (refd)

Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd [2006] 3 SLR(R) 174; [2006] 3 SLR 174 (refd)

Arab Republic of Egypt, The v Chromalloy Aeroservices, Inc (1997) XXII Yearbook Comm Arb 691–695 (not folld)

Astro Nusantara International BV v PT Ayunda Prima Mitra [2013] 1 SLR 636 (overd)

Chai Cher Watt v SDL Technologies Pte Ltd [2012] 1 SLR 152 (refd)

Compania Naviera Micro SA v Shipley International Inc (The Parouth) [1982] 2 Lloyd's Rep 351 (refd)

Dallah Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan [2010] 2 WLR 805; [2009] EWCA Civ 755 (refd)

Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan [2011] 1 AC 763 (folld)

Dalmia Cement Ltd v National Bank of Pakistan [1975] QB 9 (refd)

Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd [2010] 3 SLR 661 (refd)

Fiona Trust & Holding Corp v Privalov [2007] Bus LR 1719; [2008] 1 Lloyd's Rep 254 (refd)

Galsworthy Ltd of the Republic of Liberia v Glory Wealth Shipping Pte Ltd [2011] 1 SLR 727 (refd)

Goodman v Sayers (1820) 2 Jac & W 249; 37 ER 622 (refd)

Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd [2013] FCAFC 109 (refd)

Hilmarton Ltd v Omnium de traitement et de valorisation (1995) XX Yearbook Comm Arb 663–665 (not folld)

Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd [2007] 1 SLR(R) 292; [2007] 1 SLR 292 (refd)

IMC Aviation Solutions Pty Ltd v Altain Khuder LLC (2011) 253 FLR 9 (refd)

Jugoslavenska Oceanska Plovidba v Castle Investment Co Inc [1974] QB 292 (refd)

Kruse v Questier & Co Ltd [1953] 1 QB 669 (refd)

Middlemiss & Gould v Hartlepool Corp [1972] 1 WLR 1643 (refd)

Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga) [1990] 1 Lloyd's Rep 391 (refd)

Omnium de Traitement et de Valorisation – OTV v Hilmarton (1994) XIX Yearbook Comm Arb 214–222 (refd)

Pertamina Energy Trading Ltd v Credit Suisse [2006] 4 SLR(R) 273; [2006] 4 SLR 273 (refd)

Prodexport State Co for Foreign Trade v E D & F Man Ltd [1973] QB 389 (refd)

PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA [2007] 1 SLR(R) 597; [2007] 1 SLR 597 (refd)

Sarhank Group v Oracle Corp No 01-civ-1295, 2002 WL 31268635 (SDNY, 2002) (refd)

Sarhank Group v Oracle Corp 404 F 3d 657 (2nd Cir, 2005) (refd)

Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd [2009] 2 CLC 481 (folld)

Syska v Vivendi Universal SA [2009] Bus LR 367; [2009] 1 All ER (Comm) 244 (refd)

Tang Boon Jek Jeffrey v Tan Poh Leng Stanley [2001] 2 SLR(R) 273; [2001] 3 SLR 237 (refd)

Yukos Oil Co v Dardana Ltd [2002] EWCA Civ 543 (refd)

Legislation referred to

Arbitration Act 1953 (Act 14 of 1953) s 20

Arbitration Act (Cap 10, 1985 Rev Ed) s 20

International Arbitration Act (Cap 143A, 2002 Rev Ed) ss 3(1), 10, 19, 19B (consd); ss 19B(4), 26

International Arbitration (Amendment) Act 2001 (Act 38 of 2001)

Interpretation Act (Cap 1, 2002 Rev Ed) ss 9A, 4(2)

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[Editorial note: The decision from which these appeals arose is reported at [2013] 1 SLR 636.]

31 October 2013 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 The central question raised in the present appeals concerns the right of a party to an international arbitration, under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"), to contend that an award rendered in Singapore should not be enforced against it here on the grounds of an alleged lack of jurisdiction on the part of the tribunal, in circumstances where that party did not take up the avenues that were available to it at an earlier stage to challenge the tribunal's finding that it did have jurisdiction. The answer to this question depends on the interpretation of the relevant provisions of the IAA and the 1985 Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law ("UNCITRAL") ("the Model Law") which together govern the enforcement of international arbitral awards made in Singapore.

Facts

Background

2 The judgment of the High Court judge ("the Judge") against which the present appeals have been brought is reported as *Astro Nusantara*

International BV v PT Ayunda Prima Mitra [2013] 1 SLR 636 ("the Judgment"). The background to the substantive dispute has been set out in the Judgment at [19] to [26]. For the purposes of these appeals, it is only necessary to highlight the following facts.

Dramatis personae

3 The dispute arose out of a joint venture ("the JV") between on the one side, companies belonging to an Indonesian conglomerate ("the Lippo Group"), and on the other, certain companies within a Malaysian media group ("the Astro Group"), for the provision of multimedia and television services in Indonesia. The vehicle for the JV was to be PT Direct Vision ("DV") (also the third defendant in the proceedings below).

4 The Lippo Group's share in the JV was to be held by PT Ayunda Prima Mitra ("Ayunda") (also the first defendant in the proceedings below). Ayunda's obligations were in turn guaranteed by PT First Media TBK ("FM") (also the second defendant in the proceedings below and the sole appellant in these appeals). The Astro Group's shareholders in the JV were the third and fourth respondents initially, with the fifth respondent guaranteeing their obligations. Pursuant to a novation agreement, the first and second respondents ("the 1st and 2nd Respondents") became the Astro Group's shareholders in the JV. For ease of reference, we refer to the first to eighth respondents collectively as "Astro".

The SSA and the dispute

5 The terms of the JV were contained in a subscription and shareholders' agreement dated 11 March 2005 ("the SSA"). The parties to the SSA were the first to fifth respondents ("the 1st to 5th Respondents"), FM, Ayunda and DV. It is common ground that the sixth to eighth respondents ("the 6th to 8th Respondents") were not parties to the SSA.

6 The SSA contained a number of conditions precedent upon which the parties' respective obligations in the JV were predicated. The parties agreed that they would have until July 2006 to fulfil the conditions precedent. Nonetheless, pending such fulfilment, funds and services were provided by the 6th to 8th Respondents to DV to build up the latter's business from about December 2005.

7 The conditions precedent were not fulfilled in accordance with the schedule and by mid-August 2007, it became likely, even clear to the parties, that the JV would not close. Nonetheless, the 6th to 8th Respondents continued to provide funds and services to DV even as the parties explored their exit options. A dispute then arose over the continued funding of DV. At the heart of that dispute was whether the 6th to 8th Respondents had separately agreed, either orally or by conduct, that they would continue funding and providing services to DV.

8 This dispute was brought to a head in September 2008 when Ayunda commenced court proceedings in Indonesia against, amongst others, the 6th to 8th Respondents ("the Indonesian Proceedings").

The arbitration proceedings

9 Relying on cll 17.4 and 17.6 of the SSA, Astro took the position that Ayunda's commencement of the Indonesian Proceedings amounted to a breach of the arbitration agreement in the SSA. Read together, the two clauses provided that if the parties are unable to resolve any dispute amicably within 30 days, any party could then commence arbitration under the auspices of the Singapore International Arbitration Centre ("SIAC"). In short, parties to the SSA were not permitted to commence court proceedings to resolve any dispute arising thereunder.

10 Astro therefore commenced Arbitration No 62 of 2008 ("the Arbitration") at the SIAC on 6 October 2008 against FM, Ayunda and DV. The seat of the Arbitration was Singapore. There was, however, a preliminary hurdle to be cleared, as the 6th to 8th Respondents were not parties to the SSA. To overcome this apparent obstacle, Astro stated in their notice of arbitration ("Notice of Arbitration") that the 6th to 8th Respondents had consented to being added as parties to the Arbitration. According to Astro, this was permitted by r 24(b) (sometimes referred to as r 24.1(b)) of the SIAC Rules (3rd Ed, 1 July 2007) ("the 2007 SIAC Rules") which governed the Arbitration. Accordingly, at the same time that the Notice of Arbitration was filed, an application to join the 6th to 8th Respondents as parties to the Arbitration was also filed by the 1st to 5th Respondents ("the Joinder Application"). This was contested by FM, Ayunda and DV.

11 On 19 February 2009, the three member tribunal ("the Tribunal") directed that a preliminary hearing be conducted to determine the Joinder Application. On 7 May 2009, the Tribunal rendered an award ("the Award on Preliminary Issues"). On the Joinder Application, the Tribunal firstly held that on a true construction of r 24(b), it did indeed have the power to join the 6th to 8th Respondents as long as they consented to being joined. It then decided that this power *should* be exercised. This was because the close connection between the different claims advanced by Astro and the potential defences and counterclaims of FM, Ayunda and DV made the joinder both desirable and necessary in the interests of justice. The Tribunal was also concerned about potential inconsistent findings arising from the Arbitration and the Indonesian Proceedings and, to that end, issued an anti-suit injunction restraining Ayunda from proceeding with the latter.

12 Thereafter, between 3 October 2009 and 3 August 2010, the Tribunal rendered four other awards, including the interim final award on the merits of the parties' dispute dated 16 February 2010 ("the Final Award"). For ease

of reference, the five arbitral awards awarded in the Arbitration are collectively referred to as "the Awards".

Procedural history

13 Against that background, we trace and set out the procedural history leading to these appeals. The proceedings in the High Court began with Astro's *ex parte* applications in Originating Summonses No 807 of 2010 ("OS 807/2010") and Originating Summons No 913 of 2010 ("OS 913/2010") (collectively, "the Enforcement Proceedings") for leave to enforce the Awards that had been rendered by the Tribunal. Leave to enforce four awards was given in OS 807/2010 on 5 August 2010, while leave to enforce the remaining award was given in OS 913/2010 on 3 September 2010.

14 The two orders, which we shall refer to as the "Enforcement Orders", were purportedly served on FM, Ayunda and DV in Indonesia. After the time for filing an application to set aside the Enforcement Orders had expired without any action having been taken by either FM, Ayunda or DV, Astro entered judgments in Singapore on the Awards against them on 24 March 2011. On 3 May 2011, FM applied to set aside the judgments on the ground that the service of the Enforcement Orders was irregular. Ayunda and DV did not make a similar application. On 22 August 2011, the Assistant Registrar set aside the judgments against FM and granted FM leave to apply to set aside the Enforcement Orders. The Assistant Registrar's decision was upheld by the Judge on appeal: see the Judgment ([2] *supra*) at [41]–[65].

15 Consequently, on 12 September 2011, FM caused two summonses to be issued to set aside the Enforcement Orders granted in OS 807/2010 and OS 913/2010 ("SUM 4065" and "SUM 4064" respectively). These were heard by the Judge who dismissed the applications. Civil Appeals Nos 150 and 151 of 2012 are FM's appeals against the Judge's decision. At a pre-hearing conference on 20 February 2013, FM and Astro consented to having the two appeals consolidated.

The decision below

16 There were two grounds on which FM sought to set aside the Enforcement Orders. First, there was never any arbitration agreement between FM and the 6th to 8th Respondents. Second, the Award on Preliminary Issues (on the basis of which the Tribunal derived its jurisdiction to issue the subsequent four awards) should not be enforced because the Supreme Court of Indonesia had ruled that it violates the sovereignty of the Republic of Indonesia. It is apposite to clarify that the Awards are not foreign awards governed by Pt III of the IAA which gives effect to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"). This was not

disputed by the parties. Instead, the Awards are what the Judge termed "domestic international awards", *ie*, international commercial arbitral awards made in the same territory as the forum in which recognition and enforcement is sought.

17 The Judge dismissed FM's applications without going into the merits of the grounds relied on by FM, having found in favour of Astro on two independent threshold issues. The first was that the grounds raised by FM are not recognised as grounds for resisting enforcement of a domestic international award under the IAA. The second was that FM was precluded from raising the same jurisdictional objections which formed the subject-matter of the Award on Preliminary Issues given that it had not challenged the latter as it was entitled to under Art 16(3) of the Model Law within the prescribed time. By reason of this failure, the Judge found that it was no longer open to FM to resist enforcement in reliance on those grounds which it could have, but did not raise pursuant to Art 16(3). We set out the details of the Judge's reasoning on these two independent threshold issues below.

Grounds for resisting enforcement of domestic international awards

18 The Judge held (at [82] of the Judgment) that a domestic international award is either recognised as final and binding and not set aside, or, it is not recognised as final and binding and set aside. Since the timelines for setting aside had expired and FM was only seeking to resist enforcement of the Awards, it followed that the Awards were final and binding with the necessary corollary that enforcement could not be resisted. Second, FM's argument that there should be no distinction between the enforcement regime for domestic international awards and foreign awards was a "non-starter" (at [88] of the Judgment). This was because while parties could rely on the grounds in Art V(1) of the New York Convention to resist the enforcement of foreign awards, by virtue of s 3(1) of the IAA, Art 36(1)(*a*) of the Model Law which is contained in Ch VIII thereof and which sets out the grounds for resisting enforcement of an award made in any jurisdiction (including the seat jurisdiction) does not have the force of law in Singapore. Section 3(1) of the IAA provides:

> **Model Law to have force of law**
>
> **3.**—(1) Subject to this Act, the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore.

19 Article 36(1)(*a*) of the Model Law (which, as noted above, is contained in Ch VIII thereof) provides as follows:

> **Article 36. Grounds for refusing recognition or enforcement**
>
> (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(*a*) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(*b*) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1) (*a*) (v) of this Article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

Article 16(3) of the Model Law

20 Turning to the Judge's second ground as outlined above, she held (at [141] and [151] of the Judgment ([2] *supra*)) that where a tribunal has ruled on a jurisdictional objection as a preliminary ruling, the party wishing to challenge the preliminary ruling "must act" by lodging an application under Art 16(3), which provides as follows:

> **Article 16. Competence of arbitral tribunal to rule on its jurisdiction**
>
> …
>
> (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this Article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in Article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

21 In other words, the Judge (at [157] of the Judgment) interpreted Art 16(3) as the "exclusive route" through which a preliminary decision on jurisdiction can be challenged. Once the time limit for bringing a challenge under Art 16(3) has elapsed without any application having been made, the preliminary ruling on jurisdiction becomes final and cannot be challenged subsequently, whether by way of a setting-aside application or at the enforcement stage. As FM never challenged the Award on Preliminary Issues under Art 16(3), the Judge held that it had lost its sole and exclusive opportunity to raise its jurisdictional objection before the Singapore courts. It was therefore no longer open to a Singapore court to revisit the jurisdictional objection.

The parties' submissions on appeal

FM

22 FM's principal submission is that there is a clear and indelible distinction between active and passive remedies which is encapsulated in the Model Law's policy of "choice of remedies". Counsel for FM, Mr Toby Landau QC ("Mr Landau") submitted that at the first, *active*, level of court review, parties to an arbitration may take positive steps to invalidate the tribunal's award, such as by an application to challenge a preliminary ruling on jurisdiction under Art 16(3) or set aside an award on the grounds set out in Art 34(1) of the Model Law. At the second, *passive*, level of court review, parties may defend themselves against the award by requesting that recognition or enforcement be refused in the jurisdiction where and when the award is sought to be enforced. The Model Law provides for such passive control by Art 36. On the basis that this is the concerted policy of the Model Law, Mr Landau argued that FM was entitled to resist the enforcement of the Awards in Singapore even though it had not actively challenged the preliminary ruling via Art 16(3) or applied to set aside the Awards via Art 34. This was described as its exercise of the "choice of remedies' which the Model Law accords to the parties to an arbitration.

23 FM's submissions on "choice of remedies" were situated within a narrative in which the imperatives of the Model Law were to reduce the emphasis on the seat of arbitration. On FM's case, this policy is so strong

that Parliament must, if it wishes to do so, expressly legislate to abolish or remove this "choice of remedies". As such, the inapplicability of Art 36 of the Model Law *per se*, which is the effect of s 3(1) of the IAA, is not sufficient to alter or displace the underlying policy which permits FM to resist the enforcement of the award as a passive remedy. Mr Landau also pointed out that the stated rationale for s 3(1) was to de-conflict the Model Law regime from the New York Convention in relation to the enforcement of *foreign* awards. It was therefore argued that s 3(1) should not be construed literally and without regard to its legislative purpose, *viz*, as having the effect of removing the court's power to refuse recognition or enforcement of domestic international awards rendered in Singapore on the grounds stated in Art 36 or some analogue thereof.

24 Mr Landau also submitted that the availability of Art 16(3) did not alter the policy of "choice of remedies" by transforming jurisdictional challenges into a "one-shot remedy". If this were so, Art 16(3) would represent such a singular departure from the underlying policy that it would have been apparent from the *travaux préparatoires* of the Model Law (or *travaux* for short). Instead, he submitted that the UNCITRAL Working Group on International Contract Practices ("the Working Group") discussed Art 16(3) exclusively within the context of its role as an active remedy, leaving the award debtor's passive remedies unaffected. He submitted that Art 16(3) was designed to allow parties to have quicker access to the courts where a preliminary ruling on jurisdiction had been issued so that the arbitration could then proceed on a more certain footing. Mr Landau also noted that there were sound practical reasons against *requiring* the adversely affected party to apply to the supervising court every time a preliminary ruling on jurisdiction was made on pain of losing any other right it might have to ventilate its grievances. Such a policy could institute delay and would cut against the legitimate interests of parties not to risk antagonising the arbitrators from the outset by challenging their preliminary ruling and stalling the proceedings.

25 Mr Landau did acknowledge, however, that there was a difference in views regarding the effect of Art 16(3) on Art 34, *viz*, whether the availability of the former active remedy precluded recourse to the latter active remedy, or if parties could in fact raise two active challenges to a preliminary ruling on jurisdiction. Nonetheless, FM's position was that the availability of passive remedies remained entirely separate from the sphere of active remedies, and would not be foregone so long as the affected party had reserved its rights to challenge the tribunal's jurisdiction. In this regard Mr Landau contended that FM had conducted itself exactly as prescribed in the following passage from Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) at para 5.127:

> The proper and most effective course where there are genuine grounds upon which to challenge the jurisdiction of the arbitral tribunal is to raise the matter with the arbitral tribunal itself at the earliest possible stage, to insist that all objections should be fully argued before the arbitral tribunal and that the determination of the objections should be the subject of an interim award. If the arbitral tribunal upholds its own jurisdiction, as it frequently does, the respondent should continue to participate in the arbitration, *having expressly reserved its position in relation to the matter of jurisdiction* so that this issue may be considered again after the final award is made, either by a challenge of the award in the courts of the place of arbitration, *or by resisting attempts to obtain recognition or enforcement of the award*. [emphasis added]

26 It should be clarified that it is not FM's case that "choice of remedies" enables a party to have two bites at the cherry. Rather, Mr Landau characterised the issue as one of alternative remedies, *viz*, the waiver of a right to rely on an active remedy does not prejudice recourse to a later passive remedy.

27 Returning to the Judge's decision which had found FM's case wanting at the first hurdle of establishing a statutory basis for resisting enforcement, Mr Landau pointed to s 19 of the IAA as the key provision within which Parliament had conferred on our courts the discretion to refuse recognition and enforcement of arbitral awards. The provision bears setting out in full:

> **Enforcement of awards**
>
> **19**. 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.
>
> [emphasis added]

28 The key issue for us, according to Mr Landau, is the calibration of that power. He suggested that the court could take reference from Arts 34(2) and 36(1) of the Model Law, Art V(1) of the New York Convention, or even the English common law on s 26 of the 1950 English Arbitration Act ("1950 EAA"), upon which s 19 of the IAA was modelled to draw the content that would guide the exercise of the aforesaid power. Without committing to any one position, Mr Landau contended that s 19 had to be interpreted with the Model Law in mind, which entailed adopting "internationally accepted minimum standards" as grounds for refusing recognition and enforcement.

Astro

29 Astro's case in relation to the question of FM's right to challenge jurisdiction at this stage of the proceedings has three independent layers. First, Astro contends that there is no general concept of "choice of

remedies' under the Model Law. If it is open to a party disaffected by a decision or award to actively attack it, *ie*, via Art 16(3) or Art 34, it *must* do so. As part of the Model Law regime, the failure to seek an active remedy precludes recourse to a passive remedy. Since FM did not challenge the jurisdictional ruling under Art 16(3) or set aside the Awards under Art 34, it cannot now resist enforcement of the Awards.

30 Second, even if there is a general concept of "choice of remedies", a preliminary ruling on jurisdiction under Art 16(3) is governed by a special regime. Mr David Joseph QC ("Mr Joseph"), counsel for Astro, submitted that the nature of Art 16(3) is such that all preliminary rulings on jurisdiction must be challenged within the prescribed 30-day time limit. Failure to do so will deprive the party objecting to the decision of any other chance to subsequently raise the same jurisdictional ground which had been the subject of the ruling, for instance, in setting aside or enforcement proceedings. If the preliminary ruling is challenged but not set aside by the supervisory court, the party objecting to jurisdiction cannot raise the *same grounds* in resisting enforcement of the substantive award either by a subsequent application to set aside the award before the *supervisory court*, or by resisting enforcement proceedings before the *enforcement court*, irrespective of whether the latter is in the same jurisdiction as the supervisory court or elsewhere. In other words, Art 16(3) is a "one-shot remedy".

31 Third, even if FM could resist enforcement, the grounds on which FM could attempt to do so are extremely limited. While Mr Joseph accepted that the language of s 19 of the IAA imports a residual power to resist enforcement on restricted grounds such as enforcement being contrary to public policy, tainted by corruption or by breach of natural justice, the jurisdictional grounds such as those found in Art 36(1) of the Model Law are unavailable to a party in FM's position. Like the Judge, Mr Joseph relied on the fact that Parliament, through s 3(1) of the IAA, consciously denuded Arts 35 and 36 of any force of law. He argued that the consequence of this deliberate act of Parliament must be that the court cannot have recourse to the grounds in Art 36(1) to refuse enforcement of a domestic international award. According to Mr Joseph, this was not unusual and Singapore was not alone in adopting a more "focused" regime by excluding Arts 35 and 36. He contended that Mr Landau was trying to shoehorn into s 19 a different regime, in effect introducing Art 36(1) via a backdoor to circumvent a clear legislative act of Parliament. Instead, in interpreting s 19, the court should look to other provisions, such as Art 5 (which curtails the court's residual powers) and Art 16(3) (which sets out the time limits for challenging a preliminary ruling on jurisdiction), and so adopt a restricted interpretation of s 19.

Issues to be determined in the present appeals

32 Against this background, it is evident that the threshold question before us remains the same as that before the Judge, *viz*, whether FM is entitled to raise in SUM 4065 and SUM 4064 its objection to the joinder of the 6th to 8th Respondents which the Tribunal ordered pursuant to the Joinder Application ("the Joinder Objection"). This presents two issues:

(a) Whether the courts have a power to refuse enforcement of an award under s 19, and if so, what the ambit or content of that power is.

(b) Whether Art 16(3) is a "one-shot remedy" with the corollary that FM's failure to challenge the preliminary ruling in the Award on Preliminary Issues precludes it from raising the Joinder Objection in SUM 4065 and SUM 4064.

33 Both FM and Astro also made submissions on the merits of the Joinder Objection in the event that we find that FM is entitled to raise the Joinder Objection, as well as on the question of whether FM had waived its rights to raise the Joiner Objection assuming it had merit. We will set out and address their respective submissions in due course.

Our decision on the threshold issues

Ambit of section 19 of the IAA

History of section 19

34 The history of s 19 can be traced to the 1950 EAA. The approach towards foreign awards and domestic awards under the 1950 EAA is interesting, and in some respects superficially similar to that in the IAA. Like the IAA, the 1950 EAA did not contain a specific provision dealing with the circumstances in which enforcement of domestic awards could be refused. However, it had an entire Pt II which dealt with "Enforcement of Certain Foreign Awards". These foreign awards were those made under the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards ("1927 Geneva Convention"). The New York Convention had not yet come into existence at the time the 1950 EAA was enacted. There was a general provision in the 1950 EAA, s 26, pertaining to enforcement of awards under Pt I which was entitled "General Provisions as to Arbitration" which read:

> **Enforcement of Award**
>
> **26.** 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 order to the same effect, and where leave is so given, judgment may be entered in terms of the award.

35 As alluded to above at [28], s 26 is nearly identical to s 19 of the IAA. This is no accident as s 26 is the direct forebear of s 20 of the Singapore Arbitration Act 1953 (Act 14 of 1953) ("the 1953 AA") (see *Singapore Parliamentary Debates, Official Report* (5 March 1980) vol 39 at col 605 (Chua Sian Chin, Minister for Home Affairs)). Section 20 of the 1953 AA was, in turn, the direct forebear of s 20 of the Singapore Arbitration Act (Cap 10, 1985 Rev Ed) ("1985 AA"). And this provision was, in turn, reproduced as s 19 of the IAA when the latter was enacted in 1994. As there are no Singapore cases where s 20 of the 1953 AA, s 20 of the 1985 AA or s 19 of the IAA have been relied upon to resist enforcement of awards, the English courts' interpretation of s 26 of the 1950 EAA (as well as its predecessor, s 12 of the Arbitration Act 1889) is of some importance in aiding our understanding of the operation of s 19.

Power to refuse enforcement under section 26 of the 1950 EAA

36 In *Prodexport State Company for Foreign Trade v E D & F Man Ltd* [1973] QB 389, a dispute arose concerning the non-delivery of sugar. The sellers, who did not deliver, claimed that a law which had come into force rendered delivery illegal. The dispute was submitted to arbitration in London and the arbitrator awarded the buyers damages. The buyers sought leave from the English High Court to enforce the award under s 26 of the 1950 EAA. The sellers, on the other hand, applied for leave to extend time to set aside the award as they had exceeded the six-week statutory timeline imposed for setting aside applications. In addition, the sellers applied to have the award set aside under s 23(2), relying on the ground that the arbitrators had misconducted themselves or had acted in excess of their jurisdiction in awarding damages for the non-performance of an obligation which was illegal by the law of the country where the obligation was to be performed.

37 The court granted the sellers' application for the extension of time and then considered whether the ground for setting aside was made out. In explaining the interaction between setting aside under s 23 and enforcement under s 26, Mocatta J said (at 398):

> It is true that where a party seeks to *avoid* an ostensible award against him by establishing that there was no binding contract containing an arbitration clause to which he was a party, he usually today seeks his remedy, ***if he wishes to take the offensive rather than defend an application under section 26 of the Arbitration Act 1950 to enforce the award as a judgment***, by an action or an originating summons for a declaration rather than in a motion to set aside. There is some logical solecism in pursuing the statutory remedy to set aside an award under section 23 of the Arbitration Act 1950, when ex hypothesi, nothing exists which the law regards as an award. [emphasis added in italics and bold italics]

38 Thus, under the 1950 EAA, an award debtor had two options to avoid the consequences of an award: (a) the active remedy of setting aside under

s 23; or (b) the passive remedy of resisting enforcement under s 26. This is buttressed by Sir Michael Mustill and Stewart Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 1982) ("*Mustill & Boyd*"), where the authors recognised that there are two categories of remedies available after an award has been released. They termed these two categories as "passive remedies" and "active remedies" and described their operation in the following terms (at p 489):

> A party avails himself of a *passive remedy when he **does not** himself take **any initiative to attack the award**, but simply waits until his opponent seeks to enforce the award* by action or summary process, and then relies upon his matter of complaint as a ground why the Court should refuse enforcement. [emphasis added in italics and bold italics]

39 The authors' commentary (at p 488) on the options available to parties with jurisdictional objections is remarkably on point:

> **Jurisdictional problems**
>
> If concerned with the existence or continued validity of the arbitration agreement, the validity of the notice to arbitrate or the qualifications of the arbitrator, [a party may] issue an originating summons or a declaration. Alternatively, [that party may] wait until after the award [has been published] and *then set aside the award **or** raise the objection as a ground for resisting enforcement*.
>
> [emphasis added in italics and bold italics]

40 If the system of "choice of remedies" is to be interpreted as one which permits parties to defend against an award passively by seeking to resist its recognition and enforcement in the enforcing court even though no active attack had been taken against the award, which is exactly how both Mr Landau and Mr Joseph understood it and how we saw it, it is evident that the features of this system were already part of English arbitration law by the 1970s at the latest.

Content of the power to refuse enforcement under section 26 of the 1950 EAA

41 It is important to note that s 26 was not a *pro forma* provision. The English courts were not compelled to enforce awards if they thought that there were good grounds not to do so. Through case law, principles were developed to guide the courts as to when enforcement under s 26 of the 1950 EAA ought to be refused. For example, in *Middlemiss & Gould v Hartlepool Corporation* [1972] 1 WLR 1643, Lord Denning MR held (at 1647) that leave to enforce the award should be given "unless there is a real ground for doubting the *validity of the award*" [emphasis added]. In *Dalmia Cement Ltd v National Bank of Pakistan* [1975] QB 9, Kerr J described (at 23) the power to enforce domestic awards under s 26 as an exercise of "discretionary jurisdiction". We have some reservations with describing the power as "discretionary", as that might convey the wrong

impression that the courts had the broad flexibility to determine whether to enforce any particular award. Undoubtedly, it was a discretion that had to be exercised in line with recognised principles as these developed over time.

42 The authors of *Mustill & Boyd* stated (at p 489) that the court should refuse enforcement of a domestic award where: (a) the award is so defective in form or substance that it is incapable of enforcement; or (b) the whole or part of the award is so ineffective on the ground that the relief granted lies outside the jurisdiction of the arbitrator. More specifically, albeit in the slightly different context of a common law action on the award, they stated (at p 369):

> In addition to pleading and proving the arbitration agreement and the award, the plaintiff must establish that the dispute was within the terms of the submission, and that the arbitrator was duly appointed. It will be a good defence to an action to enforce an award that the award is void for failure to comply with some formal or substantive requirement, or that it was made in excess of jurisdiction or that it has been set aside or remitted, or that the authority of the arbitrator was validly revoked before he made his award, but not that the award ought to be set aside or remitted on grounds not rendering the award void but merely voidable.

The "substantive requirements" imposed on the award which, if not complied with, might render the award unenforceable, were: (a) cogency; (b) completeness; (c) certainty; (d) finality; and (e) enforceability: *Mustill & Boyd* at pp 339–343.

43 Although the principles appear to be stated with some degree of clarity in the textbooks, the cases lack the same precision. Nonetheless, the general theme in case law is consistent with what had been suggested in the textbooks. It was certainly clear that the invalidity of the award encompassed cases where the award was made without jurisdiction. In *Kruse v Questier & Co Ld* [1953] 1 QB 669, the defendant argued that as the submission to arbitration became invalid when the main contract was frustrated, the award was made without jurisdiction and was therefore null and void. The court considered this defence but dismissed it on the basis that the submission to arbitration had not become invalid – a principle we would recognise today under the rubric of separability (see *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254). In *Jugoslavenska Oceanska Plovidba v Castle Investment Co Inc* [1974] QB 292, the Court of Appeal reversed the High Court's decision not to allow enforcement of an award on the basis that he was bound by higher authority to hold that an arbitrator generally did not have jurisdiction to make an award in a foreign currency. Lord Denning MR held that English arbitrators did have the "authority, jurisdiction and power" to make such awards and gave leave to enforce the award (at 298).

44 Given the relationship between s 26 of the 1950 EAA and s 20 of the 1985 AA (see [35] above), it cannot be gainsaid that prior to the enactment

of the IAA, a party seeking to passively resist enforcement in Singapore of an award that was made in Singapore could do so notwithstanding that the award had not been attacked actively. In addition, the courts could refuse enforcement if there were substantial doubts as to the validity of the award. Then came the IAA through which the Model Law was received into Singapore's arbitral framework. Did the philosophy of the Model Law alter the understanding of s 19 of the IAA which had been taken from s 20 of the 1985 AA? There are two parts to this question. The first is whether the court's power to refuse enforcement in certain circumstances had been removed by the enactment of the IAA. If the answer to this is in the negative and the court's power was retained under s 19, the second issue is whether the content of that power remained the same and continued to be guided by the English authorities on s 26 of the 1950 EAA or was to be seen and understood differently given the sea change heralded by the enactment of the Model Law.

Whether the court's power to refuse enforcement was removed

45 The answer to the first question posed in the preceding paragraph must be a firm negative. This is borne out by three factors. First, save for a few inconsequential words and the positioning of a comma, s 20 in the 1985 AA was reproduced in its entirety as s 19 of the IAA. Moreover, there is nothing in the legislative debates at the time of the passing of the International Arbitration Bill ("the IAA Bill") (*Singapore Parliamentary Debates, Official Report* (31 October 1994) vol 63 (Ho Peng Kee, Parliamentary Secretary to the Minister for Law) ("*IAA Hansard*")) or in any other legislative aid which suggests that Parliament intended the abrogation of any power hitherto contained in s 20 of the 1985 AA when it was enacted as s 19 of the IAA.

46 Second, when the IAA was enacted, the 1985 AA was retained for the governance of purely domestic arbitrations which did not fall under the purview of the IAA. The adoption of the Model Law was limited to the IAA; there were no accompanying amendments to the 1985 AA. Therefore, the enforcement regime under the 1985 AA which undoubtedly included the power of the court to refuse enforcement did not change after the enactment of the IAA. If the power to refuse enforcement ceased to exist under the IAA but continued to exist under the 1985 AA, it would have meant that there were two quite different regimes operating concurrently even though they would each be rooted in virtually identical statutory terms. This seems untenable.

47 Third and perhaps most importantly, as we have shown, the philosophy of "choice of remedies" was available under the 1950 EAA. As we shall explicate below at [65]–[74], this same idea of "choice of remedies" was also fundamental to the Model Law's philosophy towards the enforcement of domestic (as opposed to foreign) awards. Therefore, there is

every reason to think that Parliament, in receiving the Model Law into Singapore, intended to retain for the courts the power to refuse enforcement of *domestic international* awards under s 19, even if the award could have been but was not attacked by an active remedy.

Present scope and content of the power to refuse enforcement

48 Thus far, our reasoning might not be controversial as far as the parties are concerned. But this leads us to the next question which is whether the *content* of this power was affected when it was enacted in the IAA.

49 The fact that a power to refuse enforcement was retained under s 19 of the IAA does not lead to the necessary conclusion that the scope and content of that power was unchanged and continued to be guided by the English authorities. On behalf of Astro, Mr Joseph argued that the power under s 19 was narrowly circumscribed (see [31] above) and did not admit of a tribunal's lack of jurisdiction as a ground to refuse enforcement. On behalf of FM, Mr Landau argued that the scope of the court's power must be calibrated in accordance with internationally accepted minimum standards (see also [28] above). This could entail referencing the grounds in Arts 34 and 36 in the Model Law, Art V of the New York Convention, or perhaps the English common law as it stood in relation to s 26 of the 1950 EAA. As far as Mr Landau is concerned, each of these various yardsticks encompasses different expressions of what is essential to his case, namely that enforcement of an award can be resisted if the tribunal had no jurisdiction.

50 In our judgment, the scope of s 19 of the IAA must be interpreted by reference to the rules governing statutory interpretation in Singapore. Section 4(2) of the IAA reminds us that the Interpretation Act (Cap 1, 2002 Rev Ed) – s 9A in particular – is the appropriate starting point. In interpreting any provision of legislation, the court should embrace an interpretation which promotes the purpose or object underlying the legislation over one which does not. Given that s 19 is found in a statute with the primary objective of enacting the Model Law in Singapore, we are satisfied that Parliament intended that the power to refuse enforcement under s 19 be exercised in a manner which is compatible with the overarching philosophy of the Model Law on the enforcement of awards. Parliament did not legislate how that power ought to be exercised, and so must be taken to have left it to the courts to determine the appropriate content of the power under s 19. In this regard, the content of that power cannot be properly determined without an understanding of the purpose of the provision, and more generally, of the IAA and of the adoption of the Model Law in Singapore.

(1) Commitment to Model Law philosophy

51 The IAA was enacted to create an omnibus regime for international arbitration. One of the key architectural pillars of that regime was the incorporation of the Model Law and the New York Convention. This is reflected in the preamble to the IAA which reads:

> An Act to make provision for the conduct of international commercial arbitrations based on the [Model Law] and conciliation proceedings and to give effect to the [New York Convention] and for matters connected therewith.

52 However, as the Model Law was never intended to be an international convention, much less one that was exclusive and self-standing, national arbitration laws play an important complementary function. Indeed, the Model Law was devised as a model legislation and not, for example, as a convention like the New York Convention, so that it would be easier to assimilate into national arbitration laws which were never contemplated to be replaced as such by the Model Law: Howard M Holtzmann and Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation, 1989) ("*Holtzmann & Neuhaus*") at p 11.

53 The purpose and function of the Model Law in Singapore was fully articulated in the second reading ("Second Reading") of the IAA Bill, the instrument through which the IAA was enacted. Then Parliamentary Secretary to the Minister for Law, Assoc Prof Ho Peng Kee ("Assoc Prof Ho"), stated in moving the IAA Bill that the IAA would provide a consolidated legal framework that would include not only the Model Law but also give effect to the New York Convention to govern the resolution of international commercial disputes by arbitration. He also explained that the IAA Bill was one of the products of the review of Singapore's laws generally to ensure "adequate legal support for Singapore's regionalisation drive": *IAA Hansard* ([45] *supra*) at col 624. Assoc Prof Ho (at cols 625–628) also briefly elaborated on the genesis of the Model Law, its core features, the widespread acceptance of the Model Law since its promulgation, and the benefits of adopting the Model Law in Singapore. Noting some dissatisfaction with the arbitral framework in existence then, Assoc Prof Ho concluded (at col 627):

> In summary, the reasons why Singapore should adopt the Model Law are as follows:
>
> Firstly, the Model Law provides a sound and internationally accepted framework for international commercial arbitrations.
>
> Secondly, the general approach of the Model Law will appeal to international businessmen and lawyers, especially those from Continental Europe, China, Indonesia, Japan and Vietnam *who may be unfamiliar with English concepts*

> *of arbitration*. This will work to Singapore's advantage as our businessmen expand overseas.
>
> Thirdly, it will promote Singapore's role as a growing centre for international legal services and international arbitrations.
>
> [emphasis added]

54 The *IAA Hansard* illuminates the considerations which were at the forefront of Parliament's deliberations. First, the Model Law was to form the cornerstone of the IAA. However, the Model Law was not intended to stand alone, at least where the enforcement of foreign awards is concerned. To that end, the New York Convention provisions and its attendant principles were to be subsumed within the IAA to address enforcement of foreign awards. Second, the consolidation of the Model Law and the New York Convention into a single legislation was the product of a thoughtful review of Singapore's arbitration landscape which was intended to ensure adequate legal support for Singapore's regionalisation drive. Third, the Model Law, which was crafted in such a way as to be acceptable both to common and civil law systems, was to herald a paradigm shift in the Singapore arbitral framework which had *until then* been guided by the English arbitration regime.

55 In the light of the above, it is clear that the scope of the power to refuse enforcement in s 19 could no longer draw direct and complete inspiration from the English authorities once the IAA came into force. The context of the 1950 EAA and the IAA were, to put it simply, informed by different considerations. The adoption of the Model Law was a game changer which necessitated an "update" of the content of the power under s 19. In short, the construction of the power to refuse enforcement under s 19 now had to be consonant with the underlying philosophy of the Model Law on the enforcement of all awards generally and more specifically, domestic international awards.

The Model Law and the New York Convention

56 UNCITRAL's general mandate was to promote the "progressive harmonization and unification of the law of international trade": *UN General Assembly Resolution 2205*, 21 UN GAOR Supp (A/6594, 17 December 1966). One of UNCITRAL's aims through the Model Law was to reduce the divergences which might result from each State's interpretation of its obligations under the New York Convention: *Note of Secretariat on Further Work in Respect of International Commercial Arbitration* (A/CN.9/169, 11 May 1979) at paras 6–9. The mechanism of a model law was intended to create uniform rules to eliminate local peculiarities which stood in the way of international consistency: see John Honnold, "The United Nations Commission on International Trade Law: Mission and Methods" (1979) 27 Am J Comp L 201.

57 Thus, from the outset, the enforcement regime of the Model Law was intended to be aligned with the New York Convention, save that it would apply not just to foreign awards but also domestic awards arising out of international commercial arbitrations: *Holtzmann & Neuhaus* at pp 1055–1056. Initially, the first draft of the Model Law had separate but closely connected sections for the enforcement of foreign and domestic awards. For foreign awards, the Model Law followed the New York Convention. As for domestic awards, the UNCITRAL Secretariat recommended that the same conditions and procedures as laid down in the New York Convention be adopted: *Note by the Secretariat: Model Law on International Commercial Arbitration: Draft Articles 37 to 41 on Recognition and Enforcement of Award and Recourse Against Award* (A/CN.9/WG.II/WP.42, 25 January 1983) reproduced in (1983) Yearbook of the United Nations Commission on International Trade Law, 1983, vol XIV at pp 92–93, notes 3 and 12.

58 At its Sixth Session, the Working Group decided to consolidate the hitherto separate sections on the recognition and enforcement of foreign and domestic awards into what became the current Art 35 of the Model Law which states:

> **Article 35. Recognition and enforcement**
>
> (1) An arbitral award, *irrespective of the country in which it was made*, shall be recognised as binding and … shall be enforced subject to the provisions of this Article and of Article 36 [which sets out the grounds for refusing recognition or enforcement].
>
> [emphasis added]

59 The consolidation was recommended because the Working Group felt that "there were no cogent reasons for providing different rules for domestic awards and for foreign awards": *Report of the Working Group on International Contract Practices on the Work of its Sixth Session* (A/CN.9/245, 29 August–9 September 1983) ("*Report of the Sixth Session*") at para 139. This was not entirely surprising given that in its first session to discuss the Model Law, the Working Group had noted as follows (*Report of the Working Group on International Contract Practices on the Work of its Third Session* (A/CN.9/216, 23 March 1982)) at para 103:

> There was wide support for the idea of adopting a *uniform system of enforcement for all awards* covered by the model law. This would result in *all awards rendered in international commercial arbitration being uniformly enforced irrespective of where they were made*. [emphasis added]

60 The Working Group noted in the *Report of the Working Group on the Work of its Seventh Session* (A/CN.9/246, 6–17 February 1984) ("*Report of the Seventh Session*") that there was a view which preferred that the Model Law omit any mention of foreign awards completely, for the following reasons (at para 142):

> … Under one view, it was not appropriate to retain in the model law provisions which would regulate recognition and enforcement of foreign awards, in view of the existence of widely adhered to multilateral treaties such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It was pointed out that those States which had not ratified or acceded to the Convention should be invited to do so but that a State which decided not to adhere to that Convention was unlikely to adopt the almost identical rules laid down in articles 35 and 36. It was further pointed out that provisions on recognition and enforcement of foreign awards were not needed by those States which adhered to the 1958 New York Convention. In addition, such provisions in the model law might cast doubt on the effect of the reciprocity reservation made by many member States and may create other difficulties in the application of this Convention. Yet another advantage of not covering foreign awards was that the remaining provisions could be better tailored to domestic awards without the need for harmony with the 1958 New York Convention.

61 However, the prevailing view was for a combined Article to cover *both* foreign and domestic awards, with the main reason being (*Report of the Seventh Session* at para 143):

> … [I]n international commercial arbitration the place of arbitration (and of the award) should be of limited importance and that, therefore, such awards should be recognized and enforced in a *uniform manner, irrespective of their place of origin*. [emphasis added]

62 This trend towards the uniform treatment of awards generally in fact began with the New York Convention which did away with the double exequatur rule prescribed in the 1927 Geneva Convention, under which leave for enforcement (exequatur and the like) was required from both the court of the seat of arbitration *and* the court of enforcement (when the place of enforcement is different from the seat of arbitration). The seat of arbitration which was influential because of the double exequatur rule therefore became less significant under the New York Convention. In fact, one delegate at the New York Conference considered the New York Convention a "very bold innovation" *because* of its impact on the double exequatur rule (see *Summary Record of the Thirteenth Meeting* (E/CONF.26/SR.13, 28 May 1958) at p 3). As Emmanuel Gaillard observed in "International Arbitration as a Transnational System of Justice" in *Arbitration – The Next Fifty Years* (Albert Jan van den Berg gen ed) (International Council for Commercial Arbitration, Kluwer Law International, 2012) at p 71:

> *The idea that the New York Convention would* ***place the seat of the arbitration at the top of a jurisdictional hierarchy for enforcement purposes is counter to its fundamental objectives****. If accepted, it would shift the focus from the award itself, which is the subject matter of the Convention, to the judicial process surrounding the award in the country where it was rendered, and would fly in the face of one of the greatest achievements of the New York Convention.* Indeed, one must recall that the drafters of the Convention set out to abolish

> the requirement of double exequatur, which governed enforcement under the 1927 Geneva Convention on the Enforcement and Recognition of Foreign Arbitral Awards. [emphasis added in italics and bold italics]

63 A clear elaboration of the implications of the New York Convention on whether and how the pursuit of active remedies in the seat of arbitration might be relevant to enforcement proceedings can be found in the recent decision of the UK Supreme Court in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 ("*Dallah (SC)*"). There, Lord Mance JSC noted that Art V(1)(*e*) of the New York Convention (see [76] below) accorded some deference and importance to the seat of arbitration, but went on to say (at [28]) the following, with which we are in agreement:

> 28. … But article V(1)(a) and section 103(2)(b) [the section in the English Arbitration Act 1996 (c 23) which gives effect to the New York Convention] are framed as free-standing and categoric alternative grounds to article V(1)(e) of the Convention and section 103(2)(f) for resisting recognition or enforcement. *Neither article V(1)(a) nor section 103(2)(b) hints at any restriction on the nature of the exercise open, either to the person resisting enforcement or to the court asked to enforce an award, when the validity (sc existence) of the supposed arbitration agreement is in issue*. The onus may be on the person resisting recognition or enforcement, but the language enables such person to do so by proving (or furnishing proof) of the non-existence of any arbitration agreement. This language points strongly to ordinary judicial determination of that issue. ***Nor do article VI and section 103(5) contain any suggestion that a person resisting recognition or enforcement in one country has any obligation to seek to set aside the award in the other country where it was made***. [emphasis added in italics and bold italics]

64 The drafters of the Model Law, in aligning the Model Law with the New York Convention, were plainly desirous of continuing this trend of de-emphasising the importance of the seat of arbitration. However, there was and is one significant difference between the New York Convention and the Model Law. Unlike the New York Convention which only dealt with enforcement of awards, the Model Law also dealt with the setting aside of awards made in the seat of arbitration by the courts of that seat. This other avenue to challenge domestic awards resulted in the possibility that the enforcement of awards originating from within the jurisdiction of the supervisory court would be treated differently from that of foreign awards. This is where "choice of remedies" becomes significant and forms the crux of this dispute.

"Choice of remedies"

65 Notwithstanding Mr Joseph's vigorous submissions, we are satisfied that "choice of remedies" is not just a facet of the Model Law enforcement regime; it is the *heart* of its entire design. The *Analytical Commentary on*

Draft Text of a Model Law on International Commercial Arbitration (A/CN.9/264, 25 March 1985) ("*Analytical Commentary*") states clearly (at p 71) that:

> [t]he application for setting aside constitutes the exclusive recourse to a court against the award in the sense that it is the only means for actively attacking the award … [a] party retains, of course, the right to defend himself against the award, by requesting refusal of recognition or enforcement in proceedings initiated by the other party (articles 35 and 36).

66 Indeed the *Analytical Commentary* deliberately couples the term "recourse" with attacks on the award so as to create a clear distinction from remedies which act as defences to enforcement (*ibid*):

> Existing national laws provide a variety of actions or remedies available to a party for ***attacking*** the award. Often equating arbitral awards with local court decisions, they set varied and sometimes extremely long periods of time and set forth varied and sometimes long lists of grounds on which the award *may be* ***attacked***. *Article 34 is designed to ameliorate this situation by providing only one means of* ***recourse*** (paragraph (1)), available during a fairly short period of time (paragraph (3)) and for a rather limited number of reasons (paragraph (2)). … [emphasis added in italics and bold italics]

67 This distinction was delineated after doubts were raised as to whether the word "recourse" might be misleading since other "recourses" could also be found in Arts 36(1) and 16(2) (see *Analytical Compilation of Comments by Governments and International Organisations on the Draft Text of a Model Law on International Commercial Arbitration* (A/CN.9/263, 19 March 1985) ("*Analytical Compilation*") at p 47):

> 5. Mexico expresses doubt about the formulation of paragraph (1), which provides that the setting aside procedure is the only recourse to a court against the arbitral award, since article 36(1) also provides recourse against 'recognition or enforcement of an arbitral award', and article 16(2) gives two other recourses: a plea that the arbitral tribunal does not have jurisdiction and a plea that the arbitral tribunal is exceeding the scope of its authority. It is suggested that this be clarified in article 34(1).

68 The drafters' specificity of language is also manifested in the overall structure of the Model Law. Article 34, which provides for applications to set aside an arbitral award, falls under Ch VII, entitled "Recourse Against Award". Articles 35 and 36, on the other hand, fall under the next Chapter, entitled "Recognition and Enforcement of Awards". It is therefore evident to us that the Model Law recognises both a substantive and linguistic division between active and passive remedies.

69 The question is whether these remedies exist as a menu of choices for the award debtor to choose from. The controversy surrounding choice of remedies was very much alive in the discussions and deliberations amongst members of the Working Group. In its Seventh Session, the Working

Group considered a proposal to insert the following paragraph in the draft Art 36 (*Report of the Seventh Session* ([60] *supra*) at para 153):

> If an application for setting aside the award has not been made within the time-limit prescribed in article 34(3), the party against whom recognition or enforcement thereafter is sought may not raise any other objections than those referred to in this article, paragraph (1), subparagraphs (*a*)(i) or (v) or (*b*).

70 Not only was the question of "choice of remedies" squarely before the Working Group, a specific proposal to limit the grounds for resisting enforcement to Arts 36(1)(*a*)(i), (v) and (2)(*b*) when an application for setting aside was not made was put before it. Most critically, that proposal was rejected. The ensuing commentary explaining the rejection is instructive and enlightening (*Report of the Seventh Session* at paras 153–154):

> 153. … Divergent views were expressed as to whether such a provision should be incorporated in the model law. *Under one view, it was desirable to adopt a provision along these lines which would reduce the grounds for refusal of recognition and enforcement in those cases where a party had not made an application for setting aside during the time-limit prescribed therefor*. It was pointed out that the provision was both useful in that it induced a party to raise objections based on the procedural irregularities covered by article 34(2)(*a*)(ii), (iii) and (iv) during the relatively short time-limit set forth in article 34(3). *While some proponents of that view thought that such a provision should apply to recognition and enforcement of* ***only domestic awards***, others were in favour of including also foreign awards, in which case the cut-off period was the period of time for requesting setting aside as prescribed in the law of the country where the award was made.
>
> 154. ***The prevailing view, however, was not to adopt such a provision***. It was pointed out that the intended preclusion unduly restricted the freedom of a party to decide on how to raise its objections. *In view of the different purposes and effects of setting aside and of invoking grounds for refusal of recognition or enforcement*, ***a party should be free to avail itself of the alternative system of defences which was recognized by the 1958 New York Convention and should be maintained in the model law***. *It was further pointed out that if the provision were limited to recognition and enforcement of domestic awards* ***it would not be consistent with the policy of the model law to treat awards in a uniform manner irrespective of their place of origin***.
>
> [emphasis added in italics and bold italics]

71 Mr Joseph contended that the description of Art 34 as an "exclusive recourse" (see the extract at [65] above) against an award is inconsistent with the notion of "choice of remedies". We disagree. At the Seventh Session, the Working Group made the very same observation which Mr Joseph made before us, and queried whether this would give the wrong impression that Art 34 "disregard[ed] the right of a party under article 36 to raise objections against the recognition or enforcement of an award"

(*Report of the Seventh Session* at para 130). The Working Group in fact "agreed that, for the sake of clarity, paragraph (1) [of Art 34] should make reference to *that other type of recourse* [*ie*, Art 36]" [emphasis added] (*ibid*). Ultimately, the Working Group declined to make the amendment that was originally recommended not because they changed their mind about "choice of remedies", but rather for a linguistic reason as it explained in the *Report of the Seventh Session* at para 197:

> The Working Group noted that the term 'recourse' in article 34(1) had, in a number of languages, the connotation of an initiative or action by a party such as an 'appeal'. Since that meaning did not fully correspond with the raising of objections envisaged under article 36, the Working Group decided not to retain the reference to that article in article 34.

Thus, in our view, the *travaux* make it clear beyond argument that the Model Law provides for the system of "choice of remedies", and that this system applies equally to both foreign and domestic awards which are treated uniformly under the Model Law. It follows that under the Model Law, parties that do not actively attack a domestic international award remain able to passively rely on defences to enforcement absent any issues of waiver.

72 Before leaving this point, there is one interesting reference in the *travaux* which might on the face of it be read as supporting Mr Joseph's position and which therefore merits addressing. In the *Report of the Sixth Session* ([59] *supra*), it was noted (see paras 128, 137, 138, 150 and 156) that "choice of remedies" for the purposes of domestic awards was unacceptable. At the time of the Sixth Session, there were separate provisions for recognition and enforcement of domestic and foreign awards. As this was later amalgamated into the current Arts 35 and 36 which drew no distinction between domestic and foreign awards, the view espoused in the Sixth Session became nothing more than a footnote. A suggestion was made in that session to delete the provisions on enforcement of domestic awards such that the only remedy would be in the setting aside provisions (*Report of the Sixth Session* at para 128):

> As regards recognition and enforcement of 'domestic' awards, it was stated that this matter was satisfactorily dealt with in the individual national laws which often treated such awards like court decisions rendered in the State. It was also pointed out that the existing national laws often set less onerous conditions than envisaged in the model law and, for example, did not provide for a special procedure for obtaining recognition or enforcement of 'domestic' awards. *Finally, it was unacceptable to retain the system of double control set forth in articles [36] and [34]*. [emphasis added]

73 It is worth clarifying that the language used in this section of the *travaux* was "double-control", which we understand in the context of the *travaux* as a whole as referring to the system of alternative remedies found in Arts 34 and 36, *ie*, the "choice of remedies" (which also coheres with the

basis upon which arguments were canvassed before us – see [40] above). Had the proposal been accepted, the only remedy open to a party seeking to challenge a domestic award would be the active remedy of setting aside. That would support Astro's case. However, this suggestion was not adopted because (*ibid* at para 157):

> … it was not justified to deprive a party from raising objections if 'domestic enforcement' was sought after expiration of this time-limit while the same objections could still be raised against enforcement in any other State.

74 Whichever way we look at it, Mr Joseph's arguments on "choice of remedies" cannot be sustained. Fundamentally, the thrust of Mr Joseph's argument was that under the scheme of the Model Law, the party objecting to jurisdiction would lose its right to raise the same jurisdictional objection in enforcement proceedings before the supervisory court if it had foregone an opportunity to actively attack the award either under Art 16(3) if there was a preliminary ruling on jurisdiction, or under Art 34. This is diametrically opposed to the concept of "choice of remedies".

A WIDER NOTION OF "DOUBLE-CONTROL"

75 At this point we depart from the main trunk of our analysis on the underlying philosophy of the Model Law and specifically on the "choice of remedies" to acknowledge that a wider meaning could also be ascribed to the language of "double-control" used in the *travaux*. "Double-control" could also be regarded as a content-neutral rubric which simply sets out the distinction between active and passive remedies without more. Interstitial doctrines would in turn then be required to modulate the relationship between these two remedial layers and, by extension, the relative roles of the supervisory and enforcing courts. It is clear, from our foregoing analysis, that both the New York Convention and the Model Law recognise the "choice of remedies" as one such interstitial doctrine, so that a party is not precluded from resisting the enforcement of an award by virtue of its failure to utilise an available active remedy. There is also authority that the New York Convention permits a party to resist enforcement even after an *unsuccessful* active challenge, save and except for the operation of any issue estoppel recognised by the enforcing court (see *Dallah Estate and Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan* [2009] EWCA Civ 755 at [90] *per* Rix LJ and *Dallah (SC)* ([63] *supra*) at [98] and [103]–[104] *per* Lord Collins of Mapesbury JSC; *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109 at [55]–[65]). In so far as this is accurate of the New York Convention we see no reason to regard the Model Law as any different, given that the objective of uniform treatment of international arbitral awards is common to both instruments. The underlying theme is that "double-control" endorses what Lord Mance JSC described in *Dallah (SC)* (at [28]) as "ordinary judicial determination" in the court of enforcement; it is

generally for each enforcing court to determine for itself what weight and significance should be ascribed to the omission, progress or success of an active challenge in the court of the seat.

76 We would add one caveat to this general position, which is that we entertain serious doubt as to whether "double-control" extends to the recognition and enforcement of an award which *has been set aside* in the seat by the court of a foreign jurisdiction. We note that French arbitration law appears to have moved down that path. French law appears to recognise a system of "transnational" or "supranational" arbitral awards, whereby awards do not derive their validity and legitimacy from a particular local system of law. Thus, in *Hilmarton Ltd v Omnium de traitement et de valorisation* (1995) XX Yearbook Comm Arb 663–665 ("*Hilmarton*"), the *Cour de Cassation* affirmed the decision of the *Cour d'Appel de Paris* which declared that the subject award was enforceable in France even though it had been set aside in Switzerland. The Swiss court had annulled the award on the basis that it had misconstrued what constituted an affront to morality in Swiss law (see *Omnium de Traitement et de Valorisation – OTV v Hilmarton* (1994) XIX Yearbook Comm Arb 214–222). The apex French court held that the Swiss award, being an international award, was not integrated into the legal order of the seat and therefore continued to exist notwithstanding that it had been set aside. The recognition of the award in accordance with French law was not, therefore, contrary to international public policy. The same result and reasoning also features in the *Cour d'Appel de Paris'* decision of *The Arab Republic of Egypt v Chromalloy Aeroservices, Inc* (1997) XXII Yearbook Comm Arb 691–695. France, of course, is not a Model Law jurisdiction and as the *Cour de Cassation* stated in *Hilmarton*, the relevant French legislation (Art 1502 of the New Code of Civil Procedure) does not contain the equivalent of Art V(1)(*e*) of the New York Convention (the wording of which is identical to Art 36(1)(*a*)(v) of the Model Law), which provides:

> (1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that –
>
> …
>
> (*e*) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

77 While the wording of Art V(1)(*e*) of the New York Convention and Art 36(1)(*a*)(v) of the Model Law arguably contemplates the possibility that an award which has been set aside *may* still be enforced, in the sense that the *refusal* to enforce remains subject to the discretion of the enforcing court, the contemplated *erga omnes* effect of a successful application to set aside an award would generally lead to the conclusion that there is simply

no award to enforce. What else could it mean to set aside an award? If this avenue of recourse would only ever be of efficacy in relation to enforcement proceedings in the seat court, then it seems to have been devised for little, if any, discernible purpose. As such, we do not think that in principle, even the wider notion of "double-control" can encompass the same approach as has been adopted by the French courts. The refusal to enforce awards which have not been set aside at the seat court may therefore constitute one of the outer-limits of "double-control". However, as this specific issue is not directly engaged in the present appeal, we offer no further comment beyond these tentative thoughts.

Germany and Québec

78 It is apposite to discuss briefly the enforcement regimes of Germany and Québec which the Judge considered and relied on heavily. According to the Judge, these two Model Law jurisdictions do not recognise the policy of "choice of remedies". Turning first to Québec, we respectfully disagree with the Judge's construction of Québec law. She said (at [83] of the Judgment ([2] *supra*)):

> 83 … In Québec, a refusal to recognise and enforce a domestic international award (homologation) is equivalent to a setting aside (annulment) of an award. The correct legal basis for a refusal to enforce is therefore that there is no award to enforce, *ie*, the award has been set aside. Articles 947, 947.1 and 947.2 of [Québec arbitration law] read as follows:
>
> > 947. The *only possible recourse* against an arbitration award *is an application for its annulment*.
> >
> > …
>
> [High Court's emphasis in the Judgment]

79 We agree with Mr Landau's submission that the phrase "the only possible recourse … is annulment" is to be understood as an "attack" against the award through setting aside or, where permissible, an appeal. The language in Art 947 tracks Art 34(1) of the Model Law which, although as we have shown incorporates the policy of "choice of remedies", at the same time provides that setting aside under Art 34(1) is the exclusive recourse against an award. There is no clearer explanation of this than that provided in the *Analytical Commentary* ([65] *supra*) on Art 34(1) which we have extracted and reproduced above at [65] and [71].

80 Indeed, in our view, Québec law is no different from Singapore law in that the courts have a power to refuse the enforcement of a domestic international award. The relevant provision, which is Art 946 and not Art 947 which the Judge referred to, reads:

> An arbitration award cannot be put into compulsory execution until it has been homologated.

81 While the court may not examine the merits of the dispute (Art 946.2), it may nevertheless refuse homologation on proof that (Art 946.4):

> 1) one of the parties was not qualified to enter into the arbitration agreement;
>
> 2) the arbitration agreement is invalid under the law elected by the parties or, failing any indication in that regard, under the laws of Québec;
>
> 3) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
>
> 4) the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the agreement; or
>
> 5) the mode of appointment of arbitrators or the applicable arbitration procedure was not observed.

82 We turn then to the position in Germany. We agree with the Judge that Germany has abandoned the "choice of remedies" and this is reflected in its legislation. However, Germany has not just excluded the operation of Arts 35 and 36 of the Model Law. It has, in addition, legislated extensively for an enforcement regime that is distinctly different from that of the Model Law. This regime is governed by s 1060 of the German Zivilprozessordnung (Tenth Book on the Code of Civil Procedure) (Germany) ("ZPO") which prescribes:

> (1) Enforcement of the award takes place if it has been declared enforceable.
>
> (2) An application for declaration of enforceability shall be refused and the award set aside if one of the grounds for setting aside under section 1059 subs. 2 exists. Grounds for setting aside shall not be taken into account, if at the time when the application for a declaration of enforceability is served, an application for setting aside based on such grounds has been finally rejected. Grounds for setting aside under section 1059 subs. 2, no. 1 shall also not be taken into account if the time-limits set by section 1059 subs. 3 have expired without the party opposing the application having made an application for setting aside the award.

83 In these circumstances, it is difficult to see how the German position can be said to be representative of the approach under the Model Law. Indeed, the authority cited by the Judge (at [82] of the Judgment), Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell, 2nd Ed, 2007) at para 864 recognised that the German position departs from what has been described as "'dual control' of a domestic award". We do not read this as endorsing the German approach as the appropriate representation of the enforcement regime under the Model Law.

(2) Populating the power to refuse enforcement under section 19

84 As we have held, the content of the power to refuse enforcement under s 19 must be construed in accordance with the purpose of the IAA which, as we have stated, is to embrace the Model Law. Given that de-emphasising the seat of arbitration by maintaining the award debtor's "choice of remedies" and alignment with the grounds under the New York Convention are the pervading themes under the enforcement regime of the Model Law, the most efficacious method of giving full effect to the Model Law philosophy would, in our view, be to recognise that the same *grounds* for resisting enforcement under Art 36(1) are equally available to a party resisting enforcement under s 19 of the IAA.

85 But what of Mr Joseph's submission that reference may not be made to Arts 35 and 36 because Parliament, by s 3(1) of the IAA, had expressly decided that those articles shall not have the force of law? To begin with, the conclusion that the grounds set out in Art 36(1) are available to guide the discretion conferred by s 19 is not the same as saying that Art 36 has the force of law in Singapore. On our reading of s 3(1), that section in no way constrains the power of the court to determine the grounds upon which it would refuse enforcement of domestic international awards under s 19 and it remains open to the courts to align the exercise of that discretion with the grounds under Art 36. This alone is sufficient to negative Mr Joseph's argument. Nevertheless and in any event, an analysis of the legislative object in excluding Arts 35 and 36 by s 3(1) of the IAA is revealing in that it readily becomes evident that this had nothing to do with constraining or limiting the content of the court's power to refuse enforcement under s 19. Instead, as the background to s 3(1) shows, it was intended only to avoid conflict with the New York Convention regarding the enforcement of foreign awards.

(3) Effect of exclusion of Articles 35 and 36 by section 3(1)

86 The drafting of the IAA was the result of wide consultation. It was first prepared by a sub-committee of the Singapore Academy of Law's Law Reform Committee (*IAA Hansard* ([45] *supra*) at col 627). The sub-committee was appointed by the Attorney-General in 1991 to examine the existing laws relating to commercial arbitration in Singapore and to make recommendations for their reform or revision. In the sub-committee's report, published in *Sub-Committee on Review of Arbitration Laws* (Academy, 1993) ("the *LRC Report*"), it was recommended (at paras 39 and 40) that Arts 35 and 36 should be excluded so that there would not be any conflict between these provisions and the provisions of the New York Convention which are premised on the concept of reciprocity. The IAA Bill contained in the *LRC Report* was subsequently adopted (with amendments which are irrelevant for the present purposes) by the full Law Reform Committee and eventually passed by Parliament as the IAA. It is therefore

evident that the specific object of Parliament in excluding Ch VIII of the Model Law, *ie*, Arts 35 and 36 of the Model Law, was to enable the enforcement of foreign awards to be governed by only one set of rules, namely, the New York Convention and not have to deal with the question of how to address the matter of reciprocity if Arts 35 and 36 were retained.

87 The *LRC Report* and the subsequent parliamentary debates *never* touched on the issue of whether the exclusion of Arts 35 and 36 would also thereby entail that the High Court would be unable to refuse the recognition and enforcement of domestic international awards which, by definition, are outside the ambit of the New York Convention. In the process of de-conflicting the enforcement regimes under the Model Law and the New York Convention (see [60] and [86] above), Parliament gave no hint of any intention to exclude the "choice of remedies" in relation to domestic international awards where enforcement proceedings are brought in Singapore. However, the effect of the legislative device that was employed in order to enable the enforcement of *foreign* awards to be governed by the New York Convention was that *domestic international awards* were left to be regulated by s 19 of the IAA. The contention that this was meant to and in fact did have the effect of excluding domestic international awards from the scheme of the "choice of remedies" would require the conclusion that Parliament intended domestic international awards which had not been set aside to be enforceable by default in Singapore. In light of the history and clear policy of the Model Law outlined above at [56]–[71], there are at least three reasons to conclude that this was never the case.

88 First, the primary object of the IAA is to give effect to the Model Law. It is therefore clear to us that if there was a shift in 1995 when the IAA came into force, it must be a shift towards rather than away from the Model Law. Given the centrality of "choice of remedies" and the alignment in the treatment of foreign and domestic awards to the philosophy of the Model Law read with the New York Convention, we do not accept that the enactment of s 3(1) was for a completely different purpose and, by that device, that the legislative omission of Art 36 is sufficiently indicative of a legislative intention to deprive award debtors under a domestic international award of passive remedies before the Singapore courts.

89 The second reason is related to the first. A policy of default enforcement for any Singapore awards which have not been set aside would be a significant innovation and if this was the legislative object, then in the context of a detailed Second Reading speech one would have expected to find some express acknowledgement or reference. Of this, there is no trace. When viewed in the context of the pre-1996 English arbitration regime and the pre-1995 Singapore arbitration regime, as well as the policy of the Model Law, default enforcement of domestic international awards must entail a positive decision: (a) to change the previously prevailing position; and (b) to depart from the Model Law. We do not think that such a

development in relation to domestic international awards was ever contemplated, much less intended, and we are unwilling to accept this as an incidental consequence of Parliament's preference that the New York Convention continue to regulate the enforcement of foreign awards. The fact that a clear reason was ascribed for the exclusion of Arts 35 and 36 which has nothing to do with treating foreign and domestic awards differently strengthens our view that there was never an intention to simultaneously introduce an unstated policy of default enforcement for domestic international awards. Of course, we are not suggesting that States cannot modify the Model Law to their own preferences. Indeed, the German example shows not only what is possible but also how it should be done if modification is desired. But it is only sensible in the end that significant policy decisions which depart not only from international norms but also the avowed purpose of the statute should not be too easily read into the margins of legislative provisions.

90 Moreover, significant practical ramifications would follow if we were to interpret s 3(1) of the IAA as having the effect of excluding the application of "choice of remedies" from domestic international awards. Parties involved in international arbitrations in Singapore would be compelled to engage their active remedies in the Singapore courts, *ie*, by challenging a preliminary ruling under Art 16(3) or initiating setting aside proceedings under Art 34, because the option of exercising a passive remedy of resisting enforcement here would not be open to them. This can have potentially far-reaching implications on the practice and flourishing of arbitration in Singapore. Without venturing into the realm of public policy, the basic point to be made here is that Parliament should not be taken to have silently, and even incidentally, undertaken such a singular and signal decision.

91 We return here to the Working Group's meeting in the Sixth Session where the issue of excluding foreign awards altogether from the Model Law was discussed (see [58]–[60] above). The prevailing view at the time was for the provisions on recognition and enforcement of foreign awards to be included in the Model Law, in addition to those dealing with domestic awards. The general discussion of the Working Group reflects two separate concerns with Art 36 – one pertaining to the overlap with the New York Convention for foreign awards, and the other relating to "choice of remedies". It is telling – particularly since Singapore had a representative in the *travaux* discussions and was therefore apprised of the debates – that Parliament, in excluding Arts 35 and 36, referenced only the former concern and made no mention at all of the latter.

92 Last but not least, we note that the legislature in other states such as Ireland, Austria, Bangladesh, Croatia and Germany have either combined the setting aside regime with the enforcement regime for domestic international awards or have limited the grounds for resisting enforcement

of those awards to public policy and non-arbitrability. In the paragraphs that follow, we set out our reasons for rejecting Mr Joseph's submission that the Singapore Parliament would therefore not have been alone or acting radically in intending through s 3(1) to contract out of the Model Law philosophy of treating the enforcement of all awards uniformly and preserving the "choice of remedies".

93 First, given our view that s 19 of the IAA is the controlling provision, a view with which Mr Joseph agrees, the only sources of authority which the court should look at are the parliamentary materials against the backdrop of the history and origin of s 19, which we have done (see [34]–[55] above). As a result of that exercise, it is evident that Parliament did not intend to reject or exclude the "choice of remedies" policy of the Model Law. Unless there is evidence to suggest that Parliament had been motivated by the position adopted in the foreign jurisdictions referred to by Mr Joseph, we do not find reference to such jurisdictions to show how *they* might have weighed their policy choices to be of any significant value. In any event, there might have been various reasons why those states excluded Arts 35 and 36. We must therefore resist the urge to reason by analogy without first scrutinising the respective legislations and their background to determine the specific rationale for the exclusion.

94 The exclusion of Arts 35 and 36 is not a new issue. In the Working Group discussions on Arts 35 and 36, certain state representatives did suggest that Arts 35 and 36 should be deleted, on the basis that arbitral awards made in some states are akin to and have the force and effect of a court judgment without the need for further steps to be taken. It was argued that if Arts 35 and 36 had the force of law, such awards would no longer have that "self-enforcing" effect. This argument, however, did not find sufficient favour amongst the majority of the Working Group and Arts 35 and 36 were therefore retained. In the end, some of these states which had wanted Arts 35 and 36 to be deleted from the Model Law nevertheless enacted the Model Law. However, other states, such as Austria and Croatia, excluded Arts 35 and 36 so as to preserve the "self-enforcing" status of their domestic awards.

95 For example, Art 31 of Croatia's Law on Arbitration (Official Gazette no 88/2001) states:

> The award of the arbitral tribunal shall have, in respect of the parties, the *force of a final judgment (res iudicata)*, unless the parties have expressly agreed that the award may be contested by an arbitral tribunal of a higher instance. [emphasis added]

96 Likewise, s 607 of the Austrian Code of Civil Procedure as revised on 13 January 2006 states:

> The award has, between the parties, the effect of a final and binding court judgment.

97 Thus, one reason for the exclusion of Arts 35 and 36 of the Model Law as shown in the examples of Austria and Croatia is the preservation of the "self-enforcing" nature of domestic international awards. That reason is inapplicable in Singapore as arbitral awards have never been "self-enforcing" (see [34]–[47] above).

98 We can accept Mr Joseph's argument that there are other states such as Germany which have contracted out of "choice of remedies" by excluding Arts 35 and 36. However, the *effect* of such exclusion must depend on its underlying *purpose*. Germany provides a good example. As we have noted above at [82], the German legislature had considered the issue of "choice of remedies" and decided that it was not suitable for them. The same cannot be said here. The German position is therefore not analogous to our local context. We would add, parenthetically, that the German position in fact impliedly acknowledges that barring such carefully and deliberately crafted legislation, the default position under the Model Law is one that upholds the "choice of remedies" even for domestic awards.

99 For these reasons, we do not find that s 3(1) precludes us from interpreting s 19 as permitting a party resisting enforcement of a domestic international award to do so on the same grounds as those in Art 36(1). On the contrary, we consider that this would accord with the objects for which the Model Law was enacted as law in Singapore in 1994 and came into effect in 1995. Our conclusion, we note, is also in line with the views expressed by most commentators on the IAA: see Michael Hwang SC *et al*, "Singapore" in *International Handbook on Commercial Arbitration* vol IV (Jan Paulsson gen ed) (Kluwer, 2011) at p 37; Lim Wei Lee and Alvin Yeo SC, "Singapore" in *Asia Arbitration Handbook* (Michael Moser & John Choong eds) (Oxford University Press, 2011) at para 15-357; but *cf* Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (Informa, 2009) at p 51.

Article 16(3) and "choice of remedies"

100 FM's attempt to mount a passive defence against the enforcement of the Awards is subject to a second obstacle in that the Joinder Objection had already been the subject of the Tribunal's decision in the Award on Preliminary Issues. FM therefore had an earlier opportunity of appealing to the Singapore court under Art 16(3) which it did not take. Article 16(3) has been reproduced at [20] above.

101 Mr Joseph argued that once an arbitral tribunal decides to make a preliminary ruling on jurisdiction, the *only* option left to an aggrieved party is to invoke the appellate route to the court as provided for in Art 16(3). According to Mr Joseph, if that route is not taken, there can be no further opportunity to revisit the jurisdictional objection at the setting aside stage after the substantive award has been rendered or at the enforcement stage. Mr Joseph submitted that this preference for "instant court control" was

adopted after extensive and deliberate discussions by the Working Group. An arbitral tribunal has the discretion to defer a decision on a jurisdictional objection to the final award on the merits, but once it chooses to render a preliminary ruling, the operative policy advantages of finality, certainty, preventing dilatory tactics and reducing waste of time and money dictate that those jurisdictional challenges must be challenged under and only under Art 16(3).

102 Last but not least, Mr Joseph pointed out that in construing the nature and effect of Art 16(3), the court should have regard to the construction of Art 13(3) because the remedy in the former was intended to be modelled after the latter. Article 13(3), which sets out the rules governing the challenging of an arbitrator, reads:

> **Article 13. Challenge procedure**
>
> …
>
> (3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this Article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in Article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

103 Mr Joseph submitted that the position under Art 13(3) was that a party that elected not to seek the court's intervention cannot subsequently challenge the validity of the award on grounds similar to those on which it based its initial challenge. This, he contended, should inform how Art 16(3) ought to be construed.

104 Mr Landau's answer to all of Mr Joseph's submissions on this point was short and in keeping with his overarching submission. Mr Landau submitted that Art 16(3) was only ever intended to be an additional active remedy and did not affect the availability of passive remedies built into the Art 36 procedure. Put another way, it was not intended to be carved out of the underlying system of "choice of remedies" built into the Model Law. Nor do the *travaux* reveal otherwise.

105 Our decision that the Model Law undoubtedly subscribes to the notion of "choice of remedies" weakens but does not foreclose Mr Joseph's argument. It is plausible that even within a system of "choice of remedies" only certain active remedies can exist alongside passive remedies. Thus, it is still necessary for us to consider if there is support in the *travaux* or elsewhere for Mr Joseph's proposition that Art 16(3) is a "one-shot remedy" which if not utilised precludes recourse to the passive remedy of resisting enforcement.

106 At first blush, the *travaux* do not yield an unequivocal answer. There were calls for Art 16(3) to expressly include a reference to Art 36 which were reiterated, but these were eventually placed on hold. In the *Analytical Compilation* ([67] *supra*), it is recorded (at p 29) that Norway was in favour of allowing the flexibility for some form of early court control, and suggested the following draft Art 16(6):

> (6) A ruling by the arbitral tribunal that it has jurisdiction may be contested only in an action referred to in paragraph (4) of this article, in an action for setting aside an award on the merits or as a defence against an action for recognition or enforcement of the award.

107 The International Bar Association was also supportive of an express clarification that a contest by way of defence to recognition or enforcement should be included in Art 16 (*Analytical Compilation* at p 30):

> Norway and [the International Bar Association] suggest that it should be mentioned in article 16(3) that a ruling by an arbitral tribunal that it has jurisdiction could also be contested by way of defence against recognition or enforcement of the award. It is pointed out by IBA that under article 16(3) it appears that questions of jurisdiction may only be raised in an action for setting aside, and not by way of defence to an action for recognition or enforcement of the award. This could lead to an absurd result if the losing party is unable to take an action for setting aside simply because the winner stepped in first with an action for enforcement.

108 In the *Analytical Commentary* ([65] *supra*), the position was recorded as follows (at p 40):

> 12. As noted earlier …, the power of the arbitral tribunal to rule on its own competence is subject to judicial control. Where a ruling by the arbitral tribunal that it has jurisdiction is, exceptionally, included in an award on the merits, it is obvious that the judicial control of that ruling would be exercised upon an application by the objecting party for the setting aside of the award. The less clear, and in fact controversial, case is where such affirmative ruling [on jurisdiction] is made on a plea as a preliminary question. The solution adopted in article 16(3) is that also in this case judicial control may be sought *only after the award on the merits is rendered, namely in setting aside proceedings (and, although this is not immediately clear from the present text [footnote omitted], in any recognition or enforcement proceedings*). [internal citations omitted; emphasis added]

109 Two points may be made. First, at the time of the *Analytical Commentary*, the version of Art 16(3) being considered provided for judicial control of a tribunal's decision on jurisdiction (including preliminary rulings) *only* at the stage of the setting aside of the final award, and not for instant court control. But, and this is the second point, the *Analytical Commentary* then clarified that although the language in Art 16(3) did not expressly say so, it was understood that a party might choose not to challenge the preliminary ruling on jurisdiction at the setting aside stage and yet raise that same challenge in enforcement proceedings.

The footnote in the above excerpt is particularly revealing (*Analytical Commentary* at p 40):

> The reason for referring in article 16(3) only to the application for setting aside was that the thrust of this provision concerns the faculty of an objecting party to *attack* the arbitral tribunal's ruling by initiating court proceedings for review of that ruling. ***However, the Commission may wish to consider the appropriateness of adding, for the sake of clarity, a reference to recognition and enforcement proceedings, which, although initiated by the other party***, provide a forum for the objecting party to invoke lack of jurisdiction as a ground for refusal (under article 36(1)(a)(i)). [emphasis added in italics and bold italics]

110 This position was maintained, as noted in the *Summary Records for meetings on the UNCITRAL Model Law on International Commercial Arbitration* reproduced in the Yearbook of the United Nations Commission on International Trade Law, 1985, vol XVI ("the *Summary Records*"). At the 315th meeting, the UK representative, Sir Michael Mustill cautioned that the impression that a ruling by the arbitral tribunal in Art 16(3) could only be contested in an action for setting aside the award "was not correct since a party could also apply for refusal of recognition or enforcement of the award under article 36" (the *Summary Records* at p 440). Separately, the US representative, Mr Howard Holtzmann ("Mr Holtzmann") agreed that "challenges to jurisdiction when made should be regarded not simply as actions for setting aside but also as a form of defence in an enforcement action" (the *Summary Records* at p 442). Later that day in the 316th meeting, Mr Holtzmann commented that "no one had spoken against the Norwegian proposal" (the *Summary Records* at p 443) which implied that a challenge against a preliminary ruling could be mounted under both setting aside and resisting enforcement proceedings, to which the Chairman suggested that the matter might be more appropriately discussed in conjunction with Art 36. Two days later at the 320th meeting, Dr Aron Broches, who was the observer for the International Council for Commercial Arbitration, enquired as to what would be the position if a party did not take advantage of its right of recourse to the court under Art 16(3) (the *Summary Records* at p 459). Specifically, he queried whether such failure could be regarded as a waiver which precluded reliance on the same ground in *setting aside proceedings* (*ibid*). The Chairman's reply was that the issue "would be a question of *national procedural law* on … *res judicata*" [emphasis added] (*ibid*).

111 All of this underscores the point that Art 16(3) was not intended to be a "one-shot remedy", much less affect the availability of defences at the stage of recognition and enforcement. Otherwise, the Commission would more likely than not have dealt with the implications for Art 36 there and then. Nothing in the *travaux* suggests that Art 16(3) was an exception to the "choice of remedies" philosophy upon which the treatment of awards was predicated.

Policy objectives of Article 16(3)

112 Mr Joseph is on somewhat firmer ground when he relies on the discussions of the policy objectives behind Art 16(3) as articulated by the *Report of the United Nations Commission on International Trade Law on the work of its Eighteenth Session* (A/40/17, 3-21 June 1985) ("*Commission Report*") at paras 158–160:

> 158. Under one view, the solution adopted in was appropriate in that it permitted such court control only in setting aside proceedings and, as should be clarified in the text, in the context of recognition and enforcement of awards. That solution was preferred to instant court control since it would prevent abuse by a party for purposes of delay or obstruction of the proceedings.
>
> 159. Under another view, [Art 16(3)] should be modified so as to empower the arbitral tribunal to grant leave for an appeal to the court or in some other way, for instance by making its ruling in the form of an award, permit instant court control. It was stated in support that such flexibility was desirable….
>
> 160. Under yet another view, it was necessary to allow the parties instant resort to the court in order to obtain certainty in the important question of the arbitral tribunal's jurisdiction. Various suggestions were made for achieving that result. One suggestion was to adopt the solution found in article 13(3) and thus to allow immediate court control in each case where the arbitral tribunal ruled on the issue of its jurisdiction as a preliminary question. …

113 However, it is important to note the context in which the policy objectives were raised in order to understand their significance. The debate on Art 16(3) centred predominantly on whether jurisdictional objections should be subject to immediate court control, or whether such review should be postponed till after the final award had been rendered. It was thus the question of *when* an active remedy could be exercised that the drafters were grappling with; not whether a jurisdictional challenge might instead be ventilated at the time of enforcement as a passive remedy.

114 There were two divergent threads. Some members of the Working Group were of the view that court control over jurisdictional challenges should not be delayed until the eventual setting aside proceedings, which had been the position in the earlier drafts of Art 16(3). They did not want awards to become redundant at the very end of the process when a jurisdictional challenge had already been raised at the outset before the tribunal. The solution of enabling earlier (or instant) court control on preliminary rulings was thus born. This solution was inherently more time and cost efficient relative to the previous solution of allowing jurisdictional challenges to be raised only at the end of the arbitration proceedings. On the other hand, the drafters were aware of the potential for parties to delay the arbitration by challenging preliminary rulings even if they were likely to fail. The solution which was finally agreed on was to enable the tribunal to

determine, in its discretion, whether the question of jurisdiction should be subject to court control earlier in the arbitration or only at the end.

115 The policy objectives relied on by Mr Joseph can therefore be explained by and within this context. These are achieved by empowering the tribunal to decide *when* its decision could be made subject to active court control. There is no need and neither was there any impetus evident in the *travaux* to imply that Art 16(3) was also intended to be a "one-shot remedy" so that the passive remedy of raising the issue at the enforcement stage was lost or excluded simply by the inclusion of Art 16(3). In our judgment, Mr Joseph's characterisation of "instant court control" as the "final and only" mode of court control is not borne out by the materials. From the way Art 16(3) evolved over the course of the Working Group discussions, the reference in the *travaux* to "instant court control" is an expression that was juxtaposed against the alternative approach of only being able to raise a jurisdictional challenge before the courts *after* the award on the merits had been rendered.

116 Of course, it can meaningfully be argued that if certainty and time and cost efficiency are the paramount objectives, Art 16(3) ought to be the one and only opportunity for raising a jurisdictional objection which has already been decided as a preliminary ruling. The question is whether the drafters placed these undoubtedly important objectives at the apex of their considerations so as to contemplate Art 16(3) being a "one-shot remedy"; or whether, while the drafters recognised that certainty and efficiency were important, they never intended to pursue this at the expense of the overarching theme of uniformity in the treatment of foreign and domestic awards and the co-existence of active and passive remedies to be pursued at the choice of the award debtor. In our judgment, the line was drawn in favour of the latter.

117 The architecture of Art 16(3) is not certainty-centric. The fact that Art 16(3) gives the tribunal an untrammelled discretion to determine whether to decide a jurisdictional challenge in a preliminary ruling which is subject to immediate court control or in a final award together with the merits suggests that Art 16(3) is not fixated with certainty. If certainty was paramount, one might have expected that all jurisdictional objections must be decided preliminarily and be subject to instant and exclusive court control. Moreover, the fact that the tribunal can proceed to determine the merits while the appeal to the court is pending also does not augur well for the argument from unconditional certainty. Certainty was important and was indeed achieved in so far as the parties were permitted, if the tribunal so chose to exercise its discretion and provide a preliminary ruling, to challenge that decision instantly before the appropriate courts (see *Commission Report* at para 160 which is reproduced at [112] above). It did not extend to precluding subsequent recourse to passive remedies.

118 In this way and to this extent, Art 16(3) was meant to render the arbitration process more efficient as compared to the earlier alternative draft of only being able to challenge jurisdictional rulings after the award on the merits was rendered. We do not see how precluding access to passive remedies after the arbitration process has been completed contributes to this objective save in so far as a court subsequently comes to a different view from that of the tribunal on the question of jurisdiction. As unfortunate as that might be, it would usually be the party that took an exuberant view of the tribunal's jurisdiction that suffers the prejudice and this is to be weighed against the prejudice to a party, who on the enforcing court's view, was never subject to the tribunal's jurisdiction in the first place.

119 Our scepticism over Mr Joseph's position is also strengthened by the permissive wording of Art 16(3), which states that the dissatisfied party "may request" the supervising court to review the matter on appeal. This suggests that Art 16(3) was meant to provide parties with an additional option rather than to confine them to a particular course of action.

120 In the final analysis, the secondary materials placed before us, while evincing a range of views, support our reading of the *travaux*. Mr Landau relies on the following commentary from *Holtzmann & Neuhaus* ([52] *supra*) at p 479:

> It should be noted, however, that the power provided in Article 16(1) is circumscribed by other provisions of the Law. The arbitral tribunal's power is neither exclusive nor final. Its decision is subject, first, to immediate review by a court under Articles 16(3), second, to later court review in a setting aside procedure under Article 34, and, third, *to still later review in an action for recognition and enforcement under Article 36*. In addition, the issue frequently will arise and be ruled on by a court in a proceeding brought under Article 8. [emphasis added]

121 Further support may be found in the opinion of Dr Aron Broches in *International Handbook on Commercial Arbitration* vol V (Jan Paulsson gen ed) (Wolters Kluwer, Suppl 11, January 1990) at p 84:

> 48. … The arguments in favour of a negative reply are even stronger than in the case of failure to raise the plea [of lack of jurisdiction] with the arbitral tribunal. I submit that after having raised the plea before the arbitral tribunal the party in question has a choice between either seeking a decision from the Art. 6 court under paragraph (3) or raising the issue in proceedings under Arts. 34 and 36.

122 Against this, Mr Joseph refers to an article by Prof Dr Alan Uzelac ("Prof Uzelac") entitled "Jurisdiction of the Arbitral Tribunal: Current Jurisprudence and Problem Areas under the UNCITRAL Model Law" [2005] Int ALR 154 at p 163, which was also cited by the Judge (at [161] of the Judgment ([2] *supra*)) in which he states:

> … the original concept of the MAL 16(3) certainly did not envisage multiple (double or even triple) court proceedings controlling one and the same arbitral decision on jurisdiction as the main matter – one under Art. 16(3); the other, independent setting aside of the award on jurisdiction; and, eventually, another setting aside of the award on the merits for the reasons stated in Art. 34(2)(i). If such practice would develop, it could have a discouraging effect on the arbitrators that would like to resolve jurisdictional issues in their preliminary decisions.

123 On a close reading, however, Prof Uzelac's article does not support Mr Joseph's point. Indeed, Prof Uzelac discussed Art 16(3) entirely within the sphere of active remedies, just as Mr Landau has characterised it. The so-called triple court proceedings consist of Art 16(3) and two applications for setting aside, one for jurisdiction and the other on the merits of the award. The extracted passage therefore says nothing more than that such a multiplicity of active remedies was never intended, from which one cannot imply that the passive remedy of Art 36 should also be excluded.

Article 13(3)

124 We turn now to the construction of Art 13(3) of the Model Law which, in Mr Joseph's submission, offers a useful analogue to the construction of Art 16(3). He argued that Art 13(3) requires the parties to invoke curial assistance for challenges to arbitrators, failing which or if the challenge is dismissed by the court, the affected party is not permitted to raise objections to the appointment of the arbitrator for the purposes of challenging the award. In support of his argument, Mr Joseph referred us to the *Report of the Sixth Session* ([59] *supra*), the *Analytical Commentary* ([65] *supra*) and the *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (United Nations, 2012) ("*UNCITRAL Digest*"). Article 13(3) has been reproduced at [102] above.

125 While we acknowledge that the *travaux* bear out Mr Joseph's contention that there was thought to be some connection between Arts 13(3) and 16(3), we disagree that the materials justify the construction of Art 13(3) contended for by Mr Joseph. First, the *Report of the Sixth Session* does not show that the Working Group took the view that a party which does not challenge the decision of the arbitral tribunal on its own appointment will lose its right to challenge it subsequently. The focus of that particular meeting was not on the effect of a failure to challenge, but rather, whether resort to the court for challenges against an arbitrator should be allowed when arbitration proceedings are pending.

126 Second, the *Analytical Commentary* does not venture as far as Mr Joseph contends. All it states (at p 33) is that:

> [Article 13] grants any challenging party, who was unsuccessful in the procedure agreed upon by the parties or in the one under paragraph (2), *a last resort* to the Court specified in article 6. The provision, in its most crucial

> part, adopts a compromise solution with regard to the controversy of whether any resort to a court should be allowed ***only*** *after the final award is made or whether a decision during the arbitral proceedings is preferable.* … [emphasis added in italics and bold italics]

127 To be fair to Mr Joseph, the *Analytical Commentary* does speak of "last resort to the court". However, as was apparent in the discussions in the Sixth Session, the operative concern was whether resort to a court should be allowed only after the final award is made or whether this could be had when the arbitration was pending. The solution was a compromise in that recourse during the arbitration was permitted, but the arbitral tribunal was allowed to proceed with the arbitration concurrently. The *Analytical Commentary* does not conclude that a party which is aggrieved by the appointment of an arbitrator is *obliged* to mount a challenge under Art 13(3) and that failing which it will be unable to raise this ground subsequently in enforcement proceedings.

128 In the course of the hearing, we drew Mr Joseph's attention to the suggestion in *Holtzmann & Neuhaus* ([52] *supra* at pp 408–410) that a party would be able to raise objections in Art 34 and Art 36 proceedings (both active and passive remedies) based on allegations of impartiality even if that party was aware of the asserted failing during the arbitration but did not bring a timely challenge. We have some reservations whether the active remedy of setting aside remains open to such an objecting party, but leaving that aside, if the rest of the suggestion presented in *Holtzmann & Neuhaus* is accepted, it must follow *a fortiori* that a failure to appeal to the court against the tribunal's ruling on a challenge against an arbitrator does not preclude the passive remedy being exercised later in Art 36 proceedings. A converse view would be entirely irrational since it would mean that a party that challenged the appointment of an arbitrator but decided not to appeal against the tribunal's ruling until after the arbitration in enforcement proceedings, would be worse off than one who knew that grounds for challenge existed but decided not to initiate any challenge until after the arbitration. Indeed, we asked Mr Joseph during the hearing if there was anything in the *travaux* which states that a failure to challenge under Art 13(3) precludes the raising of the same objection subsequently either as an active remedy in setting aside or as a passive remedy in enforcement proceedings. Mr Joseph candidly conceded that there was none.

129 The *Commission Report* ([112] *supra*) clearly demonstrates that Art 16(3) was modelled after Art 13(3) in the sense that both instruments regulate court control of the arbitration (at paras 157 and 160–161):

> 157. The Commission adopted the principle underlying paragraph (3), namely that the competence of the arbitral tribunal to rule on its own jurisdiction was subject to court control. However, there was a divergence of views as to when and under what circumstances such resort to a court should be available.

…

160. Under yet another view, it was *necessary to* ***allow*** *the parties instant resort to the court* in order to obtain certainty in the important question of the arbitral tribunal's jurisdiction. Various suggestions were made for achieving that result. *One suggestion was to adopt the solution found in article 13(3) and* ***thus to allow*** *immediate court control in each case* ***where the arbitral tribunal ruled on the issue of its jurisdiction as a preliminary question***. … Yet another suggestion was to reintroduce in the text previous draft article 17. …

161. The Commission, after deliberation, decided not to reintroduce previous draft article 17 but to provide for instant court control in article 16(3) along the lines of the solution adopted in article 13(3). …

[emphasis added in italics and bold italics]

130 "Instant court control" is therefore more aptly understood as *immediate* court control over pending arbitration proceedings, as opposed to delayed court control over the arbitration award. Both forms of control lie exclusively within the purview of the supervisory court, which in a system of "choice of remedies" is distinct from the control of the enforcing court over recognition and enforcement of the award. Therefore the prescription of "instant court control" does not, contrary to what Mr Joseph contended, imply *sole* court control. The more pertinent controversy is whether a party's active remedy under Art 34 remains available to it if it fails to trigger the instant controls available under Arts 13(3) or 16(3). In the light of the *travaux* which we have examined, it appears to us that there is a policy of the Model Law to achieve certainty and finality in the *seat of arbitration*. This is further borne out by the strict timeline of 30 days imposed under both Arts 13(3) and 16(3), the design of which seems to be to precipitate an early determination on issues of composition and jurisdiction so that the arbitration can continue. We would therefore be surprised if a party retained the right to bring an application to set aside a final award on the merits under Art 34 on a ground which they could have raised via other active remedies before the supervising court at an earlier stage when the arbitration process was still ongoing. But, as we have noted, whatever the position is with regard to the availability of a later active remedy following the failure to trigger earlier active remedies in Arts 13(3) and 16(3), it has no effect or bearing on a party's ability to invoke its passive remedies at the time of enforcement.

131 For completeness, we will also address Mr Joseph's reliance on the *UNCITRAL Digest* ([124] *supra*). In our view, the *UNCITRAL Digest* is ambivalent, at best. It only states (at p 69) that Art 13(3) was necessary to avoid unnecessary waste of time and delay. This does not help us one way or the other on the critical question of whether Art 13(3) was intended to be a "one-shot remedy". Even if we were to ignore the ambivalence of the *UNCITRAL Digest* on Art 13(3), the same commentary on Art 16(3) frankly acknowledged (at p 82) that the Model Law "does not indicate" whether a

party's failure to challenge the preliminary ruling precludes a subsequent challenge under both Art 34 and Art 36 proceedings. This corroborates the *travaux* and our view that the drafters did not intend Art 13(3) to be a "one-shot remedy".

132 On the totality of the above considerations, we are compelled to conclude that Art 16(3) is neither an exception to the "choice of remedies" policy of the Model Law, nor a "one-shot remedy". Parties who elect not to challenge the tribunal's preliminary ruling on its jurisdiction are not thereby precluded from relying on its passive remedy to resist recognition and enforcement on the grounds set out in Art 36(1). That having been said, we are of the tentative view, as noted above, that the position might not be the same in relation to whether such a party may raise such a ground to initiate setting aside proceedings under Art 34.

Section 19B

133 Although our analysis above is sufficient to dispose of the threshold issues, we make some brief observations on the construction of s 19B of the IAA which the Judge used to support her decision. Section 19B reads:

> **Effect of award**
>
> **19B.**—(1) An award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties and on any persons claiming through or under them and may be relied upon by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction.
>
> (2) Except as provided in Articles 33 and 34(4) of the Model Law, upon an award being made, including an award made in accordance with section 19A, the arbitral tribunal shall not vary, amend, correct, review, add to or revoke the award.
>
> (3) For the purposes of subsection (2), an award is made when it has been signed and delivered in accordance with Article 31 of the Model Law.
>
> (4) This section shall not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with the provisions of this Act and the Model Law.

134 The Judge held (at [14]–[15] and [78] of the Judgment ([2] *supra*)) that where a court is prepared to grant enforcement of an award under s 19, it will do so because it has *recognised* the award as final and binding. Tying recognition of the award to its enforcement, the Judge reasoned that in order to resist enforcement, the award debtor must first resist the recognition of the award, and the terms for doing so are provided in s 19B(4) of the IAA which she interpreted as referring only to setting aside proceedings.

135 She held (at [79] of the Judgment):

> This means that the *final and binding effect* of a domestic international award *is qualified by the ability to set it aside* on the grounds prescribed in Art 34 of the Model Law and s 24 of the IAA. *Should such grounds exist, this court may refuse to recognise the award in question as final and binding* ***and set it aside instead; enforcement would then be moot***. [emphasis added in italics and bold italics]

She further added (at [82] of the Judgment) that:

> [r]efusal of recognition and enforcement cannot be divorced from setting aside – a domestic international award is *either recognised and not set aside, or it is not recognised and is set aside*. [emphasis added; emphasis in original omitted]

The Judge also observed that her construction of the interplay between recognition and enforcement is not new, citing as support the German position pursuant to s 1060 of the ZPO.

136 We have already explained earlier (at [82]–[83] above) why the German position is unhelpful in our context. But in addition to this, we also find ourselves unable to agree with the Judge's reasoning and conclusion on s 19B as a matter of statutory interpretation.

137 In the Second Reading of the International Arbitration (Amendment) Bill ("the Amendment Bill") which became the International Arbitration (Amendment) Act 2001 (Act 38 of 2001) through which s 19B was inserted into the IAA, Assoc Prof Ho gave the following reason for introducing the current ss 19A and 19B which was then cl 14 under the Bill (*Singapore Parliamentary Debates, Official Report* (5 October 2001) vol 73 at col 2222 (Ho Peng Kee, Minister of State for Law)):

> [C]lause 14 provides clarification on the finality of an interim award. Under UK arbitration law and our domestic Arbitration Act, *an interim award, once given, is binding and cannot be reviewed by the arbitrator. The Model Law says nothing about the finality of an interim award but practitioners have long assumed that the position is the same as well.* The Attorney-General, the Chairman of the SIAC and leading arbitrators, including members of the Singapore Institute of Arbitrators, *have recommended that legislation be passed to clarify this position to avoid uncertainty in the law. Thus, clause 14 of the Bill amends the Act to state clearly that the position in Singapore for nternational arbitrations is that interim awards are final and binding.* [emphasis added]

138 Hence, s 19B was concerned with ensuring that interim awards were final and binding. When read together with s 19A – which was enacted at the same time – which permits arbitral tribunals to make awards at various points in the arbitration on various issues, it is clear that Parliament was grappling with the nature and effect of interim awards. This, in turn, is an entirely different issue from that which the Judge found. In this regard,

although it was not expressly stated in the Second Reading, the view expressed by Tay Kay Kheng in "Of Interim Awards: Their Effect *Prior To and After* the International Arbitration (Amendment) Act 2001" (2002) 14 SAcLJ 143 that the insertion of ss 19A and 19B was meant to legislatively overrule *Tang Boon Jek Jeffrey v Tan Poh Leng Stanley* [2001] 2 SLR(R) 273 ("*Jeffrey Tang*") is persuasive.

139 In that case, the arbitrator made an award dismissing the respondent's claim and purportedly, also the appellant's counterclaim. This award was stated to be "final save as to costs". A week later, the arbitrator issued another award in which he acknowledged that in his earlier award, he had in fact omitted to deal with the appellant's counterclaim. After hearing further arguments, the arbitrator issued yet another award in which he allowed the appellant's counterclaim with interest, on the ground that his earlier decision was erroneous. In the third award, the arbitrator also dealt with the issue of interest and costs. The respondent's application to set aside the third award on the basis that the arbitrator was *functus officio* when he made it was initially allowed by the High Court. However, the Court of Appeal reinstated the award, holding that a "final award" had to be one that decided or completed everything that the arbitral tribunal was expected to decide, including the question of costs. Until such a final award was given, the arbitral tribunal's mandate continued and it was not *functus officio*. As the arbitrator had not decided on all the issues, his mandate had not been terminated and he was entitled to reconsider his decision and if he thought fit, as he did here, to reverse himself. It is evident that the outcome in *Jeffrey Tang* could not be reached after the enactment of ss 19A and 19B.

140 It can be seen from Assoc Prof Ho's speech in the Second Reading of the Amendment Bill (see [137] above) that Parliament's intention to align the effect of interim awards with that of final awards was driven by its object of providing that all awards – interim and final – should reflect the principle of finality. What this meant was that an award, once issued, was to be final and conclusive as to the merits of the subject-matter determined under that award; and it could thereafter only be altered in the limited circumstances provided for in Arts 33 and 34(4) of the Model Law. This is nothing more than another way of saying that the issues determined under the award are *res judicata*. This was also how Gloster J interpreted the equivalent provision in the 1996 English Arbitration Act, s 69, in *Shell Egypt West Manzala GmbH v Dana Gas Egypt Limited (formerly Centurion Petroleum Corporation)* [2009] 2 CLC 481. Section 69 provides that "[u]nless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings". As the right of appeal under s 69 can be contracted out, the award creditor submitted that cl 14.3 of the arbitration agreement which

states that the award shall be "final, conclusive and binding on the parties" manifested the parties' intention to do so.

141 Gloster J rejected that argument, holding (at [38]):

> … Although, on their face, the words 'final, conclusive and binding upon them' are words of considerable width, which might, in an appropriate context, appear to be sufficient to exclude a right of appeal, the reality is that the expression 'final and binding', *in the context of arbitration, and arbitration agreements, has long been used to state the well-recognised rule in relation to arbitration, namely that an award is final and binding in the traditional sense and creates a res judicata between the parties. The expression was used for such purpose in section 16 of the Arbitration Act 1950, which was re-enacted in section 58(1) of the 1996 Act, with the added provision contained in section 58(2), that the finality and binding nature of an award does not exclude the possibility of challenging an award, by any available arbitral process of appeal or review or otherwise in accordance with Part 1 of the 1996 Act.* As stated at page 342 of the *2001 Companion* to Mustill and Boyd's *The Law and Practice of Commercial Arbitration in England* (2nd Edition), this provision was inserted because the reference to finality in section 16 of the Arbitration Act 1950 was sometimes assumed 'wrongly' to exclude the possibility of challenging an award. [emphasis added]

142 In our view, it is clear that s 19B(1) had everything to do with *res judicata* of issues which results in the tribunal being *functus officio* in relation to awards already made, and nothing to do with the availability of curial remedies. While s 19B(4) does talk about curial remedies, its effect was misconstrued by the Judge. We disagree that s 19B(4) imposes a positive obligation on the award debtor to challenge the award in an active manner, *viz*, setting aside, if it wishes to extricate itself from the otherwise "final and binding" consequences of the award. The point of s 19B(4) is a negative one. As Gloster J pointed out, although issues determined under the award are *res judicata*, it was important to dispel the misconception that the award then becomes unimpeachable. On the contrary, it may still be challenged in accordance with the available processes of appeal or review of the *award* permitted by the law governing the arbitration. In short, s 19B(4) in fact clarifies what "final and binding" *does not amount to*.

Conclusion on threshold issues

143 To summarise, we hold that:

(a) the enforcement of domestic international awards is governed by s 19 of the IAA, the construction of which must be consonant with the underlying philosophy of the Model Law (at [53]–[55]);

(b) the overarching scheme of the Model Law was to de-emphasise the importance of the seat of arbitration and facilitate the uniform treatment of international arbitration awards (at [57]–[62] and [64]);

(c) the "choice of remedies", under which passive defences will still be available to the award debtor who did not utilise his active remedies, is fundamental to the design of the Model Law (at [65]–[68] and [71]);

(d) it follows that the best way to give effect to the philosophy of the Model Law would be to recognise that the same grounds for resisting enforcement under Art 36(1) of the Model Law will be equally available under s 19 of the IAA (at [84]);

(e) s 3(1) of the IAA cannot be understood as having incidentally derogated from the clear philosophy of the Model Law (at [86]–[90]);

(f) Art 16(3) is neither an exception to the "choice of remedies" nor a "one-shot remedy" (at [109] to [123] and [125] to [132]); and as such,

(g) pursuant to s 19 of the IAA, FM may apply to set aside the Enforcement Orders under any of the grounds which are found in Art 36(1) (at [99]).

Our decision on the merits of the Joinder Objection

144 Thus far, we have only concluded that the court has the power under s 19 of the IAA to refuse enforcement of domestic international awards if it is able to establish one of the grounds under Art 36 of the Model Law. It still remains for us to determine whether the Joinder Objection falls within one of the Art 36 grounds, and if so, whether the Joinder Objection should be decided in FM's favour.

The Joinder Objection as a ground for refusing enforcement

145 Mr Landau's case was that the Joinder Objection resulted in there being "no arbitration agreement" between FM and the 6th to 8th Respondents. However, he did not rely on any specific statutory ground either in the IAA or the Model Law to support FM's application that the Enforcement Orders should be set aside. This is perhaps not surprising given that the thrust of his case was that the power to refuse enforcement is to be exercised in a manner which is consistent with generally accepted standards, and not any specific grounds such as Art 36 of the Model Law (see [49] above).

146 In our judgment, the first step of characterising the objection is of vital importance in any effort to resist enforcement. Although Mr Landau has characterised the Joinder Objection as an issue of the existence of an arbitration agreement, there are other possible characterisations. For instance, the Joinder Objection could be seen as an issue of whether the scope of the arbitration agreement in the SSA extends to the 6th to 8th Respondents given that the parties had agreed to a set of institutional

rules under which the joinder might be proper. Alternatively, it could be viewed as a challenge to an improper procedure undertaken by the Tribunal. Each characterisation falls to be determined under a different ground of Art 36 of the Model Law (or Art V of the New York Convention).

147 In our view, there are three potential bases under the IAA read with the Model Law which permit the refusal to enforce a domestic international award on account of a finding that there was no arbitration agreement between the award creditor and debtor: (a) the opening words of s 19 which requires enforcement to be made "on an arbitration agreement"; (b) the ground in Art 36(1)(*a*)(i); and (c) the ground in Art 36(1)(*a*)(iii).

Award on an arbitration agreement

148 It is a generally accepted rule in international commercial arbitrations that a party may only enforce an award if *that party* can show that the award which it is seeking to enforce was made pursuant to *an arbitration agreement* between itself and the party against whom the award is sought to be enforced. This essentially *party-centric* precondition is prescribed, albeit in varying words, by both the Model Law (Art 35(2)) and New York Convention (Art IV(1)(*b*)). The same concept that an enforceable award must be made pursuant to an arbitration agreement is also found in s 19 of the IAA:

> An award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced …

149 In *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 253 FLR 9 ("*Altain*") where a foreign award was sought to be enforced in Australia, the Victoria Court of Appeal grappled with whether the existence of an arbitration agreement was a precondition for enforcement (Stage One), or, if it was an issue which should be considered under one of the Art V grounds of the New York Convention (Stage Two). The court treated the existence of an arbitration agreement as antecedent to the issue of whether the award debtor was required to establish one of the Art V grounds in the New York Convention, *ie*, a Stage One matter. The burden was therefore on the award creditor to show that there was an existing arbitration agreement between itself and the award debtor. The reasoning by the court in *Altain* can be gleaned from the following example which it gave (at [139]):

> … If the named parties to an arbitration agreement were X and Y, and an award was made in favour of X against Z, production of the arbitration agreement and the award would not suffice for the making of an ex parte order for the enforcement of the award even if the award stated that it was made pursuant to the arbitration agreement. This is because, even though the award [was] purported to have been made under the arbitration agreement, the contents of those documents do not provide any evidence that Z was a party to the arbitration agreement.

150 Although *Altain* does not stand alone in taking this approach (see *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Stefan Michael Kröll *et al* eds) (Kluwer Law International, 2011) at pp 323–332), there is another view that questions whether this relatively robust interpretation of the obligation to demonstrate an existing arbitration agreement in *Altain* unduly cuts into the defences for resisting enforcement under Stage Two (see, *eg*, *Yukos Oil Company v Dardana Limited* [2002] EWCA Civ 543 ("*Dardana*") at [11]–[12]). The overlap between the two stages of the enforcement process is inevitable but we do not think that this presents undue difficulty. The distinction between a Stage One and Stage Two matter is an issue that goes towards burden of proof of entitlement to enforcement. No doubt in certain cases the burden of proof may prove determinative, for example, where the award creditor cannot even produce an arbitration agreement. However, it is equally true that in very many cases, the award creditor can produce an arbitration agreement. Even if the arbitration agreement is challenged as not having been entered into between the parties, such a challenge would, save in the clearest of cases, almost certainly proceed to Stage Two where the onus is then on the award debtor to make good its assertion that the presented arbitration agreement was in fact never agreed to or formed between the parties. As the authors of *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Herbert Kronke *et al* eds) (Kluwer Law International, 2010) ("*Global Commentary on the New York Convention*") explained (at pp 163–164, and 167):

> The procedural prerequisites to an application for enforcement of an arbitration award are to be distinguished from the several defences to enforcement enumerated in Article V of the New York Convention. Article IV requires an applicant only to 'supply' the document; the text of Article IV does not mention proof of validity. Once the applicant in an enforcement action meets the procedural burden as per Article IV of providing an award and an arbitration agreement in the form prescribed therein, he establishes a prima facie case for enforcement of the award. For purposes of Article IV, it is not relevant whether the agreement is valid. Regarding the validity, the burden of proof then shifts to the defendant to establish a ground for non-enforcement under Article V. Article IV deals only with formal requirements.
>
> However, Article IV(1)(b) and Article V(1)(a) may overlap in some respects. *The prima facie presumption [of enforceability] … arises only if, at least at a first glance, the arbitration agreement to be submitted is between the parties. Submission of an arbitration agreement to which the defendant [award debtor] is obviously not a party would generally not satisfy the requirement [of Article IV(1)(b)].* …
>
> …

> As a general rule, courts addressing an enforcement petition should not use Article IV to examine the material validity of the arbitration agreement *beyond ascertaining that it was between the parties*. …
>
> [emphasis added]

151 There is no dispute over the burden of proof on the facts before us. Both Astro and FM were content to argue the Joinder Objection in full, with the concomitant understanding that the resolution of the Joinder Objection would determine the outcome of their respective applications. Notably, FM's case was not run on the basis that Astro did not produce an arbitration agreement for the purposes of Stage One. On these premises, we do not have to decide when and under what factual circumstances an assertion that there was no arbitration agreement at all, crosses from being a Stage One matter to a Stage Two matter. What we do have to decide is this: on a Stage Two analysis, should a challenge such as the Joinder Objection properly fall within one of the grounds under Art 36(1) of the Model Law or Art V of the New York Convention (in foreign award cases), namely Arts 36(1)(*a*)(i) and (iii), and Arts V(1)(*a*) and V(1)(*c*) respectively? For ease of reference, we shall refer to Art 36(1)(*a*)(i) and Art V(1)(*a*) as the first ground, and Art 36(1)(*a*)(iii) and Art V(1)(*c*) as the third ground (see [19] above).

Articles 36(1)(a)(i) and 36(1)(a)(iii)

152 There is no settled position on whether the existence of an arbitration agreement between two parties should fall under the first or third ground. Following *Dardana* at [12], and *Dallah (SC)* ([63] *supra*) at [12], it is clear that the English courts consider the *existence* of the arbitration agreement as falling under the umbrella of the *validity* of the arbitration agreement set out in the first ground. The *Global Commentary on the New York Convention* (at pp 277–278), on the other hand, noted that there is authority for the view that the issue falls to be decided under the third ground. Amongst the cases cited in support are the US District Court and Court of Appeals' decisions in *Sarhank Group v Oracle Corp* No 01-civ-1295, 2002 WL 31268635 (SDNY, 2002); 404 F 3d 657 (2nd Cir, 2005).

153 The Singapore High Court has considered this question on two previous occasions. In *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR(R) 174, an employee of a company was named in an arbitration notice on the basis that the arbitration agreement between his company and the claimant provided that any dispute involving, *inter alios*, their employees, shall be resolved by arbitration which was seated in Arizona. The arbitrator found that the dispute was within his jurisdiction and made an award against the employee. When the award was sought to be enforced in Singapore, the employee challenged the enforcement on the basis that he was not a proper party to the arbitration agreement, and that the award was unenforceable pursuant to Art V(1)(*c*) of the New York

Convention, *ie*, the third ground. Judith Prakash J held (at [69]) that the third ground covers challenges relating to the *scope* of the arbitration agreement rather than to whether a particular person was a party to that agreement. She therefore rejected Art V(1)(*c*) as an available basis for resisting enforcement on those facts.

154 In *Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd* [2010] 3 SLR 661 ("*Ultrapolis*"), the award debtor sought to resist enforcement of an award made in Denmark under Art V(1)(*a*) of the New York Convention, *ie*, the first ground. The argument advanced by the award debtor was that the arbitration clause in a standard form was not incorporated into the main agreement between the parties. As such, there was no binding arbitration agreement. Belinda Ang Saw Ean J rejected (at [45]) the award debtor's challenge under the first ground not because it was brought within the wrong ground, but because she found that the standard form terms did form part of the main contract between the parties.

155 The view that the third ground deals more with the *scope* of the arbitration agreement as opposed to its existence has also found favour with Mercédeh Azeredo da Silveira and Laurent Lévy in their chapter "Transgression of the Arbitrators' Authority: Article V(1)(c) of the New York Convention" in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Emmanuel Gaillard & Domenico Di Pietro eds) (Cameron May, 2008) at pp 639–640. Gary Born in his treatise, *International Commercial Arbitration* (Kluwer Law International, 2009) at pp 2777 and 2798 also states that the first ground generally deals with the existence *and* validity of arbitration agreements and that "in contrast", authorities dealing with the interpretation of the *scope* of the arbitration agreement are more appositely dealt with under the third ground. The International Council for Commercial Arbitration also considers the non-existence of an arbitration agreement as a matter falling under the first ground: *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (ICCA, 2011) at p 86.

156 That said, there is no doubt some difficulty with the express language of the first ground. As Lord Collins JSC in *Dallah (SC)* observed at [77], the words used in the first ground suggest that its purpose is limited to issues of validity of an arbitration agreement which at least once existed (in addition to any issue of capacity which is not relevant for present purposes). Nevertheless, in our view, the question of the existence of an arbitration agreement can be subsumed within the issue of the validity of an arbitration agreement. In addition to Lord Collins JSC's observations (at [77]) that this interpretation of the first ground is "consistent international practice", we would add some further observations.

157 The existence or, more accurately, *formation* of a contract has not always been considered as part of the basket of issues concerned with the

material *validity* of a contract. This is not unexpected as the notion of validity of a contract might be conditioned on the supposition of a contract which at least once existed. However, as the development of the law in the area of the conflict of laws has shown, this fine divide can be bridged. At one point, the choice of law rule for contract formation and material validity were considered separately by the leading treatise on the subject, *Dicey & Morris on The Conflict of Laws* vol 2 (J H C Morris gen ed) (Stevens & Sons Limited, 10th Ed, 1980) at pp 775–778 (on formation) and pp 789–794 (on material or essential validity). In the latest edition of the same treatise, now known as *Dicey, Morris & Collins on The Conflict of Laws* vol 2 (Lord Collins gen ed) (Sweet & Maxwell, 15th Ed, 2012) at para 32-107, r 225 which prescribes the choice of law rule for material validity of a contract is introduced as such:

> This Rule is based on Art. 10 of the [Rome I] Regulation, which is headed 'consent and material validity.' The expression 'material or essential validity' covers situations where something in the nature of the contract makes it wholly or partially invalid. In prior English usage it included cases in which a contract was illegal in inception (e.g. contracts in restraint of trade), and although there were some differences, this was also the approach of civil law systems. *The reference in Art. 10(1) to existence and validity thus includes such matters as formation* (including the effect of silence), absence of consideration, fraud, duress, mistake, and also the legality of a contract. [emphasis added]

The subsequent paragraphs then go on to discuss the old common law cases on contract formation (*Albeko Schuhmaschinen AG v Kamborian Shoe Machine Co Ltd* (1961) 111 LJ 519; *Compania Naviera Micro SA v Shipley International Inc (The Parouth)* [1982] 2 Lloyd's Rep 351).

158 If validity in the first ground is interpreted in this manner (which interpretation we cannot see any strong objections to), the issue of the existence of an arbitration agreement would be capable of being subsumed under the first ground. The question thus is whether the alleged arbitration agreement between FM and the 6th to 8th Respondents is valid in the sense of whether it was ever formed; with the validity of this agreement to be decided in accordance with the law governing the alleged arbitration agreement. As this alleged arbitration agreement between FM and the 6th to 8th Respondents was created, if at all, by the joinder procedure, it falls outside of the SSA and any choice of law clause therein. As such, the applicable law to determine the Joinder Objection must be Singapore law as the law of the place where the Awards were made. Indeed, neither party took any issue with the application of Singapore law to resolve this issue.

Reviewing the Joinder Objection

159 On that basis, we turn to the Joinder Objection. Given that – as the Tribunal itself acknowledged – the 6th to 8th Respondents were not parties to the SSA, there is no doubt that they were technically strangers to the

arbitration agreement. FM's Joinder Objection rests on the premise that the Tribunal rendered the Awards without jurisdiction as the 2007 SIAC Rules did not vest it with the power to join non-parties to the Arbitration.

160 The merits of FM's challenge turn on the proper construction of r 24(b) of the 2007 SIAC Rules which provides as follows:

> **Rule 24: Additional Powers of the Tribunal**
>
> 24.1 In addition and not in derogation of the powers conferred by any applicable law of the arbitration, the Tribunal shall have the power to:
>
> …
>
> (b) allow other parties to be joined in the arbitration with their express consent, and make a single final award determining all disputes among the parties to the arbitration.

161 Drilling down to specifics, it is the meaning to be ascribed to "other parties" which will be the principal determinant of whether the joinder was properly ordered.

Standard of review

162 Before analysing the arguments, it is necessary to set out the standard of review to be applied. Mr Landau submitted that this court can and should review the Tribunal's decision *de novo*. He relies in particular on the authority of *Dallah (SC)* ([63] *supra*), and emphasised the following passage from Lord Mance JSC's decision (at [30]):

> The nature of the present exercise is, in my opinion, also unaffected where an arbitral tribunal has either assumed or, after full deliberation, concluded that it had jurisdiction. There is in law no distinction between these situations. The tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all. This is so however full was the evidence before it and however carefully deliberated was its conclusion. ….

163 The extracted passage represents the leading statement on the standard of curial review to be applied under the New York Convention, and there is no reason in principle for the position under the Model Law to be any different. Significantly, the jurisprudence of the Singapore courts has also evinced the exercise of *de novo* judicial review (see *Ultrapolis* at [38]–[39] and *Galsworthy Ltd of the Republic of Liberia v Glory Wealth Shipping Pte Ltd* [2011] 1 SLR 727 at [8]). We affirm these local authorities. In particular, we also agree with Lord Mance JSC that the tribunal's own view of its jurisdiction has no legal or evidential value before a court that has to determine that question.

164 In the light of our decision that a domestic international award can be refused enforcement if one of the grounds reflected in Art 36(1) of the Model Law is established and that the Joinder Objection, if justified, would

fall within Art 36(1)(*a*)(i), it must follow that we are entitled, indeed obliged, to undertake a fresh examination of the Joinder Objection which was decided in the Award on Preliminary Issues.

The Tribunal's decision

165 The Tribunal's reasons for granting the joinder of the 6th to 8th Respondents can be outlined as follows:

> (a) as a matter of construction, a tribunal's power "to allow other parties to be joined in the arbitration" under r 24(b) must be understood as meaning that parties outside of the *arbitration agreement* may be joined into the arbitration;
>
> (b) there is no scope for implying into r 24(b) a further requirement that there should be an expression of consent by *all* the parties to the reference; and
>
> (c) a rule which required further express consent by all parties in an arbitration would have been "merely a statement of the obvious".

166 The Tribunal's most crucial holding was that "other parties" for the purposes of r 24(b) referred to strangers to the agreement to arbitrate, as opposed to others who though party to the agreement to arbitrate had not hitherto joined or been involved in the arbitration. It began its analysis by looking at the meaning of the term "party" within the 2007 SIAC Rules. A distinction was drawn between "the agreement to refer future disputes to arbitration, and the separate agreement arising when an existing dispute becomes the subject of a reference to arbitration". This distinction is constitutive of the doctrine of "double-severability". In *Syska v Vivendi Universal SA* [2009] 1 All ER (Comm) 244 ("*Syska*"), Christopher Clarke J explained the doctrine as such (at [93]):

> This analysis is also consonant with the well-established English law doctrine of 'double-separability', whereby the 'continuous' arbitration agreement and the individual reference to arbitration in a particular case constitute separate contracts, and may be governed by different laws so that the former contract may fail when the latter does not. See eg: *Black Clawson International Ltd v Papierwerke Wladhof-Aschaffenburg AG* [1981] 2 Lloyd's Rep 446 at 455 (per Mustill J), *Unisys International Services Ltd v Eastern Counties Newspapers Ltd* [1991] 1 Lloyd's Rep 538 at 562 and *Mustill and Boyd Commercial Arbitration* (2nd edn, 1989) at pp 60–62:
>
> > It is now established that when a dispute arises within the scope of an agreement to arbitrate future disputes, and when that agreement is put into effect by the giving of a notice of arbitration, a new set of contractual relationships comes into existence, requiring the parties to arbitrate the individual dispute. Although this obligation springs from the continuous agreement to arbitrate future disputes, it is distinct from it, at least in the sense that events which terminate one group of relationships do not necessarily terminate the other. Thus, the question

> — 'Has something happened which means that the parties are no longer obliged to submit any of their disputes to arbitration?' is to be answered by reference to different contractual terms from those which govern the question — 'Has something happened which means that the parties are no longer obliged to submit this dispute to this reference?'. Since the questions are different, it would appear to follow that in theory they may have to be answered by reference to different laws.
>
> The principle of double-severability [*sic*] is foreign to most systems of law. But it serves as an example of how the reference can have a life of its own unaffected by the fact that the arbitration agreement is invalid for the purpose of any future proceedings.

167 Having set out this doctrine, the Tribunal proceeded to find that the term "party" is used in the 2007 SIAC Rules to refer only to the subjects in the separate agreement which is independently conceived by the reference to arbitration ("the arbitration reference") and not to the subjects of the agreement to arbitrate. The sole support for this proposition was derived from r 25.2, which provides that:

> A plea that the Tribunal does not have jurisdiction shall be raised not later than in the Statement of Defence. A plea that the Tribunal is exceeding the scope of its authority shall be raised promptly after the Tribunal has indicated its intention to decide on the matter alleged to be beyond the scope of its authority. In either case the Tribunal may nevertheless admit a late plea under this Rule if it considers the delay justified. *A party* is not precluded from raising such a plea by the fact that he has nominated, or participated in the nomination of an arbitrator. [emphasis added]

168 The Tribunal reasoned that "a party" that challenges the jurisdiction of a tribunal may assert that it is outside of the agreement to refer future disputes to arbitration, *ie*, the arbitration agreement, but in raising such a challenge it is inescapably a part of the arbitration reference. As such, the "party" referred to in r 25.2 must necessarily be a subject of the arbitration reference rather than the arbitration agreement. The Tribunal then extrapolated that "other parties" in r 24(b) must refer to "parties who are not already parties to the agreement to refer the dispute which is the subject of the reference", and not "other parties to the agreement to refer future disputes".

169 Apart from this textual analysis, the Tribunal also thought that its favoured interpretation was the only way to save r 24(b) from redundancy. The reasoning here (at [104]) is worth setting out in full with the prefatory understanding that FM's argument at the time was r 24(b) should be understood as requiring the consent of not just the party to be joined, but also all other parties to the reference:

> This is the context in which rule 24 b. is to be construed, and demonstrates the object which it was designed to achieve. To have drafted a rule which

> required, beyond the consent given by agreeing to an arbitration in accordance with the rules, some further express consent by all parties to the arbitration, would have produced a result of little or no practical value. In some cases parties do consent to the joinder of third parties. No rule is required to make this happen, and it is impossible to imagine that the draftsman of the SIAC Rules intended to achieve merely a statement of the obvious, while imposing a further requirement that the arbitration tribunal should have a power to allow (and therefore also to disallow) the joinder of a third party in such circumstances. Indeed it is difficult to conceive circumstances in which an arbitral tribunal would consider it could properly refuse to allow joinder where all parties concerned wished it to take place. On the other hand, to promulgate a rule, as the respondents say SIAC has done, which allowed one party to the proceedings to veto the joinder of a third party with the consent of everyone else concerned would have been simply pointless. That is the position without such a rule, and is precisely the mischief which the international arbitration community has been searching for means to avoid.

Parties' submissions

170 Mr Landau attacked the Tribunal's decision as mistaking r 24(b) for a provision which confers the *jurisdiction* to bring or join non-parties into an arbitration instead of a procedural *power* to effect joinder. On his submission, there is a clear conceptual difference between jurisdiction and power. A tribunal only has jurisdiction over parties to the arbitration agreement, and it is only with the consent of those parties that the power to join non-parties to the arbitration agreement can be exercised. This is presented as a general principle which necessitates unequivocal words of departure. Mr Landau points to the discussions of the Working Group tasked with drafting the 2010 revisions to the UNCITRAL Arbitration Rules as support. The *Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Sixth session* (A/CN.9/619, 5-9 February 2007) ("*UNCITRAL Arbitration Rules Report*") records (at para 122) that the proposal to permit the joinder of non-parties was considered and rejected on the basis that it would run counter to the "fundamental principle of consent of parties in arbitration".

171 On the issue of construction, Mr Landau's argument was that the reference to "other parties" was first introduced in the 1997 version of the SIAC Rules, which was in turn derived from r 13(c) of the 1985 London Court of International Arbitration (LCIA) Rules ("the 1985 LCIA Rules"). The 1985 LCIA Rules were subsequently amended in 1998 ("the 1998 LCIA Rules") to allow the joinder of "third persons" under Art 22.1(h). Mr Landau argues that the 1985 LCIA Rules did not permit the joinder of non-parties to the arbitration agreement, but only of other parties to the arbitration agreement. This argument runs by implication from the change of wording between r 13.1(c) of the 1985 LCIA Rules and Art 22.1(h) of the 1998 LCIA Rules, and is supported by Peter Turner and Reza Mohtashami,

A Guide to the LCIA Arbitration Rules (Oxford University Press, 2009) at para 6.47:

> … ICC tribunals have rejected the power to join third parties (as opposed to extending the scope of the arbitration clause). … It is this difficulty that the provision of Article 22.1(h) seeks to overcome, by providing an express power to join third parties who may not necessarily be parties to the arbitration agreement. This remains, however, a controversial area. …

172 On this point, Mr Joseph relied on an article released contemporaneously with the 1985 LCIA Rules to argue that r 13.1(c) *did* permit the joinder of non-parties to the arbitration. In J Martin Hunter and Jan Paulsson, "A Commentary on the 1985 Rules of the London Court of International Arbitration" published in *Yearbook Commercial Arbitration 1985 vol X* (Pieter Sanders ed) (Kluwer Law International, 1985), the authors state unequivocally that the rules "allow arbitrators to permit non-signatories to the arbitration agreement to join in the arbitration, providing that they are willing to do so, and unless all signatories to the arbitration agreement refuse the joinder" (at p 168). We would add that Mr Joseph's point is also reflected in the exposition in Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 2nd Ed, 1991) at p 188:

> The other solution is to incorporate into the arbitration agreement reference to rules of arbitration which enable other parties to be joined. … Amongst the arbitral institutions, the LCIA has provided for joinder of parties, and for a single award, by the following provisions:
>
> > … the Tribunal shall have the power … to:
> >
> > (c) allow other parties to be joined in the arbitration with their express consent, and make a single final award of determining all disputes between them … ;
>
> This provision retains the element of consent usually regarded as essential in international commercial arbitration so far as the party to be joined is concerned. However, it removes that element in relation to the existing parties (or rather, one of them – since it would be impracticable for an arbitral tribunal to join a third party against the wishes of *all* the parties to the existing arbitration).

173 Finally, Mr Landau pointed to the equivalent provision in the latest version of the SIAC Rules (5th Ed, 1 April 2013) ("the 2013 SIAC Rules"), which permits the joinder of "third parties … provided that such person is a party to the arbitration agreement". It is therefore clear that under the 2013 SIAC Rules, only other parties to the arbitration agreement can be joined to the reference. On the premise that it would be improbable for the SIAC Rules to have moved in an illiberal direction, he submitted that the 2007 SIAC Rules could not have been more permissive than the latest iteration of the Rules.

Whether the joinder was proper

174 We recognise that certain institutional arbitration rules confer on the putative tribunal the power to join third parties who are not party to the arbitration agreement (hereinafter referred to as "non-parties") without first obtaining the consent of all the parties which are part of the extant arbitration. The prime example is Art 22(1)(h) of the 1998 LCIA Rules, which is still in force:

> **Article 22**
>
> **Additional Powers of the Arbitral Tribunal**
>
> 22.1
>
> Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views:
>
> …
>
> (h) *to allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party* ***provided any such third person and the applicant party*** *have consented thereto in writing*, and thereafter to *make a single final award, or separate awards*, ***in respect of all parties so implicated in the arbitration***.
>
> [emphasis added in italics and bold italics]

175 Article 4(2) of the Swiss Rules of International Arbitration (June 2012) ("Swiss Rules") is similar but wider in that the tribunal has broad discretion to decide whether to join a "third person" and if the consent of any party to the arbitration is required:

> *Where one or more third persons request to participate* in arbitral proceedings already pending under these Rules *or where a party to pending arbitral proceedings under these Rules requests that one or more third persons participate* in the arbitration, the arbitral tribunal shall decide on such request, *after* ***consulting*** *with all of the parties, including the person or persons to be joined,* ***taking into account all relevant circumstances***. [emphasis added in italics and bold italics]

176 A joinder under the LCIA Rules and the Swiss Rules has, rather aptly, been termed as a "forced joinder", since a joinder under these rules is possible notwithstanding the objections of a party to the arbitration: see Gary Born, *International Arbitration: Law and Practice* vol I (Kluwer Law International, 2012) ("*Born*") at pp 228–229.These rules are not before us and we therefore shall not express any views on them.

177 What is before us is the question of whether by contracting to arbitrate under the 2007 SIAC Rules, the parties had agreed to confer on the putative tribunal the power to order a forced joinder. Although there is

some divergence in the views expressed in the literature in this area, the basic commonality which is undisputed is the requirement of consent to the forced joinder (see Julian Lew *et al*, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) ("*Lew, Mistelis & Kröll*") at para 16-40. If there is consent given in any form, either under the arbitration agreement or through subscription to a set of institutional rules which unambiguously permits forced joinders, that would suffice to negative any subsequent allegation that there was no agreement to arbitrate with the joined party.

(1) Construction of rule 24(b)

178 The Tribunal held that r 24(b) of the 2007 SIAC Rules confers on a tribunal the power to allow parties who are not parties to the arbitration agreement to be joined without first procuring consent from all the other parties who were already part of the arbitration reference. Indeed, it took the view that a party may be joined to the reference "even against the wishes of all the other parties". The only consent necessary was that from the party which was to be joined.

179 It is apposite to note that r 24(b) is silent as to whether a forced joinder will be ordered on the motion of one of the parties to the arbitration agreement, the party or parties to be joined, or the tribunal itself. Therefore, under the Tribunal's construction of the rule, where the process is initiated by the party to be joined, the tribunal's discretion is the only obstacle to forced joinder. Where the process is initiated by the tribunal, the consent of the party to be joined is the only obstacle. In the second possible scenario, r 24(b) comes precariously close to creating on the part of the existing parties to an agreement to arbitrate under the 2007 SIAC Rules, a unilateral offer to arbitrate with an indeterminate class of potential disputants. Indeed, a tribunal's power to join non-parties also appears to be open-ended in that it is subject only to the qualification that it should not be exercised "in derogation of the powers conferred by any applicable law of the arbitration" (at r 24.1). There are no express conditions which need to be fulfilled before a non-party can be joined, nor is there any express mention that parties can modify the tribunal's power to join non-parties to the arbitration.

180 On this reading, r 24(b) stands in marked contrast to Art 22.1(h) of the 1998 LCIA Rules (see [174] above). The latter provision specifies that the joinder should be effected: (a) upon the application of a party to the arbitration reference; (b) that the third person must have consented with the applicant party in writing; (c) that this additional power of joinder is subject to the parties agreeing otherwise in writing; and (d) that parties must be given a reasonable opportunity to state their views. Similarly, Art 4(2) of the Swiss Rules (see [175] above) sets out how a request for joinder might originate and broadly prescribes the necessary procedural

steps. The relative paucity of detail in the 2007 SIAC Rules suggests to us that r 24(b) might not have been intended to have the same effect as a forced joinder under the 1998 LCIA Rules and the Swiss Rules. If indeed r 24(b) was intended to vest tribunals with such a broad power to join non-parties, we think it scarcely credulous that the language used to convey this should be so unclear. The use of a differentiating term like "third person", as with the 1998 LCIA Rules and the Swiss Rules, would have been a straightforward solution (see also [187] below).

181 Having decided that r 24(b) conferred upon it this broad power to join non-parties to the arbitration, the Tribunal did not then delineate the limits of this power. We cannot see, however, how the power to join non-parties to the arbitration could be exercised outside of the subject-matter of the arbitration reference between the original parties. A tribunal cannot extend its jurisdiction to disputes over which it has no jurisdiction by simply purporting to rely on r 24. To this extent we accept Mr Landau's argument that r 24(b) acts as a procedural power, rather than a means for a tribunal to extend its jurisdiction. It would otherwise be a portal through which a tribunal could exercise unlimited jurisdiction over any dispute which any non-party could have with the parties to the arbitration reference. We do not think that any set of arbitration rules, unless explicitly stated otherwise (and even then, we would reserve our views), could provide for such unlimited jurisdiction. The terms of any arbitration reference must ultimately lie within the limits described by the arbitration agreement, save to the extent that it might be extended with the explicit consent of all the parties. In our judgment, the general position must be that the arbitration agreement sets the parameters of the tribunal's jurisdiction. This follows from the premise that arbitration references spring from the continuous agreement to arbitrate future disputes (see *Syska* above at [166], citing *Mustill & Boyd* ([38] *supra*)).

182 In this regard it is useful to set out the relevant sections of cll 17.1 and 17.4 of the SSA:

> 17.1 Parties' Efforts. The Parties agree to use all reasonable efforts to resolve any dispute under, or in relation to this Agreement quickly and amicably to achieve timely and full performance of the terms of this Agreement.
>
> …
>
> 17.4 Dispute Resolution Procedure. If the Parties in dispute are unable to resolve the subject matter of dispute amicably within thirty (30) days, then any Party in dispute may commence binding arbitration through the Singapore International Arbitration Centre ('SIAC') and in accordance, except as herein stated, with the rules of SIAC. The arbitration proceedings, including the making of an award, shall take place at the Singapore International Arbitration Centre and the award of the arbitrators shall be final and binding upon the Parties. Notwithstanding the provisions and rules

> set forth in the rules of SIAC, the following procedural provisions shall apply to such arbitration proceedings:
>
> …

183 It is abundantly clear that the dispute resolution mechanism of the SSA does not pertain to disputes outside of the scope of the SSA itself, *ie*, disputes which arise from an entirely different contract. As such, there is nothing in the wording of r 24(b) or the SSA itself which could support a finding of jurisdiction over an unconnected dispute any more than it could support a claim to arbitration by, say, FM's window cleaners. Yet, taken to its logical extreme, the Tribunal's decision would allow r 24(b) to have such an effect, at least notionally. It is disconcerting that the Tribunal's decision could conceivably permit a non-party to apply, on his own motion, to be joined to an arbitration for the purpose of arbitrating a separate dispute with one of the extant parties, which application might then be granted without any consultation with the parties to the arbitration or opportunity given for objections to be raised by those parties. As the Tribunal did not address these other aspects of joinder, and so as not to speculate on its unexpressed views, perhaps it would suffice to say that the Tribunal did not appear to have fully apprehended the potential implications of its construction of r 24(b).

184 It ought to be apparent from the foregoing that the forced joinder of non-parties is a significant procedure which raises issues that go to the very core of the arbitration. Unsurprisingly, the Working Group which considered the inclusion of such a rule in the 2010 UNCITRAL Arbitration Rules thought that it would represent a "major modification": see *UNCITRAL Arbitration Rules Report* ([170] *supra*) at para 126. If the Tribunal's view is to be accepted, such a momentous shift occasioned by the 2007 SIAC Rules was both accompanied by and greeted with silence, until now. Indeed this would have occurred as early as 1991, as the first version of the SIAC Rules is *in pari materia* with the 2007 SIAC Rules on the power of joinder (see r 24.1(c) of the SIAC Rules (1st Ed, 1 September 1991)). More importantly, the shift would have occurred without any clear linguistic signification – indeed the 2007 SIAC Rules would seem to have veiled the true purport of r 24(b) under the generic reference to "other parties".

185 Even if we accept that the 1985 LCIA Rules were intended to permit the joinder of non-parties, it is telling that the 2007 SIAC Rules did not adopt the clarification introduced by the 1998 LCIA Rules, which replaced "other parties" with "third persons". Indeed the trajectory of the SIAC Rules has been in the opposite direction, with the latest iteration of the Rules clearly stating that the party to be joined must be part of the arbitration agreement. In the final analysis, we find it difficult to accept that the 2007 SIAC Rules empowered a tribunal to join a stranger to the arbitration agreement as a party to the reference. This is so for a number of

reasons, not least among which is that such standard rules are meant to set out clear procedures to facilitate the conduct of arbitration. Given the extent to which the forced joinder of non-parties may expose an arbitrating party to further obligations to arbitrate (in terms of the parties with whom as well as the matters in respect of which), any provision purporting to have this effect would need to be in clear and certain terms; *a fortiori*, where such joinder is provided for in institutional rules which are to be incorporated by a model dispute resolution clause. It is quite evidently the case that such clear language cannot be found in r 24(b).

186 The Tribunal also observed that the 2007 SIAC Rules had to be construed in the context of a long-standing debate over the joinder of non-parties, which requires "solutions which are simple and workable, while preserving the principle of party autonomy and respecting so far as possible the confidentiality of the arbitral process". The Tribunal's preferred interpretation of r 24(b) was thought to meet this stated objective. However, as we have already noted (see [183] above), the full import of this interpretation did not appear to have been factored into the Tribunal's deliberations. We are also inclined to regard the Tribunal as having underestimated the extent to which forced joinder impinges upon party autonomy and confidentiality. The centrality of confidentiality to arbitration in the SIAC is evident from r 34 of the 2007 SIAC Rules, with which the Tribunal's understanding of r 24(b) is at odds:

> **Rule 34: Confidentiality**
>
> 34.1 The parties and the Tribunal shall at all times treat all matters relating to the proceedings, and the award as confidential.
>
> 34.2 A party or any arbitrator shall not, without the prior written consent of all the parties, disclose to a *third party* any such matter except:
>
> a. for the purpose of making an application to any competent court of any State under the applicable law governing the arbitration;
>
> b. for the purpose of making an application to the courts of any State to enforce or challenge the award;
>
> c. pursuant to the order of or a subpoena issued by a court of competent jurisdiction;
>
> d. to a party's legal or other professional advisor for the purpose of pursuing or enforcing a legal right or claim;
>
> e. in compliance with the provisions of the laws of any State which is binding on the party making the disclosure; or
>
> f. in compliance with the request or requirement of any regulatory body or other authority.
>
> …
>
> [emphasis added]

187 It is important to note that r 34.2 is the only provision in the 2007 SIAC Rules which uses the term "third party". The enumerated instances under r 34.2 make it abundantly clear that "third party" refers to parties outside of the arbitration agreement, such as court officers or legal and professional advisors. Tellingly, the same phrase was not employed in r 24(b).

188 The forced joinder of non-parties is also a major derogation from the principle of party autonomy, which is of foundational importance because all arbitrations must proceed *in limine* from an agreement to arbitrate. Forced joinders carve out a significant exception to this by compelling an arbitration with other persons with whom the parties had not specifically agreed to arbitrate. Even where these other persons are connected to the subject matter of the arbitration, there has been no election of arbitration as the specific dispute resolution mechanism with those other persons. This is not without prejudice to the arbitrating parties, who are presumptively precluded from recourse to the courts in relation to the dispute with the joined parties, and who may find themselves subject to a final award which determines a deeper if not a larger pool of issues and legal liability. The bulk of the damages awarded in the Final Award, for example, pertained to the 6th to 8th Respondents, with only nominal sums awarded to the original parties to the SSA. Indeed the claims of the 6th to 8th Respondents in restitution represented an entirely separate head of claim to that of the 1st to 5th Respondents. As noted above (at [10]), the application to join the 6th to 8th Respondents was filed together with the Notice of Arbitration itself. The Tribunal's interpretation of r 24(b) would effectively allow a principal dispute to be "piggy-backed" on a formal claim filed by the parties to the arbitration agreement and proceed to arbitration. In such circumstances, the original arbitration agreement would function as little more than a Trojan Horse.

189 We should address the two reasons given by the Tribunal in support of its construction, *viz*, the linguistic comparison with r 25.2 and the need to salvage r 24(b) from redundancy.

190 Even on its own terms, the Tribunal's comparative analysis of "party" as employed in r 25.2 gives rise to difficulties. If it is accepted that "party" refers to a subject of the arbitration reference under r 25.2, how is it that "*other* parties" under r 24(b) should refer to parties *other than* those in the agreement to arbitrate? It seems to us that the Tribunal's implicit assumption was that "other" refers to a *different type* of party rather than *another* party of the same type. This is a linguistic election which derives no clear support from the rest of the 2007 SIAC Rules. Rule 24(h), for example, also uses the phrase "other parties" where "other" clearly serves to indicate another party to the arbitration reference as opposed to a different type of party altogether:

> h. order any party to produce to the Tribunal and to the other parties for inspection, and to supply copies to any document(s) in their possession or control which the Tribunal considers relevant;

191 We have also mentioned that r 34.2 uses "third party" to the exact same effect as the Tribunal's understanding of "other parties" (see [187] above). On the whole, a purely textual analysis of r 24(b) does not take one very far. It is clear that "other parties" was intended to refer to parties outside of the arbitration reference, but the language provides no further guidance on the limits of that general class – *ie*, whether it extends only to the other parties to the agreement to arbitrate or to persons outside of that agreement but sufficiently connected to the subject matter, or even to the world at large. Equally, while accepting that "double-separability" answers one half of the equation in that it tells us what "parties" refers to, *viz*, subjects of the stand-alone arbitration reference, it is completely silent about the scope of the word "other". As such we do not think that the textual reasons given by the Tribunal are sufficient to justify its reading of r 24(b) as permitting the forced joinder of third parties who are not party to the arbitration agreement.

192 The Tribunal's concern with redundancy is also problematic because of the way in which it arose, namely in the context of FM's argument that r 24(b) requires the consent of all parties before a non-party could be joined. The redundancy therefore was thought to arise because r 24(b) would then be stating the obvious. This much we agree with. But if FM were to succeed in the construction of r 24(b) that was put to us, namely that the rule refers to other parties to the agreement to arbitrate who are not yet party to the arbitration reference, then the issue of consent to the joinder and of redundancy would not even be engaged in the first place, as only parties to the arbitration agreement can be joined. This is our preferred interpretation and in our judgment, on this basis, r 24(b) would very much serve a useful purpose. It is not difficult to imagine, for example, a tripartite commercial transaction involving A, B and C with all three parties agreeing to submit any disputes *inter se* to arbitration. Separate disputes between A and B and A and C then arise in short succession. A and B may have already formally commenced arbitration in respect of their dispute. When the dispute between A and C is sought to be resolved, A has two options. The first is to have a separate arbitration to resolve its dispute with C. The other option would be for A to apply in the arbitration between itself and B, for C to be joined into that arbitration. The efficacy of such joinder is palpable, and r 24(b) serves that useful function. As was succinctly summarised in *Born* ([176] *supra*) at p 221:

> Consolidating separate international arbitrations, and permitting joinder or intervention of additional parties into an international arbitration, can provide some obvious advantages. As with litigations, a single arbitration can in some circumstances be more efficient than two or more separate arbitrations. A single proceeding permits the same savings of overall legal

> fees, arbitrators' fees, witness's time, preparation efforts and other expenses that exist in litigation. Further, a consolidated arbitration reduces the risk of inconsistent results in two or more separate proceedings.

193 It is also sensible that only C's consent would be required in such circumstances, given that all three parties would already have consented to the same arbitration agreement. Mr Landau uses the same factual matrix to demonstrate how it is *precisely because* of the doctrine of "double-separability" that recourse to r 24(b) would be necessary for C to be joined to an arbitration between A and B. As the arbitration reference for the first arbitration between A and B had already been constituted, a procedural mechanism for C to be joined would be necessary, notwithstanding that C had agreed, through the arbitration agreement, to arbitrate its disputes with A and/or B (see *Syska* at [166] above).

194 For completeness, it might also be noted that the Tribunal's assertion of redundancy is somewhat undermined by the fact that r 24(b) has since been amended to unequivocally state the precise proposition which the Tribunal thought to be so obvious as to be unworthy of inclusion in the SIAC Rules (see [173] above).

(2) Agreement to arbitrate under a set of rules

195 Although our construction of r 24(b) is dispositive of the Joinder Objection, we would make one comment on Mr Joseph's principal argument that FM had implicitly consented to the joinder of the 6th to 8th Respondents by agreeing to the 2007 SIAC Rules and, by extension, r 24(b); under those circumstances, no *further* consent by FM was required.

196 We are cognisant of the raging controversy in this area of multiparty arbitrations (for an overview of such situations, see Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions* (Kluwer Law International, 2006) at pp 163–196) where a prevalent argument is that there is *default* consent to a forced joinder whenever the joinder is properly ordered pursuant to the applicable institutional rules. The reasoning is fairly straightforward. Parties, by agreeing to arbitrate under those rules, are deemed to have consented to the exercise of the power to force a joinder: Tobias Zuberbühler *et al*, "Introductory Rules: Consolidation of Arbitral Proceedings (Joinder), Participation of Third Parties (Art 4) in *Swiss Rules of International Arbitration: Commentary* (Tobias Zuberbühler *et al* eds) (Kluwer Law International, 2005) at para 12; *Lew, Mistelis & Kröll* ([177] *supra*) at para 16-42.

197 In principle, this is not objectionable as parties can contractually agree to any rules which they would like to subject their arbitrations to. This may include rules which confer on the tribunal ultimate discretion to order forced joinders without having to obtain further consent from the parties who are already part of the arbitration reference. However, as emphasised

earlier, the idea of forced joinders is a drastic one. Because the power of the tribunal to join non-parties to an arbitration at any stage without the consent of the existing parties and at the expense of the confidentiality of proceedings is such utter anathema to the internal logic of consensual arbitration, a rule which allows the tribunal to order a forced joinder without obtaining "fresh" consent to the joinder must be decidedly unambiguous. Rule 24(b) is not so. At a more general level, in the face of linguistic ambiguity in the provision which regulates the power to join without obtaining further consent, the consent under an arbitration agreement to arbitrate in accordance with a set of institutional rules cannot be taken as an *ex ante* consent to the forced joinder.

198 In short, the lack of accompanying content in the 2007 SIAC Rules, the overarching imperative of clarity in setting out standard rules, and the internal logic of the consensual basis of an agreement to arbitrate all militate against the Tribunal's construction of r 24(b). Our analysis is also strengthened by the fact that r 24(b) and its ultimate predecessor, r 13(c) of the 1985 LCIA Rules, have not been widely received as solutions to the problem of joinder in international commercial arbitration. We therefore do not accept the Tribunal's construction of r 24(b). The proper construction of this rule is that it permits other parties to the arbitration agreement who are not yet part of the arbitration reference to be joined into an existing arbitration reference. It follows that FM's objection to the Tribunal's assertion of jurisdiction over the claims of the 6th to 8th Respondents is well-founded.

Whether FM had waived its right to raise the Joinder Objection or is otherwise estopped

199 This brings us to the final issue. Notwithstanding the merits of the Joinder Objection, Astro also contends that FM's conduct after the Award on Preliminary Issues constituted an acceptance of it which precludes it from presently arguing otherwise. The gist of this aspect of Astro's case is that, by continuing to participate in the arbitration, FM had waived its objections to the Tribunal's jurisdiction to determine issues pertaining to the 6th to 8th Respondents. In the alternative, Astro argued that FM is estopped from raising these objections having purportedly represented that it will no longer challenge the Tribunal's jurisdiction.

200 At the outset, we make two clarifications. First, the concept of waiver and estoppel are distinct. Broadly speaking, waiver of rights occurs when a party has indicated that it will be relinquishing its rights. Estoppel, however, requires something more. The party invoking the estoppel must typically show that it had relied on the representations of the other party to its detriment (*Pertamina Energy Trading Limited v Credit Suisse* [2006] 4 SLR(R) 273 at [72]; see also, albeit in the context of proprietary estoppel, *Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd* [2007]

1 SLR(R) 292 at [170]). The two legal concepts may produce different outcomes when applied to the same factual matrix. Astro accepts, however, that the requirements of estoppel are substantially similar in so far as it must be shown that FM had made a clear representation that it will forego the right to challenge the Award on Preliminary Issues. The evidential assessment of the concurrent pleadings of waiver and estoppel will largely traverse the same grounds.

201 The parties are agreed as to the legal conditions which must be met in order to establish a waiver of rights. Both Mr Landau and Mr Joseph cited Lord Goff of Chieveley's guidance in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391 ("*The Kanchenjunga*"), which has been approved in Singapore in *Chai Cher Watt (t/a Chuang Aik Engineering Works) v SDL Technologies Pte Ltd* [2012] 1 SLR 152 as definitive at [33]. In *The Kanchenjunga*, Lord Goff described the operation of waiver as such (at 398):

> … In particular, where with knowledge of the relevant facts a party has acted in a manner which is *consistent only with his having chosen one of the two alternative and inconsistent courses of action then open to him* – for example, to determine a contract or alternatively to affirm it – he is held to have made his election accordingly … It can be communicated to the other party by words or conduct; though, perhaps because a party who elects not to exercise a right which has become available to him is abandoning that right, he *will only be held to have done so if he has so communicated his election to the other party in clear and unequivocal terms* … [emphasis added]

202 The party asserting that otherwise actionable rights have been waived must therefore meet a high threshold of demonstrating that the adversely affected party's conduct is *only* consistent with waiver and that the purported waiver had been communicated in clear and unequivocal terms.

203 Mr Landau's answer to Astro's case on waiver is that there was simply no instance where it could be said that FM's conduct was consistent only with a waiver of its rights. In fact, he avers that FM had reserved its rights on the jurisdictional issue as early as 22 May 2009, and explicitly stated in its Defence that "nothing herein shall be construed as an acceptance by [Ayunda, FM and DV] of the Tribunal's jurisdiction or that [Ayunda, FM and DV] agree or concede that the [6th to 8th Respondents] are valid parties to this Arbitration, and [Ayunda, FM and DV's] rights in this regard are strictly reserved". Moreover, he contended that, doctrinally, an objection needs only to be raised once in order to reserve one's rights in relation to its subject matter. The following passage from Sir Michael Mustill & Stewart Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) (at p 578) is singled out:

> … If a party to a commercial dispute has a genuine defence to the claim, and also has a genuine reason for saying that the arbitrator is not the correct tribunal to rule upon it, he should be allowed to take both points … and

> should not be forced into a position where he must either take pre-emptive action or lose his right to challenge the jurisdiction. Provided the respondent has made a clear protest, and has emphasised that his continued participation in the reference is without prejudice to his case on jurisdiction, we believe that a court should, in the interests of common sense, hold that there has been no waiver. …

204 It is necessary here to undertake a closer examination of how the parties had conducted themselves after the Award on Preliminary Issues. Both parties submitted elaborate recitals of the events which followed, of which these passages feature prominently:

(a) the immediate aftermath of the Award on Preliminary Issues;

(b) the entry of judgment in the UK;

(c) the signing of the Memorandum of Issues ("MOI"); and

(d) the partial satisfaction of the Award on Preliminary Issues.

(1) The immediate aftermath of the Award on Preliminary Issues

205 On 16 May 2009, Astro sought an urgent procedural hearing before the Tribunal to establish an expedited timetable. Ayunda and FM replied on 19 May 2009, disagreeing with the proposed timetable. This is the first correspondence emanating from FM following the Award on Preliminary Issues. In this response it was stated that Ayunda and FM were considering an appeal against that award in the Singapore High Court. It was also asserted that the expedited timetable was unrealistic and allowed insufficient time for preparation. Ayunda and FM also represented that they wanted their counsel who represented them at the hearing of the preliminary issues, Mr Laurence Rabinowitz QC ("Mr Rabinowitz"), to continue acting for them. Finally, Ayunda and FM represented that they were considering their position in relation to counterclaims. At this stage, there was neither an express reservation of rights nor an unequivocal waiver.

206 Ayunda and FM's letter on 20 May 2009 also represented that they were still contemplating the filing of an appeal:

> Our clients are fully entitled to properly consider and take advice on whether they should exercise their statutory right of appeal.

207 Astro evidently did not take this as a waiver. In its reply on the same day, it represented that "[Ayunda] and [FM's] stated intention of considering a challenge to the Courts of Singapore on the question of jurisdiction does not of course change the fact that, as far as [Astro] understand[s] the position, the tribunal itself has finally determined these issues". Astro therefore viewed the Tribunal as having completed its work even though Ayunda and FM might *yet* avail themselves of further avenues of review. Its response was to insist that Ayunda, DV and FM sign a draft order recording the Award on Preliminary Issues. On 20 May 2009, Astro's

solicitors sent a draft Final Order and Award on Preliminary Issues to Ayunda and FM by e-mail. The purpose of this draft order was "to distinguish between those matters finally determined and those matters left open for determination at the substantive hearing". Some indication of the purport of "finally determined" is discernible in the representation that the draft order set out issues which "were disposed of finally and were not interim rulings". The clear purpose of the draft order was therefore to confirm that the issue of jurisdiction would not be re-visited by the Tribunal at the substantive hearing.

208 On 22 May 2009, Ayunda and FM's solicitors replied to the effect that they saw no need for any further order on the matter, which "could only be justified to the extent that it accurately described the terms of the Award". The specific response to the terms of the draft order is set out in full:

> (1) Without prejudice to their position on any appeal, the First and Second Respondents would – if some further form of order were thought necessary – have no objection to paragraphs 1 and 2 of the proposed draft, since these accurately reflect the Preliminary Award.

209 It is evident that FM's position in relation to the preliminary ruling on jurisdiction was both conditional ("if some further form of order were thought necessary") and qualified ("[w]ithout prejudice to their position on any appeal"). This was subsequently reiterated in a letter dated 25 May 2009 regarding the filing of the defence and counterclaim for the substantive hearing, in which FM's solicitors stated that "none of the steps taken or to be taken by [Ayunda & FM] are to be construed as an acceptance of the Tribunal's jurisdiction". The 30-day limit within which Ayunda and FM would have had to file their notice of appeal against the Award on Preliminary Issues expired the next day. Parties then proceeded to file the statement of case and defence. As stated above at [203] (see also below at [219]), Ayunda, DV and FM expressly reserved their rights in relation to the issue of the Tribunal's jurisdiction in its Defence.

210 Up to this point there could be no question that FM had not waived any of its rights in relation to the Tribunal's jurisdiction and the joinder of the 6th to 8th Respondents. Mr Joseph identified a teleconference with the arbitrators held on 25 June 2009, however, as a marked departure. The teleconference was arranged for the primary purpose of obtaining directions from the Tribunal as to the timetable for the main hearing. The principal arbitrator's first order of business was therefore to obtain an update on whether there was a challenge to the Preliminary Award in Singapore. Mr Rabinowitz replied that "[t]here is no challenge to your award in Singapore".

211 Mr Joseph contended that Mr Rabinowitz's statement constituted a waiver of FM's rights to challenge the Tribunal's jurisdiction. His submission is that Mr Rabinowitz could easily have made an express

reservation of FM's rights in his reply, but did not do so. Instead, he made a categorical statement that there was no challenge to the Tribunal's award.

212 However, there are other possible interpretations of Mr Rabinowitz's statement. The most straightforward would perhaps be that Mr Rabinowitz had provided the most direct and literal response to the principal arbitrator's question – he was simply updating the Tribunal of the fact that there was no existing challenge to the Award on Preliminary Issues at the time. Another reading of Mr Rabinowitz's answer is that it was intended to communicate that the Tribunal could proceed with the main hearing, being unimpeded by any pending appeal against the Award on Preliminary Issues. This reading is supported by the general administrative purpose of the teleconference, which is also evident from the conversation between the principal arbitrator and Mr Joseph regarding the status of parallel proceedings in Indonesia. The focus of the conversation was on pushing the Arbitration ahead as quickly as possible, encapsulated in Mr Joseph's exhortation that "we are very, very, very anxious ourselves for a date".

213 Yet another, more robust, reading is that Mr Rabinowitz had intended to convey not only, either one or both of the possibilities we have identified in the previous paragraph, but also that Ayunda and FM would not avail themselves of any statutory right they might have under Art 34 as well as any passive remedies at the enforcement stage. What militates against this is that there was no question of invoking any passive remedies at that stage because no substantive award had been made. That issue was not even alive at that stage. In short, in our judgment, it does not follow from Mr Rabinowitz's statement, that Ayunda, DV or FM had accepted that the Tribunal's joinder of the 6th to 8th Respondents was proper. Nor did this statement entail an abandonment of all future avenues to challenge the Tribunal's jurisdiction at the stage of enforcement. We note that Mr Rabinowitz was not asked if Ayunda, DV or FM were thereby accepting the Tribunal's jurisdiction, despite their repeated insistence up to that point that they continued to refute that jurisdiction.

214 Taking FM's conduct in the round, we are unable to accept Mr Joseph's contention that there had been a waiver of its rights, let alone a clear representation that it had accepted the Tribunal's jurisdiction. We note that in Astro's statement of reply to the defence on 1 July 2009 (at [7]–[9]) they objected to the effectiveness of FM's reservation contained in its Defence; but this was informed by Astro's understanding that Art 16(3) represented a "one-shot remedy". Its position, then and now, is that FM could not revisit the issues of joinder and jurisdiction because it only ever had the one opportunity to do so. Hence, it seems to us that Astro never relied on any representation by FM. Instead, it seems that Astro merely relied on its own understanding of the legal consequences of FM not having brought a challenge under Art 16(3). In the final analysis.

Mr Rabinowitz's concise statement is too slender a peg on which to hang Astro's case for waiver.

215 For the sake of completeness, we also address Mr Joseph's argument that FM had waived its objection by filing a counterclaim in the Arbitration. The counterclaim, advanced on the basis of a breach of fiduciary and good faith obligations under the common law, was framed in reference to the "UT Shareholders", which is defined as "the 3rd and 4th Claimants (later, the 1st and 2nd Claimants)". The short answer therefore, is that the counterclaim did not constitute a waiver of FM's rights in relation to the improper joinder of the 6th to 8th Respondents because it was not directed at them.

(2) Entry of UK judgment

216 On 27 July 2009, Astro applied for and obtained leave to enforce the Award on Preliminary Issues in England. On 24 August 2009, Ayunda and FM's solicitors stated in an e-mail that:

> It is not [Ayunda & FM's] position that [Astro] are not entitled to apply to enforce the [Award on Preliminary Issues]. Rather, the point is that the calculated timing of the Claimant's application to enforce the Jurisdictional Award just before the hearing before the Tribunal in September has put the Respondents in a position where they will be denied natural justice at and in connection with that hearing.

217 Mr Joseph suggested that the first sentence of that e-mail constituted an acceptance of the validity of the Award on Preliminary Issues. The use of the double negative, however, leaves open the possibility that Ayunda and FM, whilst admitting that Astro can *apply* to enforce the award, can also seek to *resist* enforcement on jurisdictional grounds. Indeed, the e-mail is carefully worded so as not to positively accept that the Award on Preliminary Issues is valid. Moreover, when read in full, it is clear that the main point conveyed by the e-mail was not that Ayunda and FM did not object to the Tribunal's jurisdiction but that they had a more specific objection to Astro's application to enforce the Award on Preliminary Issues, *viz*, the denial of natural justice at the substantive hearing. Once again, we do not think that in such a context it would be fair to read a waiver into Ayunda and FM's statement.

(3) Signing of the MOI

218 Astro also places heavy reliance on the fact that FM had signed a MOI on 31 July 2009. The MOI stated that:

> A number of issues in this arbitration, including that of its own jurisdiction, have already been fully and finally determined by the Tribunal in its Award

> dated 7 May 2009. The remaining claims and issues to be determined by the Tribunal in this arbitration are as follows:
>
> …

219 In our judgment, the MOI cannot be invested with great or particular significance. First, when read as a whole, the main object of the MOI was to frame the issues which were yet to be determined by the Tribunal rather than to categorically bind parties to the preliminary ruling. This may be compared with the draft order which was sent to Ayunda and FM's solicitors on 20 May 2009 (see [207] above), which focused entirely on what had been determined in the Award on Preliminary Issues. It is clear from the correspondence between the parties that the draft order was intended to record the terms of the Award on Preliminary Issues and did not signal Ayunda and FM's acceptance of the Tribunal's jurisdiction. Rather, the MOI was directed to the converse objective of identifying what remained open before the Tribunal. Second, and for good measure, Ayunda and FM continued to reserve its objection to the Tribunal's jurisdiction after signing the MOI. For instance, it was stated in their statement of defence and counterclaim filed on 18 June 2009 that they did not "agree or concede that the [6th to 8th Respondents] are valid parties to this Arbitration" and that their rights in this regard were strictly reserved.

(4) Part satisfaction of the Award on Preliminary Issues

220 On 17 September 2009, the Tribunal ordered Ayunda, DV and FM to pay costs for the Award on Preliminary Issues. Payment was made on 1 October 2009. Mr Joseph argued, on the authority of *Goodman v Sayers* (1820) 2 Jac & W 249 ("*Goodman*"), that part satisfaction of an award constitutes clear and unequivocal acceptance of it. In *Goodman*, the plaintiff agreed to satisfy the debt due from him under the award so long as the defendant discontinued its action for enforcement and referred certain alleged errors back to the arbitrators for further investigation. Having made payment after offsetting the sums in error, the plaintiff then applied to set aside the award. Sir Thomas Plumer MR framed the question before the court as such (at 262–263):

> It comes then to this important question, whether a court of equity can entertain jurisdiction, in a case where an action having been brought to enforce the award, the party voluntarily pays the money, upon an agreement for a reference back as to part, under which an alteration is made, of which he takes the benefit, receiving the £25 as a final settlement of the dispute? Can he, after that, make it the subject of a bill in equity?

221 The Master of the Rolls went on to conclude that this must be answered in the negative (at 263):

> … It is admitted, that at law it is impossible to recover, after a voluntary payment, with a knowledge of all the facts, though under a mistake in point of law; it cannot be disputed … that where an action is brought and is

> proceeding, and the Defendant having a knowledge of all the circumstances, and having the means of proving them at trial, submits to pay, he has no remedy at law. …

222 Once again we are unable to agree with Mr Joseph's argument. We do not think that the payment of costs to the Tribunal constituted an unequivocal waiver of FM's rights. Rather, it was an acknowledgment that the Tribunal could decide its own jurisdiction and would be entitled to be paid for this decision. This was in line with the doctrine of *kompetenz-kompetenz*, and is distinct from the situation which arose in *Goodman*, where the payment was made pursuant to an express agreement to satisfy the award. We would add that *Goodman* does not strictly stand for the proposition that part payment will or must always constitute waiver. The part payment in that case arose in the context of an agreement that the parties reached to refer certain alleged errors in the initial award back to the arbitrators. Most importantly, the plaintiff in *Goodman* never reserved his rights to raise the very objections which he later attempted to rely on to set aside the award. Indeed, one of the factors which Sir Thomas Plumer MR took into account (at 262) was that the plaintiff in Goodman chose not to "persevere in his resistance". In light of the fact that FM did reserve its rights, we do not think that the payment of costs would constitute a tacit waiver of those reserved rights.

Conclusion on merits of the Joinder Objection

223 Having examined in some detail how the parties had conducted themselves after the Award on Preliminary Issues was handed down, we are unable to accept the Astro's argument that FM had waived or is otherwise estopped from asserting its rights to resist the enforcement of the Awards.

224 In the final analysis we find in favour of FM on the merits of the Joinder Objection:

(a) Given that they were not parties to the SSA, it is a matter to be determined by Singapore law whether the 6th to 8th Respondents were properly joined to the Tribunal's proceedings so as to establish an arbitration agreement with FM (at [158]).

(b) In consideration of its language and lack of substantive content, r 24(b) does not confer on the Tribunal the power to join third parties who are not party to the arbitration agreement, in this case, the SSA, into the Arbitration (at [178]–[185], [191]–[193] and [197]).

(c) Accordingly, the Tribunal's exercise of its power under r 24(b) to join the 6th to 8th Respondents to the Arbitration was improper with the corollary that no express agreement to arbitrate existed between the 6th to 8th Respondents and FM (at [198]).

(d) In addition, FM did not waive its rights or conduct itself in such a way that it is estopped from raising the Joinder Objection:

(i) FM consistently stated that any further participation in the lead up to the substantive hearing would be without prejudice to its position on any appeal (at [208]–[209]) and later reserved its rights in relation to the Tribunal's jurisdiction in its Defence (at [203], [209] and [219]);

(ii) the statement that "[t]here is no challenge to [the Tribunal's] award in Singapore" made at the teleconference with the arbitrators on 25 June 2009 cannot be taken as a clear representation that FM had accepted the Tribunal's jurisdiction (at [212]–[214]);

(iii) FM's counterclaim was unconnected to the 6th to 8th Respondents (at [215]);

(iv) FM's acceptance of Astro's ability to bring an application to enforce the Award on Preliminary Issues in the UK did not contain any concession as to its validity, and moreover, it instead conveyed the more specific objection that there would be a denial of natural justice as a result of the timing of that application (at [216]–[217]);

(v) the signing of the MOI was intended to frame the issues which were still to be determined by the Tribunal rather than to categorically bind parties to the Award on Preliminary Issues (at [219]); and

(vi) the part satisfaction of the Award on Preliminary Issues on 1 October 2009 cannot be taken as more than FM's acknowledgement that the Tribunal could decide its own jurisdiction and was not sufficient in itself to constitute an acceptance of the Tribunal's jurisdiction (at [222]).

In consequence of the foregoing, FM is fully entitled to resist the enforcement of the Awards pursuant to s 19 of the IAA.

Enforcement by 1st to 5th Respondents

225 It will be recalled that the Enforcement Orders were granted to Astro, *ie*, all eight Respondents, while the collective relief sought in SUM 4065 and SUM 4064 by FM was for the Enforcement Orders to be set aside entirely. Although we have found that the Awards are not enforceable by the 6th to 8th Respondents against FM because there was no arbitration agreement between the former and latter, and to that extent FM's application to set aside the Enforcement Orders is granted, it does not follow that the 1st to 5th Respondents, whom FM did not dispute were proper parties to the SSA and the Arbitration, ought not to be able to enforce the Awards against FM.

226 An arbitral award binds the parties to the arbitration because the parties have consented to be bound by the consequences of agreeing to

arbitrate their dispute. Their consent is evinced in the arbitration agreement. In a multiparty arbitration agreement, the vitiation of consent between two parties does not *ipso facto* vitiate the consent between other parties. For example, in an arbitration agreement between A, B and C, the subsequent vitiation of the consent between A and B to be bound by the award does not necessarily cause it to lose its binding effect as between A and C, or between B and C. It is only where the circumstances which gave rise to the vitiation of consent between A and B can be said to have infected the consent between the other parties, *ie*, A and C and/or B and C, that the award as between those parties would cease to have binding effect.

227 Partial enforcement is viable here because the orders in the Awards do not intertwine in such a manner as to impede severance. In relation to the Final Award in which most of the substantive orders are found, we find that the Tribunal's orders against the various parties are sufficiently discrete. The Final Award provided that:

> (a) Ayunda, FM and DV are jointly and severally liable to pay the 6th Respondent RM103,333,546;
>
> (b) DV is liable to pay the 6th Respondent RM210,884,780 (less any payment in (a) above);
>
> (c) Ayunda, FM and DV are jointly and severally liable to pay the 7th Respondent US$5,773,134;
>
> (d) DV is liable to pay the 7th Respondent US$15,659,174 (less any payment in (c) above);
>
> (e) Ayunda, FM and DV are jointly and severally liable to pay the 8th Respondent US$59,459,258;
>
> (f) DV is liable to pay the 8th Respondent US$151,281,768 (less any payment in (e) above);
>
> (g) Ayunda and FM are jointly and severally liable to pay the 1st and 2nd Respondents US$608,176.54, GBP22,500, and S$65,000; and
>
> (h) Ayunda and FM are jointly and severally liable to indemnify the 1st and 2nd Respondents for the benefit of the 6th to 8th Respondents in respect of any further losses which may be suffered by the 6th to 8th Respondents by reason of the breach by Ayunda and FM of cl 17.6 of the SSA, including any liability which Ayunda, FM and DV may establish against the 6th to 8th Respondents in the Indonesian Proceedings or any replacement proceedings in so far as they relate to the SSA.

On the face of these orders, FM is not jointly and severally liable to any of the 1st to 5th Respondents *and* any of the 6th to 8th Respondents at the same time. FM's obligations under the Final Award to the 1st to 5th Respondents can therefore be severed cleanly from its obligations to the

6th to 8th Respondents, with the order at [227(g)] being the only enforceable order by the 1st to 5th Respondents against FM as far as the Final Award is concerned.

228 We have perused the other four awards sought to be enforced and are satisfied that the orders contained therein are either directed at parties other than FM and therefore do not affect the current proceedings, or if they are directed at FM, impose obligations on FM *vis-à-vis* the 6th to 8th Respondents that are severable from the orders as between FM and the 1st to 5th Respondents. As for the costs of the Arbitration as well as the interest for which FM was held by the Tribunal to be liable to the 6th to 8th Respondents – whether jointly and severally with Ayunda and DV or otherwise (see the award dated 5 February 2010 and the award dated 3 August 2010) – those sums shall also be unenforceable.

229 A final clarification is apposite. Both sides in their respective applications have either sought to enforce or refuse enforcement of all five awards. We would point out that one of those awards, the Award on Preliminary Issues, contains, *inter alia*, the Tribunal's preliminary ruling on jurisdiction. In *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*"), this court thought it significant that the Model Law adopted a narrow definition of "award", *ie*, "one that does not expressly include a ruling on jurisdiction as an 'award'" (at [62]). Given that certain types of recourse such as setting aside only apply to awards properly so-called, there is an issue as to whether the Singapore courts can enforce or refuse enforcement of preliminary rulings on jurisdiction which are couched as awards. We refrain from expressing any view on this not only because no submissions were made, but also in the light of the fact that neither FM nor Astro contested the other's application on the basis that the Award on Preliminary Issues (or at least the preliminary ruling on jurisdiction) was not subject to recourses only available to awards as construed by *PT Asuransi*. Indeed, Astro sought leave to enforce the Award on Preliminary Issues as well as the other awards. It is also not necessary for us to go further into this because whatever might have been the position in relation to the Award on Preliminary Issues, there was never any question that the remaining awards were entirely amenable to the orders we have made. Those awards prescribe the payment obligations of FM. In so far as they derive their jurisdictional basis from the Award on Preliminary Issues, it is evident from our analysis that the Award on Preliminary Issues was wrong. Accordingly, there was no jurisdictional basis for any of the other awards that were made in favour of the 6th to 8th Respondents.

Conclusion

230 In summary, FM's appeal is therefore allowed to the extent that leave to enforce the Awards in both OS 807/2010 and OS 913/2010 is refused in relation to the Tribunal's orders in the Awards that purport to apply as

between FM and the 6th to 8th Respondents. The joinder of the 6th to 8th Respondents to the Arbitration had been predicated on a mistaken construction of the 2007 SIAC Rules. The Awards rendered in their favour therefore suffer from a deficit in jurisdiction and are refused enforcement pursuant to s 19 of the IAA. As FM had not waived and is not otherwise estopped from raising its valid objection to the Tribunal's jurisdiction, FM was within its rights to challenge the enforcement of the Awards by the 6th to 8th Respondents. As such, leave to enforce is granted only in relation to the Tribunal's orders which are exclusively directed at the 1st to 5th Respondents, namely those set out at [227(g)] above.

231 If there are disagreements over the exact apportionment of costs and interest awarded in the Arbitration, the parties may apply to this court for clarification. FM will have its costs for these appeals and of the hearing below, to be taxed if not agreed. The usual consequential orders will apply.

232 We record our appreciation to both counsel for the clear, thorough and complete manner in which they assisted us.

Reported by Jonathan Yap and Nicholas Poon.

Bombay High Court
Avitel Post Studioz Ltd & Ors vs Hsbc Pi Holdings (Mauritius) Ltd on 31 July, 2014

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.196 OF 2014
IN
ARBITRATION PETITION NO.1062 OF 2012

Avitel Post Studioz Ltd & ors. .. Appellants
vs.
HSBC PI Holdings (Mauritius) Ltd. .. Respondent.

Mr. Saurabh Kirpal with Mr. Z.B.Kamdin i/b. Pandya & Co. for the Appellants.
Dr. Virendra Tulzapurkar, Senior Advocate with Mr.N.H. Seervai, Senior Advocate, Mr. Nikhil Sakhardanade, Mr. Rohan Rajadhyaksha, Mr. A. Iyer, Mr. Agarwalla and Ms Priyanka Shetty

i/b AZB & Partner for Respondent.

CORAM: MOHIT S. SHAH, C.J. &
M.S.SONAK, J.

JUDGMENT RESERVED ON : 19 June 2014

JUDGMENT PRONOUNCED ON : 31 July 2014

JUDGMENT (PER M.S.SONAK, J.):

1] This appeal is directed against the judgment and order dated 22 January 2014 in Arbitration Petition No.1062 of 2012 instituted under Section 9 of the Arbitration and Conciliation Act, 1996 (the Act) restraining the appellants from withdrawing the amounts retained by the Corporation Bank in the appellants' account to the extent of USD 60 Million and in the event the balance in the said account with the Corporation Bank is less than USD 60 Million, a direction to the appellants to deposit the short 1 of 40 2 j-196.14 fall in the said account, so as to maintain the balance of USD 60 Millions. The admitted position is that on the date when the impugned judgment and order came to be passed, the amount in the appellants Corporation Bank account was in the range of Rs.60 Crores or USD 10 Million, which in terms of the impugned judgment and order, the appellants have been restrained to withdraw. Further, the impugned judgment and order issues an interim mandatory injunction to deposit the short fall, i.e., about USD 50 Million in the Corporation Bank within a period of four weeks from the date of the order.

2] The factual matrix in which the aforesaid judgment and order came to be made has been set out in great details in the impugned judgment and order itself. However, a brief reference to some pertinent facts and circumstances is necessary for the purposes of appreciating the challenges raised in the present appeal.

3] Appellant No.1 is a company incorporated under the provisions of the Companies Act, 1956 having its registered office at Mumbai (hereinafter referred to as "Avitel India"). Appellant No.1 is stated to be engaged in the business of production of animated works, media past production and film restoration services. Appellant No.1 is a parent company in the Avitel Group, inasmuch as it owns 100% share in Avitel Holdings Limited (hereinafter referred to as "Avitel Mauritius"), which in turns owns 100% share in Avitel Post Studioz FZ LLC (hereinafter referred to 2 of 40 3 j-196.14 as "Avitel Dubai"). Avitel Dubai was the entity represented by the Avitel India and respondent Nos.2 to 4 (hereinafter referred to as "Jains").

4] Respondent No.1 is a company incorporated under the laws of Mauritius and has its registered office at Mauritius (hereinafter referred to as "HSBC"). Respondent No.1 is an investment holding company for the Principal Investments Asia Division of HSBC.

5] It is the case of HSBC that the appellants had represented to the HSBC that the Avitel Group was at a very advanced stage of finalizing a contract with British Broadcasting Corporation (BBC) and had signed a MOU for the said purpose to convert the BBC's film library from 2D to 3D and that such contract was expected to generate a revenue of USD 300 Million in the first phase, which revenue was expected to ultimately increase upto USD 1 Billion. On basis of such representations, which the appellants knew as being false, the appellants induced the HSBC to invest an amount of USD 60 Millions for purchase of equipments to specifically enable Avitel Dubai to service the BBC contract. The appellants also represented to the HSBC that the Avitel Group had the benefit of number of material contracts, mainly with three customers, which contracts were valued in the range of USD 658 Million. Again this representation was false to knowledge of the appellants and was made solely for the purposes of inducing the HSBC to make the aforesaid investment in the 3 of

40 4 j-196.14 Avitel Group.

6] On 21 April 2011, the appellants and the HSBC entered into a share subscription agreement, in terms whereof the HSBC subscribed 7.8% of equity capital in Avitel India. This was followed by a share holders agreement dated 11 May 2011.

7] Upon the HSBC acquiring knowledge that the BBC had not entered into any contract with Avitel Group and all the representations held out by the appellants in that regard as also in regard to material contracts with three customers being false and made for sole purposes of inducing the HSBC to make an investment of USD 60 Millions, the HSBC on 11 May 2012 invoked the arbitration agreements under the Share Subscription Agreement (SSA) and Share Holders Agreement (SHA) and sought for emergency relief under the provisions of Singapore International Arbitration Council Rules 2010 (SIAC).

8] The Arbitral Tribunal at Singapore passed two unanimous final partial awards dismissing the jurisdictional challenges raised by the appellants on 17 December 2012 and15th March 2013. The jurisdictional awards, inter alia, hold as under:-

> (a) that the Singapore law and not the Indian law was the governing law of the arbitration agreement;
>
> (b) that under the Singapore law, allegations of fraud and/or complicated issues of fact and law are 4 of 40 5 j-196.14 arbitrable;
>
> (c) that the Arbitral Tribunal has jurisdiction to adjudicate the disputes between parties under the SSA and SHA.

9] The Arbitral Tribunal at Singapore has also granted some interim measures in favour of the HSBC and against the appellants on 28 and 29 May 2012. In regard to the SHA, the Arbitral Tribunal has passed unanimous final award on 3 November 2013. In regard to the SSA, final hearing before the Arbitral Tribunal at Singapore has concluded on 6 November 2013 and final award is awaited.

10] In the meantime, the HSBC instituted proceedings under Section 9 of the Act seeking inter alia for the disclosures & freezing of the appellants' bank accounts and further to direct the appellants to deposit amounts to the extent of claims raised by the HSBC, approximately to the extent of USD 60 Million in regard to SSA and SHA, in which the impugned judgment and order dated 22 January 2014 came to be passed.

11] We have heard Mr.Saurabh Kirpal, learned counsel for the appellants and Dr. Virendra Tulzapurkar, learned senior counsel for the respondent at great length. With consent of learned counsel for the parties, we propose to dispose of the appeal finally.

12] Mr. Kirpal, learned counsel for the appellants has

broadly made the following submissions in support of the appeal:

> (a) That the HSBC is merely a disgruntled share holder, but not a creditor in respect of appellant No.1. The investment of USD 60 Million made by the HSBC ceased to have character of 'investment' and was effectively transferred into capital of the appellant No.1 consequent upon issue and allotment of shares to the HSBC. Such capital was in fact utilized by appellant No.1 for purchase of equipments. Since the case of HSBC is that, post investment, there has been misuse or siphoning of the capital of appellant No.1 company, the HSBC can at highest initiate proceedings under sections 397 and 398 of the Companies Act, 1956 for mismanagement. Further, as a share holder, the HSBC can claim no rights in the assets of the company, which is precisely what the HSBC seeks to achieve by initiating arbitration proceedings and application for the interim relief under section 9 of the Act. This according to Mr. Kirpal is clearly impermissible, both in principle and upon authority of the Supreme Court in Hindustan Lever Employees v. Hindustan Lever Ltd. (1995) Suppl (1) SCC 499 ;

(b) The law governing arbitration agreement in the present case, is the Indian law. This is clear upon reference to clauses 15 and 16 of the SSA and 6 of 40 7 j-196.14 corresponding clauses of SHA. In such circumstances, the arbitration proceedings in Singapore are clearly without jurisdiction. By instituting proceedings under section 9 of the Act, the HSBC virtually seeks indirectly to enforce the interim awards passed by the Arbitral Tribunal at Singapore. Since the arbitration proceedings at Singapore are without jurisdiction, the Indian Courts ought not to entertain the application for interim relief under section 9 of the Act;

(c) In any case and without prejudice, it was submitted that the proceedings under section 9 of the Act virtually seek enforcement of emergency award dated 29 May 2012 by which the appellants' bank accounts were sought to be frozen and directions issued to secure the claim of the HSBC. Relying upon the decision of the Delhi High Court in HFCL v. UOI (OMP No.464 of 2009) decided on 18 August 2009, it was submitted that a petition under section 9 of the Act for enforcement of an award is clearly not maintainable;

(d) Assuming that arbitral proceedings were competent in Singapore, for a foreign award to be enforced or executed in India, it is necessary that the conditions of enforceability set out in section 48 of the Act are complied with. In terms of section 48(2) (a) of 7 of 40 8 j-196.14 the Act, no award can be enforced if, the subject matter itself is not capable of settlement by arbitration under law of India. In the present case, the HSBC has made serious allegations of fraud and criminality and it is well settled that the issues of such nature are not capable of settlement by arbitration. It is submitted that if ultimately the awards that may be made in Singapore are incapable of being enforced in India, then surely there is no case made out for even considering grant of interim reliefs by resort to section 9 of the Act, particularly as such interim reliefs are meant to be only in aid of final relief. If no final relief can be enforced in India, then there is obviously no question of the Indian Courts entertaining in plea for grant of interim relief by resort to section 9 of the Act;

(e) Even otherwise, on merits the impugned judgment and order is vulnerable, broadly on the following grounds:

> (i) In matters where serious allegations of fraud have been made, it is imperative that there must be some material and evidence to make good such allegation and mere pleadings are not sufficient. Further, such allegations, even in a civil dispute, must be established beyond reasonable doubt and not merely on basis of preponderance of 8 of 40 9 j-196.14 probability;

(ii) On the basis of the allegations of fraud made in the HSBC claim, the HSBC lodged a first information report with the Economic Offences Wings, Mumbai (EOW). The EOW, upon detailed investigation has submitted a report under section 173 of Code of Criminal Procedure (Cr.P.C.) recording a conclusion that no case of fraud has been made out against the appellants. Learned Single Judge, ought to have considered this report and on the said basis ruled that no prima-facie case has been made out by the HSBC for grant of any interim measures;

(iii) In the present case, particularly since no special circumstances have been pleaded or established, measure of damages cannot be the amount of loss ultimately stated to be sustained by the HSBC. The measure of damages, can at the highest be the difference between the price which the HSBC paid for shares and the price which HSBC would have received, had it sold the shares in the market forthwith, after the purpose. This principle, which has been laid down by the Supreme 9 of 40 10 j-196.14 Court in M/s. Trojan and C. v. RM.N.N.

Nagappa Chettiar - AIR 1953 Supreme Court 235, has been entirely ignored whilst passing the impugned judgment and order directing the appellants to deposit USD 60 Million, which represents the entire share price paid by the HSBC, allegedly on the basis of fraudulent representation by the appellants;

(iv) In matters of grant of interim mandatory injunction, the applicant has to satisfy the Court that its case is of higher standard than a prima facie case which is normally sufficient for grant of prohibitory injunction. This much has been laid down by the Supreme Court in Dorab Cawasji Warden vs. Coomi Sorab Warden & ors - (1990) 2 SCC 117. Inasmuch as, this principle has been

overlooked, the impugned judgment and order calls for interference;

(v) The impugned order virtually grants final relief to HSBC, at the interim stage. This is clearly impermissible.

13] Dr. Tulzapurkar, learned senior counsel for the HSBC, at the outset, submitted that :

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(a) The HSBC claim was not in its capacity as a share holder. The HSBC claim, was basically in the capacity of an entity which was induced to enter into a contract of investment, without free consent. The consent was not free because it was caused by the fraud and misrepresentation as defined under sections 17 and 18 of the Indian Contract Act, 1872 or principles analogous thereto. In such circumstances, it was submitted that there was no question of resort to the provisions of sections 397 and 398 of the Companies Act, 1956;

(b) The law governing arbitration agreement in the present case is the Singapore law and not the Indian law. The Arbitral Tribunal at Singapore, has already passed two unanimous final partial awards dated 17 December 2012 and 15 March 2013 holding so. Despite opportunity, the appellants have not chosen to challenge the same and consequentially this issue of jurisdiction has attained finality as between the HSBC and the appellants. Accordingly, it was submitted that by applying principle of 'issue estoppel' the appellants are not entitled to even raise the issue of jurisdiction in the proceedings under section 9 of the Act. The provisions of section 9 of the Act clearly entitle a party to an arbitration agreement to seek interim measures before or during arbitral proceedings and therefore, 11 of 40 12 j-196.14 there is no jurisdictional infirmity whatsoever in learned Single Judge entertaining the application under section 9 of the Act;

(c) Relying upon several judgments of the Supreme Court, including, in particular, the recent decision in Swiss Timing Limited vs. Organising Committee, Commonwealth Games (Arbitration Petition No.34 of 2013) decided on 28 May 2014, it was submitted that even under the Indian law, there is no bar to the issue of fraud being arbitrable. The previous decisions of the Supreme Court in N. Radhakrishnan vs. Maestro Engineers and others- (2010) 1 SCC 72 and others, which suggest a different view, are clearly distinguishable and in any case have been held to be per incuriam by the Supreme Court itself in Swiss Timing Ltd (supra). As such, Dr. Tulzapurkar submitted that there shall be no ground to resist the enforcement of the awards that may be made by the Arbitral Tribunal at Singapore, as and when occasion would arise for such enforcement;

(d) There is no requirement to establish allegations of fraud beyond reasonable doubt in civil proceedings. The test to be applied is and continues to be that of preponderance of probability. Applying such test, 12 of 40 13 j-196.14 learned Single Judge has rightly come to the conclusion that fraud was indeed practised by the appellants upon the HSBC, which fraud vitiated the consent for the contract of investment;

(e) In the context of Economic Offences Wing report under section 173 of the Code of Criminal Procedure (Cr.P.C.), it was submitted that the same was rightly not relied upon or considered by the learned Single Judge, since in terms of the provisions contained in section 190 of Cr.P.C., as also several authorities, upon which reliance was placed, there arises no question of taking cognizance of such report in civil proceedings. The Magistrate to whom such report is made is empowered to take cognizance of the offence irrespective of the view expressed in the report or to direct the police to carry out further investigation in the matter;

(f) Relying upon the authority of the Supreme Court in Wander Ltd. & anr. vs. Antoz India P. Ltd. - 1990 (supp) SCC 727, it was submitted that as an appellate court, we should desist reassessment of the material on record and seek to reach a conclusion different from the one reached by the learned Single Judge, particularly since the learned Single Judge has reasonably and in a judicious manner considered the material on record and exercised discretion by way of 13 of 40 14 j-196.14 grant of interim measures.

14] The rival contentions now fall for our evaluation.

15] We are unable to accept Mr. Kirpal's contention that the HSBC, being merely a disgruntled share holder could only have resorted to the provisions relating to operation and mismanagement of minority share holders in terms of sections 397 and 398 of the Companies Act, 1956. In the present case, the HSBC is primarily concerned with misrepresentation and fraud, by reason of which the HSBC was induced to enter into a contract of investment with the appellants and part with an amount of approximately USD 60 Millions in pursuance thereof. No doubt, there is reference to siphoning of capital, but that is mainly in support of the allegation of fraud and misrepresentation. This is not a case where the HSBC accepts that the contract by which it was induced to make the investment and purchase shares was legal and valid and its grouse concerns only the subsequent acts of mismanagement or otherwise by major shareholders of appellant No.1. The HSBC questions the very contract, in terms whereof the HSBC has made an investment of USD 60 Millions, as being vitiated on account of there being no free consent due to fraud and misrepresentation. The decision in Hindustan Level Employees Union (supra), does not even remotely deal with a situation of present kind. Accordingly, reliance placed thereupon is clearly misplaced.

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16] On the issue of the law governing arbitration

agreement being the Indian law, Mr. Kirpal invited our attention to clause 15 of the SSA, which reads thus:

> "15. Governing Law: This Agreement shall be governed by and construed in accordance with the laws of the Republic of India without regard to applicable conflict of laws principles".

The counsel submitted that the law of arbitration agreement, unless specified to the contrary will follow the governing law of contract. There is absolutely no indication in both SSA and SHA that the law of arbitration agreement in the present case, ought to be any law other than the governing law, i.e., Indian law. In this regard, counsel placed reliance upon the decisions of the Supreme Court in National Thermal Power Corporation (NTPC) vs. Singer Company & ors - (1992) 3 SCC 551 and Sumitomo Heavy Industries Ltd. vs. ONGC Ltd.& ors (1998) 1 SCC 305.

17] On the other hand, Dr. Tulzapurkar invited our attention to clause 16 of the SSA, which reads thus:-

> "Clause 16
>
> 16. DISPUTE RESOLUTION 16.1 Arbitration 16.1.1 Any dispute, controversy or claim arising out of or in connection with this Agreement, including any question regarding its 15 of 40 16 j-196.14 existence, validity, interpretation, breach or termination shall be referred to and finally resolved by binding arbitration at the Singapore International Arbitration Centre ("SIAC") in accordance with the Singapore International Arbitration Rules in force at the date of this Agreement ("Rules"), which Rules are deemed to be incorporated by reference into this clause and as may be amended by the rest of this clause.
>
> 16.1.2 The seat of arbitration shall be Singapore ...
>
> 16.1.6ig The parties waive any right to apply to any court of law and/or other judicial
>
> authority to determine any preliminary point of law and/or review any question of law and/or the merits, in so far as such waiver may be validly made. The parties shall not be deemed, however, to have waived any right to challenge any award on the ground that the tribunal lacked substantive jurisdiction and/or the ground of serious irregularity affecting the tribunal, the proceedings or the award to the extent allowed by the law of the seat of the arbitration.

16.1.7 Nothing, in this Clause 16.1 shall be construed as preventing any party from seeking conservatory or interim relief in any court of competent jurisdiction ...

16.4 Application of Arbitration Act Save for section 9, Part I of the Indian Arbitration and Conciliation Act, 1996 ("the Arbitration Act"), the provisions of Part I of the Arbitration Act shall not apply to the terms of this Agreement."

16 of 40 17 j-196.14 18] In particular, Dr.Tulzapurkar emphasized that the parties had in terms agreed that any dispute controversy or claim arising out of or in connection with the agreements, including any question regarding its existence, validity, interpretation, breach or termination shall be referred to and finally resolved by binding arbitration at the SIAC in accordance with the SIAC Rules and that the seat of arbitration shall be at Singapore.

19] Dr. Tulzapurkar, with reference to Clause 16.4, submitted that the parties had clearly agreed that save for section 9 of the Act, Part-I of the Act shall not apply to the terms of this agreement. Thus according to Dr. Tulzapurkar, the parties to the arbitration agreement had clearly specified that the law of arbitration agreement will be the Singapore law, notwithstanding the position that the governing law for the purposes of the agreement is the law of Republic of India.

20] In any case, Dr.Tulzapurkar submitted that the appellants ought to be estopped from even raising such an issue, in the light of jurisdictional awards dated 17 December 2012 and 15 March 2013, which hold in clear terms that the Singapore law and not the Indian law was the governing law for the arbitration agreement and the said jurisdictional awards have attained finality, for want of challenge by the appellants. Dr. Tulzapurkar, invoked the principle of 'issue estoppel' and relied upon the decisions in Indo-Pharma Pharmaceutical Works Private Limited vs. Pharamceutical Company of India - 1977 (80) BLR 73, Ishwar Dutt 17 of 40 18 j-196.14 vs. Land Acquisition Collector and anr. - (2005) 7 SCC 190, M.Nagabhushana vs. State of Karanataka & ors. - (2011) 3 SCC 408 and Bhanu Kumar Jain vs. Archana Kumar & anr. - (2005) 1 SCC 787, which lay down that a judgment after a proper trial by the Court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should forever set the controversy at rest. This means that when a proceeding based on a particular cause of action has attained finality, the principle of res judicata which is a specie of the principle of estoppel should be fully applied.

21] The principle of issue estoppel has been explained in Wade & Forsyth on Administrative Law, 9th Edition at page 243 and quoted by the Supreme Court in Ishwar Dutt (supra), as follows;

> "One special variety of estoppel is res judicata. This results from the rule which prevents the parties to a judicial determination from litigating the same question over again, even though the determination is demonstrably wrong. Except in proceedings by way of appeal, the parties bound by the judgment are estopped from questioning it. As between one another, they may neither pursue the same cause of action again, nor may they again litigate any issue which was an essential element in the decision. These two aspects are sometimes distinguished as 'cause of action estoppel' and 'issue estoppel'.

22] In our opinion, there is no necessity to decide the submission premised upon the principle of issue estoppel in the present proceedings. This is because we are satisfied that in the 18 of 40 19 j-196.14 present case the law governing arbitration would be the law of Singapore. Clause 15 of the SSA, provides that agreement shall be governed by and construed in accordance with the law of Republic of India without regard to applicable conflict of laws principles. Clause 16 of SSA, provides that the seat of arbitration shall be at Singapore and the arbitration shall be in accordance with SIAC Rules. Further, Clause 16.4 of the SSA makes it clear that save and except section 9 of the Act, Part-I thereof is not to apply to the terms of the arbitration agreement. The Supreme Court in National Thermal Power Corporation (supra) and Sumitomo Heavy Industries Ltd. (supra) has held that normally the law of arbitration agreement is the same as the substantive law of contract, unless a different intention is either expressed or implied. In light of categorical provisions contained in SSA and SHA, it is clear that the parties have expressly or in any case by implication agreed that the law of arbitration shall be the SIAC Rules, i.e., laws of Singapore.

23] In Bharat Aluminium Co. Ltd. vs. Kaiser Aluminium Technical Services Inc. - 2012 (9) SCC 552, the Supreme Court has held that the seat of arbitration would determine the governing law of arbitration agreement. In paragraph 197 of the said decision however, the Supreme Court has held that same will apply with prospective effect. A Division Bench of this Court in Konkola Coppper Mines (PLC) vs. Stewarts and Lloyds of India Limited 2013 (5) Bom CR 29 upon consideration of the decision in Bharat Aluminium Co. Ltd. (supra) has held that the Supreme 19 of 40 20 j-196.14 Court has merely declared the law as it always stood. In the present case, there is no dispute that the seat of arbitration is at Singapore.

24] In any case, if the entire decision of the Supreme Court in Bharat Aluminium (supra) is to be regarded as having only a prospective effect, even then the principles in cases of National Thermal Power Corporation (supra) and Sumitomo Heavy Industries Ltd. (supra), would apply. In fact, this is the case set up by the appellants themselves. Therefore, even by applying the principles in the said cases to the facts and circumstances of the present case, we cannot fault the decision of the learned Single Judge that the parties either expressly, or in any case by implication intended to exclude the applicability of Part-I of the Act, save and except section 9 of the Act thereof. This is clear from reference to Clause 16 of, as well as analogous clauses in, the SHA.

25] For all the aforesaid reasons, we see no merit in the submission of Mr. Kirpal that the law governing arbitration in the present case, is the Indian law.

26] This takes us to the next contention of Mr. Kirpal that the proceedings under section 9 of the Act, virtually seek enforcement of the emergency award dated 29 May 2012, by which interim measures, similar to those now granted by the learned Single Judge by the impugned judgment and order, came 20 of 40 21 j-196.14 to be granted in favour of HSBC. Mr. Kirpal, relying upon the decision of the Delhi High Court in Himachal Futuristic Communication Ltd. (HFCL) vs. Union of India (OMP No.464 of 2009) decided on 18 August 2009 submitted that a petition under section 9 for enforcement of an award is clearly not maintainable.

27] In HFCL (supra), learned Single Judge of Delhi High Court was basically faced with a situation where interim measures akin to those contemplated under Order 38 Rule 5 of CPC were applied after making of arbitral award, but before its enforcement. In this context, the learned Single Judge of the Delhi High Court observed that the applicant for interim measures, had neither pleaded nor established any of the ingredients necessary for invoking the provisions of Order 38 Rule 5 of the CPC as against the Union of India. In that context, it was observed that powers under section 9 of the Act are not the same as in execution proceedings, where different parameters would apply. That apart, the learned Single Judge of the Delhi High Court was not concerned with a clause akin to clause 16.4 of SSA, in the present case which specifies that the save for section 9, Part-I of the Act shall not apply to the terms of the agreement. The parties in the present case have specifically retained unto themselves the right to invoke section 9 of the Act in matters of seeking interim measures in Indian Courts. Section 9 of the Act provides that interim measures can be applied for before or during arbitral proceedings or at any time after making of the arbitral award.

28] It is to be noted that even without there having been

any emergency or interim awards from the Arbitral Tribunal at Singapore, in light of the provisions contained in clause 16.4 SSA, the HSBC could have invoked the provisions of section 9 of the Act. Merely because, in the present case such emergency or interim awards have been made by the Arbitral Tribunal at Singapore, that would make no difference, particularly when it comes to determination of the jurisdiction of the Indian Courts to grant interim measures by resort to section 9 of the Act. Ultimately, it has to be borne-in-mind that we are dealing with an international commercial arbitration, where perhaps the emergency or interim awards may be enforceable in other parts of the globe, without any further ado, on account of inapplicability of restrictions akin to those contained in sections 46 to 49 of the Act. The decisions in HFCL (supra) is clearly distinguishable, particularly as no such issues at all arose in the said case.

29] Mr. Kirpal, then laboured extensively upon his submission that in terms of section 48(2)(a) of the Act, any award that may be passed by the Arbitral Tribunal at Singapore would be incapable of being enforced in India, as according to him the subject matter of the present dispute was not at all capable of settlement by arbitration under the law of India. In this regard, Mr. Kirpal submitted that the HSBC has leveled serious allegations of fraud and even impersonation. Based upon the very same allegations, the HSBC even went to the extent of lodging a First Information Report (FIR)

against the appellants invoking the 22 of 40 23 j-196.14 provisions of sections 419, 420, 467, 468 and 120-B of Indian Penal Code (IPC). These provisions deal with offences of cheating by impersonation, forgery for the purposes of cheating, and criminal conspiracy. Mr. Kirpal submitted that it is well settled that issues of serious allegations of fraud and criminality are incapable of settlement by arbitration under the law of India. Therefore, in terms of section 48(2)(a), if any final award made by the Arbitral Tribunal at Singapore is incapable of being enforced in India, then surely, there arises no question of granting any interim measures by the Indian Courts, particularly as interim measures are meant to be only in aid of final relief. Mr. Kirpal placed reliance on the decision of the Supreme Court in Afcon Infrastructure Ltd. v. Cherian Varkey Constructions Pvt. Ltd. (2010) 8 SCC 24, Booz Allen and Hamilton v. SBI Home Finance (2011) 5 SCC 532, N.

Radhakrishnan (supra)and Goldstar metal Solutions v. Dattaro G.

Kavtankar in Arb. Appeal No.12 of 2013 dt. 13 March 2013, which according to him lay down that under the arbitration laws of India, serious allegations of fraud or criminality are incapable of settlement by arbitration.

30] Having considered the aforesaid submissions and having perused the decisions as aforesaid, we are of the opinion, that said judgments do not lay down any general or peremptory rule that allegations of fraud, in all cases, are incapable of settlement by arbitration under the law of India. There is a real though subtle difference between 'suitability' and 'arbitrability' in the context of subject matter of disputes. In order to be conscious 23 of 40 24 j-196.14 of this difference, regard shall have to be had to the nature of allegations, the context in which the same are made and the ultimate relief which is being applied for on basis of such allegations. If the subject matter of dispute has an eminently civil profile, then it may not be proper to conclude that the subject matter of dispute is incapable of settlement by arbitration, merely because fraud or misrepresentation as defined under Section 17 and 18 of the Indian Contract Act, 1872 may have been alleged as one of the grounds for questioning the contract.

31] In the context of provisions of Contract Act 1872, fraud and misrepresentation are some of the well accepted grounds for questioning validity of a contract by the entity, upon whom the same are alleged to have been practised. Section 10 of the Contract Act, 1872 provides that all agreements are contracts, if they are made by free consent of the parties, competent to contract, for lawful consideration, with lawful object which is not expressly declared to be void. Therefore, 'free consent' is one of the essential ingredients for a valid contract under the Contract Act. Section 13 of the Contract Act provides that two or more persons are said to consent, when they agree upon the same thing in the same sense. Section 14 of the Contract Act provides that a consent is said to be 'free' when it is not caused, inter alia by 'fraud' as defined under section 17 or 'misrepresentation' as defined under section 18 of the Contract Act. Sections 17 and 18 of the Contract Act define in great details, the expressions 'fraud' and 'misrepresentation'. The principle difference between fraud and 24 of 40 25 j-196.14 misrepresentation is that in cases of fraud the person, who makes the representation does not himself believe it to be true, whilst in cases of misrepresentation, the person himself believes it to be true. Thus, 'fraud' and 'misrepresentation' as defined under sections 17 and 18 of the Contract Act are well accepted grounds which would vitiate 'free consent' and consequently

the contract itself.

Therefore, as a general rule, it cannot be said that the moment allegations of fraud and misrepresentation are made in the context of a contract, the subject matter of the dispute is rendered incapable of resolution by arbitration.

32] In Booz Allen and Hamilton (supra), upon which reliance was placed by Mr. Kirpal, the Supreme Court has noted with approval its earlier decision in Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan, (1999) 5 SCC 651, in which the contention that a dispute relating to specific performance of a contract cannot be referred to arbitration, was repelled. In the said decision, the Supreme Court did observe that certain disputes like criminal offences of a public nature, disputes as to status such as divorce cannot be referred to arbitration. It was further held that if in respect of the facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (Keir v. Leeman, (1846) 9 QB 371). Similarly, it was held that a husband and a wife may refer to arbitration, the terms on which they shall separate, because they can make a valid agreement between themselves on that matter.

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33] In paragraph 23 of the decision in N. Radhakrishnan

(supra), the Supreme Court has held that the facts of the said case do not warrant the matter to be tried and decided by the arbitrator, rather, for furtherance of justice, it should be tried in a court of law which would be more competent and have the means to decide such complicated matters involving various questions and issues raised in the dispute. Similarly, in paragraph 26, the Supreme Court after noticing the allegation made, has held that the disputes cannot be 'properly' dealt with by the arbitrator. It does appear therefore, that the Supreme Court was concerned with the issue of 'suitability' rather than 'arbitrability' of the disputes.

34] In any case, the Supreme Court in Swiss Timing Limited (supra), upon analysis of its decision in N. Radhakrishnan (supra) has held that the decision in N. Radhakrishnan (supra) is 'per incuriam' on two grounds:

> (i) Firstly, the judgment in Hindustan Petroleum Corporation Limited vs. Pink City Midway Petroleums, (2003) 6 SCC 503 though referred has not been distinguished but at the same time is not followed also. The judgment in P. Anand Gajapathi Raju v.

P.V.G. Raju (dead), (2000) 4 SCC 539 was not even brought to the notice of this Court. Therefore, the same has neither been followed nor considered;

(ii) Secondly, the provision contained in section 16 of the Arbitration Act, 1996 were also not brought to the notice of the this Court.

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35] Mr. Kirpal, however contended that the decision of the

Supreme Court in Swiss Timing (supra) was rendered by a Single Judge whereas the decision in N.Radhakrishnan (supra) is by a bench of two Judges and therefore we must follow the principle laid down in N.Radhakrishnan(supra).

36] Mr. Kirpal, then invited out attention to paragraph 35 in the decision of Swiss Timing (supra), wherein it is observed thus:

"35.

ig The purpose of the aforesaid solitary rule is to avoid embarrassment to the accused. In contrast, the findings recorded by the arbitral tribunal in its award would not be binding in criminal proceedings. Even otherwise, the Constitution Bench in the aforesaid case has clearly held that no hard and fast rule can be laid down that civil proceedings in all matters ought to be stayed when criminal proceedings are also pending. As I have indicated earlier in case the award is made in favour of the petitioner herein, the respondents will be at liberty to resist the enforcement of the same on the ground of subsequent conviction of either the Chairman or the officials of the contracting parties."

.. (emphasis supplied) 37] Based upon the aforesaid italicised portion, Mr. Kirpal submitted that enforcement of any arbitral award, in which allegations of fraud are upheld, can always be resisted. Therefore, according to Mr. Kirpal, any award that may be made by the Arbitral Tribunal at Singapore upholding the HSBC allegation of fraud against the appellants, would be unenforceable in India in 27 of 40 28 j-196.14 the wake of categorical provisions contained in section 48(2)(a) of the Act. The

> parameters of determination at the stage of reference to arbitration and at the stage of enforcement of an award are different and distinct. This according to Mr. Kirpal, is clear by reference to the aforesaid italicised portion of paragraph 35 in Swiss Timing (supra).

38] In the aforesaid regard, we must note that though the decision in Swiss Timing (supra) has been delivered by a Single Judge of the Supreme Court, nevertheless, the same is after taking into consideration the earlier decision in N.Radhakrishnan(supra).

There are two specific reasons indicated as to why in its opinion, the decision in N.Radhakrishnan (supra) is 'per incuriam'. In such circumstances, it is not open for us to follow the dictum in N.Radhakrishnan (supra) even if we were to agree with Mr. Kirpal that the said decision lays down absolute proposition that issues of fraud are per se non-arbitrable.

39] Again, based upon the italicised portion of paragraph 35 in the decision of Swiss Timing (supra), we are not prepared to accept that some broad proposition with regard to difference in parameters at the stage of reference and at the stage of enforcement has been laid down by the Supreme Court. In fact, such a broad proposition may run counter to the decision of the Supreme Court in SBP & Co. v. Patel Engineering Ltd.- (2005) 8 SCC 618 and Chloro Controls India Private Limited v. Severn Trent 28 of 40 29 j-196.14 Water Purification INC & ors.-(2013) 1 SCC 641. But however, we choose not to dilate on this issue, as in our opinion, the same really does not arise for our consideration in the facts and circumstances of the present case.

40] The HSBC, in its claim statement before the Arbitral Tribunal at Singapore has alleged 'misrepresentation' and 'breach of warranty' on the part of Avitel India and also sought for indemnification from the 'Jains' in the aforesaid connection. The HSBC, in paragraphs 73 to 83 of the claim statement has set out the representations held out by Avitel India and the Jains, which induced the HSBC to enter into the transaction documents and invest USD 60 Million. It has been pleaded that all such representations were false and misleading to the knowledge of Avitel India and Jains. There is reference to contracts represented as existing between Avitel India and Kinden, when in fact Kinden was not even in existence during the period between 13 October 2010 and 25 October 2011, when HSBC invested in the Avitel Group. There is similar reference to contracts, represented as existing between Avitel and Purple Passion, which again was stated as dissolved on 23 November 2010 and therefore not in existence when HSBC invested in the Avitel Group. There is reference to the role played by one John Linwood or rather the person who is alleged to have played the role of John Linwood in the context of BBC Contract, which ultimately never materialized. There is reference to representations held out in form of tax returns, accounts and legal compliances which were misleading 29 of 40 30 j-196.14 and untrue, to the knowledge of Avitel and Jains. On such basis, HSBC has raised a claim for damages which is presently being adjudicated by Arbitral Tribunal at Singapore. In fact, even the final arguments have been concluded in November 2013 and the final award is now expected at any time.

41] If the aforesaid allegations/pleadings as set out in the claim before the Arbitral Tribunal at Singapore are taken into consideration, then they establish an eminent civil profile of the disputes

that has arisen between the parties. The allegations of fraud and misrepresentation are primarily in the context of fraud and misrepresentation as defined under sections 17 and 18 of the Contract Act or in any case principles analogous thereto. As noted earlier, these are well accepted and valid pleas for questioning a contract on the ground that such agreement was made without free consent. Making of such allegations does not, in our opinion, render the subject matter of dispute to be incompetent of settlement by arbitration under the law of India. Besides, there is no dispute whatsoever that the law governing arbitration agreement in the present case is the Singapore law and that under the Singapore law there is no bar to the arbitral adjudication upon issues of fraud and misrepresentation.

42] For all the aforesaid reasons and in facts and circumstances of the present case, we are unable to find fault with the decision of the learned Single Judge on the issue of non arbitrability of allegations of fraud and misrepresentation.

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Accordingly, we see no merit in Mr. Kirpal's submission based upon non-enforceability of any award that may eventually be made by the Arbitral Tribunal at Singapore upholding allegation of fraud and misrepresentation levelled by HSBC against the appellants.

43] Insofar as merits of the impugned judgment and order are concerned, we must remind ourselves that parameters of interference are limited to what have been set out by the Supreme Court in Wander Ltd. (supra). In appeals against the exercise of discretion by the learned Single Judge, as an appellate court, we are not to interfere with the exercise of discretion and substitute our own discretion, unless we are satisfied that discretion is shown to have been exercised arbitrarily, capriciously, perversely or where the Court has ignored the settled principles of law regulating grant or refusal of interim measures. The appeal against the exercise of discretion is primarily an appeal on principle. In such an appeal, as the appellate court, we would be loathe to interfere, solely on the ground that, if we had considered the matter in the first instance, we might have come to any contrary conclusion.

44] The criticism of Mr. Kirpal that the learned Single Judge has returned prima-faice findings of fraud and misrepresentation, merely on the basis of pleadings and without there being any material to support the same, is unfounded. The impugned judgment and order indicates that material in form of 31 of 40 32 j-196.14 several documents has been taken into consideration to reach the prima facie findings. There is reference to representations held out by the appellants that the BBC contract was almost concluded or in any case, would be concluded, no sooner the equipment necessary for conversion of 2D films to 3D films is acquired. Such representations, eventually turned out to be false, to the knowledge of the appellants themselves. There is reference to representations held out

by the appellants with regard to contracts with customers like M/s. Purple Passion valued at Millions of Dollars, which representations ultimately turned out to be false, to the knowledge of the appellants. In fact, there is prima-facie material on record which establishes that the entity M/s. Purple Passion had been dissolved even prior to the date of execution of agreements between the parties. There is reference to some material on record, which prima-facie suggest that no explanation was forthcoming from the appellants as to the manner in which USD 60 Million invested by the HSBC came to be spent. The appellants placed no clear material on record in this regard, thereby lending force to the contention of HSBC that out of USD 60 Million, an amount of almost USD 51 Million was circulated back into the account of appellant No.3, in stead of being used to purchase of equipments, necessary to secure the BBC contract. Applying the Wander Ltd. (supra) principle, this is no occasion to re-appreciate the material on record. Suffice to note that the prima-facie findings particularly in the context of grant of prohibitory injunction, are by no means arbitrary, capricious or perverse.

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45] Mr. Kirpal is again not right in his submission that the

standard of proof necessary in a civil case involving allegation of fraud is the same as the standard of proof necessary in a criminal case, that is, proof beyond reasonable doubt. In Gulabchand vs. Kudilal & ors., AIR 1966 Supreme Court 1734, the Supreme Court has ruled that the definition of the words 'proved', 'disproved' and 'not proved' given in section 3 of the Evidence Act makes it apparent that it applies the same standard of proof in all civil cases and it makes no difference between cases in which charges of a fraudulent and criminal character are made and the cases in which such charges are not made. This does not mean that the Court will not, whilst striking the balance of probability, keep in mind the presumption of innocence, but it is wrong to insist that such charges must be proved clearly beyond reasonable doubt.

46] Insofar as the EOW report is concerned, the learned Single Judge was quite right in not adverting to the same in light of the provisions contained in section 173 and 190 of Code of Criminal Procedure (Cr.P.C.). There can be no dispute that the EOW report is relatable to section 173(2) of the Cr.P.C. It is settled position in law that when the Magistrate who is dealing with a report submitted by the police under section 173 (2) of the Cr.P.C., may either agree with the said report and close the proceedings, or may take the view, on a consideration of such report, that the opinion formed by the police is not based upon full and complete investigation, in which case the Magistrate will have ample jurisdiction to give direction to the police under section 156 (3) of 33 of 40 34

j-196.14 Cr.P.C. to make further investigation. Again, the Magistrate is also empowered to take cognizance of the offence under section 190(1)(b) of Cr.P.C., notwithstanding any contrary opinion of the police as expressed in the report. This position is made clear by the Supreme Court itself in Abhinandan Jhaand ors vs. Dinesh Mishra - AIR 1968 SC 117, M/s. India Card Pvt. Ltd. vs. State of Karnataka & anr. - (1989) 2 Supreme Court Cases 132 and H.S. Bains, Director Small Saving-cum-Deputy Secretary Finance, Punjab, Chandigarh vs. State (Union Territory of Chandigarh)-(1980) 4 SCC 631. In light of this position, we see no error on the part of the learned Single Judge in not adverting to the EOW report for determining whether prima-facie case has been made out by the HSBC or not.

47] In the course of arguments, Mr. Kirpal submitted that learned Single Judge in exercising powers under section 9 of the Act, has virtually proceeded to grant final relief to HSBC. Such submission is misconceived. The interim relief as granted, primarily directs Avitel India to secure the claim amount by way of deposit/retention of the same in its Corporation Bank Account in India. Final relief, if and when granted, would perhaps enable HSBC to obtain the claim amount for its own appropriation. Thus, this is not a case where learned Single Judge, in exercising powers under section 9 of the Act, has proceeded to grant final reliefs to HSBC.

48] By the impugned judgment and order, however, learned Single Judge has not only granted prohibitory injunction restraining the appellants from withdrawing any amounts from out of their Corporation Bank account, but further issued an interim mandatory injunction directing the appellants to deposit in the said account, an amount of approximately USD 50 Million, so that there is a balance of USD 60 Million maintained in the said account. Insofar as grant of prohibitory injunction is concerned, it is sufficient if an applicant makes out a prima-facie case and further establishes that the balance of convenience is in its favour and that irreparable loss and prejudice would occasion the applicant, in case relief of prohibitory injunction is declined. However, when it comes to grant of interim mandatory injunction, the position is slightly different.

49] In Dorab Cawasji Warden (supra) , the Supreme Court has ruled that though the Courts have the power to grant interim injunction, such power ought not to be exercised as a matter of course. Interim mandatory injunctions may be granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts which have been illegally done or the restoration of that which was wrongfully taken by the party complaining. The general guidelines to be applied in the matter of granting interim mandatory injunction are as follows:

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(i) the plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima- facie case, i.e., normally require for a prohibitory injunction;

(ii) It is necessary to prevent or serious injury which normally cannot be compensated in terms of money;

(iii) The balance of convenience is in favour of one seeking such relief;

50] In the aforesaid decision, the Supreme Court has itself made it clear that the grant of relief of interim mandatory injunction being essentially an equitable relief, the grant or refusal of the same shall ultimately rest in the sound judicial discretion of the court to be exercised in light of the facts and circumstances of each case. Therefore, aforesaid guidelines can neither be regarded as exhaustive nor complete or absolute rules and there may be exceptional circumstances needing action, applying them as a pre-

requisite for grant or refusal of such injunction would be a sound exercise judicial discretion.

51] In Metro Marins & anr. vs. Bonus Watch Co. (P.) Ltd & ors - (2004) 7 SCC 478, the Supreme Court reiterated the position laid down in Dorab Cawasji Warden (supra) that interim mandatory injunction can be granted only in exceptional cases coming within the exception noticed in the said judgment and that the grant of interim mandatory injunction must not amount 36 of 40 37 j-196.14 to grant of a pre trial decree.

52] Applying the aforesaid principles, we have to evaluate as to whether pre-requisite for grant of interim mandatory injunction could be said to have been complied with in the present case.

53] As noted earlier, HSBC invested an amount of USD 60 Million in April - May 2011 contemporaneous with execution of SSA dated 21 April 2011 and SHA dated 11 May 2011. The decision to invest, was undoubtedly a commercial decision. Prior to such decision, there is material on record which suggests that, HSBC had carried out due diligence by engaging leading agencies like Ernst & Young, Clifford Chance at an expense of approximately Rs.3 Crores.

54] The disputes arose between the parties after about a year from the date of execution of SSA and SHA, which is evident from the circumstance that HSBC invoked arbitration agreement on or about

11 May 2011. There is, however, no clear material on record which establishes the position regards value of of 7.8 % of equity capital held by HSBC in Avitel India soon after the investment of USD 60 Million and acquisition of stake, to the extent of 7.8%. Mr. Kirpal submitted that in absence of any special circumstances, the measure of damages cannot be the amount of loss ultimately sustained by the representee, i.e., HSBC. The measure of damages, can at the highest be difference between 37 of 40 38 j-196.14 the price paid by HSBC and the price, which the HSBC would have received, if it had resold in the market forthwith after the purchase provided, provided of course, there was a fair market for the shares at that stage. In M/s Torjan & Co (supra), the Supreme Court, when dealing with a situation where a party was fraudulently induced to purchase shares and consequently suffered damages has, observed thus:-

> "15. Now the rule is well settled that damages due either for breach of contract or for tort or (sic) damages which, so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act. Difficulty, however, arises in measuring the amount of this money compensation. A general principle cannot be laid down for measuring it, and every case must to some extent depend upon its own circumstance.
>
> It is however, clear that in the absence of any special circumstances the measure of damages cannot be the amount of the loss ultimately sustained by the representee. It can only, be the difference between the price which he paid and the price which he would have received if he had resold them in the market forthwith after the purchase provided, of course, that there were a fair market then. The question to be decided in such a case is what could the plaintiff have obtained if he had resold forthwith which he, had been induced to purchase by the fraud of the defendants. In other words, the made of dealing with damages in such a case is to see what it would have cost him to get out of the situation, i.e., how much worse off was his estate owing to the bargain in which he entered into."
>
> 38 of 40 39 j-196.14 55] The HSBC claim statement before the Arbitral Tribunal at Singapore seems to accept, or at any rate indicate consciousness, as regards the aforesaid position. In respect of misrepresentation, HSBC has claimed damages to the extent of its investment sum of USD 60 Million, "less the value of HSBC investment in Avitel India to be assessed, but likely nil". In these circumstances, it cannot be said that HSBC had made out a case of a standard higher than a prima-facie case, requisite for an interim mandatory injunction to require Avitel India to deposit the entire amount of USD 60 Million in its Corporation Bank Account in India by way of security. It must be noted that in this case HSBC has also not offered to sell or surrender its shares/equities in Avitel India, but rather, HSBC seeks to retain the same whilst seeking damages proportionate to its entire extent of investment.

56] As noticed earlier, an interim mandatory injunction can only be granted in exceptional cases and that too preserve or restore status quo of the last non-contesting status, which preceded the

controversy. The grant of interim mandatory injunction must not amount to grant of pre trial decree. Such relief is essentially an equitable relief and discretion in that regard has to be exercised in light of facts and circumstances of each case. In the facts and circumstances of the present case, we are of the opinion that interests of justice would be served, if the appellants are directed to deposit an additional amount equivalent to USD 20 Million in its Corporation Bank Account at Mumbai, so that total deposit in the said account is maintained at USD 30 39 of 40 40 j-196.14 Million. This is on the basis that the HSBC can be said to have made out a fairly strong case, of a standard higher than a mere prima-facie case, for an award of such amount in the aribtral proceedings at Singapore. This direction to deposit, is certainly, without prejudice to the rights and contentions of the parties before the Arbitral Tribunal at Singapore. Accordingly, we may not be taken to have expressed any final opinion either upon the merits of the contentions of either parties or quantum of damages.

57] For the aforesaid reasons, we partly allow the present appeal. The direction to the appellants to deposit the shortfall in the Corporation Bank Account at Mumbai, so as to maintain balance of USD 60 Million is substituted by a direction to the appellants to deposit the shortfall in the said account, so as to maintain a balance of USD 30 Million within four weeks from today. Save and except the aforesaid modification, rest of the directions in the impugned judgment and order dated 22 January 2014, are hereby upheld and maintained.

58] Appeal is disposed of accordingly. In the facts and circumstances of the present case, there shall be no order as to costs.

(CHIEF JUSTICE) (M.S.SONAK, J.) dssherla 40 of 40

BCY
v
BCZ

[2016] SGHC 249

High Court — Originating Summons No 502 of 2016
Steven Chong J
16, 17 August; 9 November 2016

Arbitration *— Agreement — Governing law — Arbitration agreement part of contract containing choice of New York law as governing law of agreement — Arbitration agreement specifying Singapore as seat of arbitration — Whether governing law of arbitration agreement New York law or Singapore law*

Arbitration *— Arbitral tribunal — Jurisdiction — Parties negotiating sale and purchase agreement containing arbitration clause — Sale and purchase agreement not executed — Whether parties bound by arbitration clause to submit dispute to arbitration — Whether arbitral tribunal had jurisdiction over dispute*

Facts

This dispute arose from the proposed sale of the plaintiff's shares in a company ("the Shares") to the defendant and a co-purchaser ("W"). Seven drafts of the sale and purchase agreement ("SPA"), which incorporated an International Chamber of Commerce ("ICC") arbitration clause, were circulated and negotiated but the SPA was not eventually signed.

The first draft SPA provided for New York law as the governing law of the agreement. This choice remained the same in all seven drafts of the SPA. The second draft SPA sent on 25 June 2013 replaced a choice-of-court clause in the first draft SPA with the ICC arbitration clause. In the fourth draft SPA, two amendments were made to the arbitration clause: any dispute was now to be referred only to one arbitrator (instead of three) and Singapore was specified as the seat of arbitration. The sixth draft SPA was sent on 18 July 2013 by the plaintiff's investment specialist, who indicated in the covering e-mail that the plaintiff was "ready to sign" the SPA that day. W replied on the same day that its legal counsel was still "finalising the draft". A seventh draft SPA with some "significant changes" was circulated by e-mail on 25 July 2013 by W to the plaintiff and defendant. This was stated to be the "final and agreed SPA" which the defendant and W were "available to sign".

The plaintiff decided not to proceed with the sale of the Shares. The defendant commenced arbitration pursuant to the rules of the ICC. The defendant's position in the arbitration was that the arbitration agreement was formed either on 25 June 2013 or on 18 July 2013, before the SPA was concluded.

The Arbitrator found that the proper law of the arbitration agreement was New York law. He held that if the parties did not identify an express choice of law for the arbitration agreement, there was a rebuttable presumption that their implied choice of law was the governing law of the main contract. Since the governing law of the main contract was New York law, the proper law of the arbitration

agreement would be the same. There were no factors displacing that rebuttable presumption. Applying New York law on contract formation, the Arbitrator found, on the basis of the words and conduct of the parties, that the arbitration agreement came into existence between the plaintiff and the defendant by 18 July 2013. That was the date on which the plaintiff had indicated its preparedness to sign the sixth draft SPA.

This originating summons was the plaintiff's application for a declaration, pursuant to s 10(3) of the International Arbitration Act (Cap 143A, 2002 Rev Ed), that the Arbitrator had no jurisdiction to hear and determine any claim advanced by the defendant in the arbitration.

Held, allowing the application:

(1) In the absence of any indication to the contrary, parties were assumed to have intended the whole of their relationship to be governed by the same system of law. This meant that in the absence of an express choice of law for the arbitration agreement, the natural inference was that the proper law of the main contract should also govern the arbitration agreement. This presumption was supported by the weight of authority and was, in any event, preferable as a matter of principle: at [43] and [49].

(2) Where the arbitration agreement was part of the main contract, the governing law of the main contract was a strong indicator of the governing law of the arbitration agreement unless there were indications to the contrary. The choice of a seat different from the law of the governing contract would not in itself be sufficient to displace that starting point. The governing law of the main contract should only be displaced if the consequences of choosing it as the governing law of the arbitration agreement would negate the arbitration agreement even though the parties had themselves evinced a clear intention to be bound to arbitrate their disputes: at [65] and [74].

(3) Where the arbitration agreement was freestanding, in the sense that it was not intended to be a term of any other contract, then in the absence of any express choice of law, the law of the seat would most likely be the governing law of the arbitration agreement: at [66] and [67].

(4) The arbitration agreement was clearly intended to be part of the SPA and was at all times negotiated as part of the SPA. Therefore, as a starting point, the presumption was that New York law, as the express choice of law governing the SPA, was also the governing law of the arbitration agreement. The choice of Singapore as the seat would not be sufficient on its own to displace the presumption. It was also not displaced by the fact that New York law provided for the doctrine of equitable estoppel, which might have been inconsistent with a term of the SPA expressly stating that it was not intended to benefit any third party or be enforceable by any third party: at [71] to [75].

(5) Based on New York law as the governing law of the arbitration agreement, there was no objective manifestation of any mutual intention by the parties to be bound by the arbitration agreement as at 18 July 2013: at [83].

(6) Although the plaintiff proposed to substitute an arbitration clause in place of the choice-of-court clause in the second draft SPA, it did not follow that it intended to be bound by the arbitration clause independently of the SPA: at [84].

(7) Although the parties agreed on the wording of the arbitration clause by the fourth SPA and made no further changes to the arbitration agreement thereafter, this did not mean they intended to be bound by the arbitration agreement as an independent contract. Agreeing to the wording of the arbitration clause did not *per se* equate to an intention to be contractually bound to arbitrate absent the conclusion of the contract under which the arbitration clause was negotiated: at [86] and [90].

(8) The putative arbitration agreement and SPA were "subject to contract" and would only be binding upon execution: at [93].

(9) The inclusion of the "existence of the SPA" in the scope of the arbitration clause did not show that it was intended to be a binding agreement. It was not unusual for an arbitration clause which was part of a contract to refer disputes concerning the existence of that main contract to arbitration: at [96].

(10) There was no binding arbitration agreement formed on 18 July 2013 prior to the unexecuted SPA. As a consequence, the Arbitrator did not have jurisdiction to hear the claims: at [97].

Case(s) referred to

APC Logistics Pty Ltd v CJ Nutracon Pty Ltd [2007] FCA 136 (refd)

Arsanovia Ltd v Cruz City 1 Mauritius Holdings [2013] 2 All ER (Comm) 1 (folld)

Barnmore Demolition and Civil Engineering Ltd v Alandale Logistics Ltd [2010] IEHC 544 (refd)

Bazak International Corp v Tarrant Apparel Group 491 F Supp 2d 403 (SDNY 2007) (folld)

C v D [2008] 1 All ER (Comm) 1001 (refd)

Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pte Ltd [2016] 1 SLR 79 (refd)

Chem Orchid, The [2015] 2 SLR 1020 (refd)

Fiona Trust & Holding Corp v Privalov [2007] 2 All ER (Comm) 1053 (refd)

FirstLink Investments Corp Ltd v GT Payment Pte Ltd [2014] SGHCR 12 (not folld)

Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Coy Ltd [2013] EWHC 4071 (Comm) (folld)

Hyundai Merchant Marine Co Ltd v Americas Bulk Transport Ltd [2013] EWHC 470 (Comm) (refd)

Jordan Panel Systems Corp v Turner Construction Co 45 AD 3d 165, 841 NYS 2d 561 (1st Dept 2007) (folld)

Jiangsu Overseas Group Co Ltd v Concord Energy Pte Ltd [2016] 4 SLR 1336 (refd)

Marion Coal Co v Marc Rich & Co International Ltd 539 F Supp 903 (SDNY 1982) (folld)

Norcast SARL v Castle Harlan, Inc No 12 Civ 4973 (PAC) (SDNY 2014) (refd)

Piallo GmbH v Yafriro International Pte Ltd [2014] 1 SLR 1028 (refd)

Sanum Investments Ltd v Government of the Lao People's Democratic Republic [2016] 5 SLR 536 (folld)

Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA [2013] 1 WLR 102 (folld)

Viscous Global Investments Ltd v Palladium Navigation Corp "Quest" [2014] EWHC 2654 (Comm) (refd)

Legislation referred to

International Arbitration Act (Cap 143A, 2002 Rev Ed) ss 6, 10(3)

Thio Shen Yi SC, Colin Liew, Cheryl Ng and Michelle Chew (TSMP Law Corp) for the plaintiff;
Herman Jeremiah and Geraldine Yeong (Dentons Rodyk & Davidson LLP) for the defendant.

9 November 2016 Judgment reserved.

Steven Chong J:

Introduction

1 When the jurisdiction of an arbitral tribunal is challenged on the basis that there is no binding arbitration agreement, the usual ground for such a challenge is that the contract which incorporates the arbitration clause was itself never concluded. In this familiar situation, it has been held that the validity of the arbitration agreement and the existence of a binding contract would "stand or fall together" and the court would usually determine *both* issues collectively (see *Hyundai Merchant Marine Company Ltd v Americas Bulk Transport Ltd* [2013] EWHC 470 (Comm) at [35]–[36], cited in *Jiangsu Overseas Group Co Ltd v Concord Energy Pte Ltd* [2016] 4 SLR 1336 at [48]).

2 The present case is a departure from that conventional approach. It concerned an International Chamber of Commerce ("ICC") arbitration commenced by the defendant against the plaintiff. The dispute arose from a proposed sale of shares ("the Shares") in a company by the plaintiff to the defendant under a sale and purchase agreement ("SPA"). Seven drafts of the SPA, which incorporated an ICC arbitration clause, were circulated and negotiated but the SPA was not eventually signed.

3 When the plaintiff decided not to proceed with the proposed sale of the Shares, the defendant commenced ICC arbitration proceedings, purportedly pursuant to the arbitration clause in the SPA. A sole arbitrator ("the Arbitrator") was appointed. The plaintiff raised a preliminary objection to the Arbitrator's jurisdiction on the basis, *inter alia*, that no ICC arbitration agreement had been concluded between the parties. The parties agreed to bifurcate the arbitration. There were thus to be two stages: (a) the jurisdictional challenge; and (b) the hearing on the merits, which has yet to take place. For the jurisdictional challenge, the Arbitrator sensibly proposed to the parties that in dealing with the jurisdictional issue, he should also

deal with some issues on the merits, in particular, whether a legally binding SPA was concluded between the parties. This would be entirely in line with the conventional approach. However, the defendant was not agreeable to the Arbitrator's suggestion and the parties thereafter agreed that the Arbitrator would only decide the jurisdictional issue without examining the question whether a valid SPA had been concluded between the parties.

4 Interestingly, the defendant's case is that a binding ICC arbitration agreement was concluded *before* the conclusion of the SPA. In advancing this case theory, the defendant argued, relying on the doctrine of separability, that the arbitration clause is separate from and independent of the SPA. Given the defendant's case that the arbitration agreement *pre-dated* the SPA, it is perhaps explicable why the parties agreed that the Arbitrator should decide the jurisdictional challenge without reference to the question whether the SPA was *separately* concluded between them. For reasons as explained below, in a situation where the arbitration clause was negotiated in the context of a contract, such an approach is problematic from the perspective of the parties and consequently, the Arbitrator as well.

5 As a consequence of the defendant's case theory, the identity of the governing law of the arbitration agreement, as distinct from the governing law of the SPA, was a hotly contested issue in the arbitration. The defendant asserted that the substantive law governing the arbitration agreement should be the same law governing the SPA, *ie*, New York law, while the plaintiff's case was that the arbitration agreement should be governed by the law of the seat of the arbitration, *ie*, Singapore law. That dispute continued to occupy some misplaced primacy in this application. The contest between New York law and Singapore law was misplaced simply because both parties acknowledged during the hearing that there was, in real and practical terms, no material difference between the two systems of law in so far as they relate to the only substantive issue before this court – whether an arbitration agreement was formed. This was essentially the finding of the Arbitrator as well. Nonetheless, owing to seemingly conflicting authorities on this issue, this judgment will examine the two competing positions because in some situations, the differences in the laws may well have a direct and material bearing on the outcome.

6 Eventually, the Arbitrator proceeded to determine the jurisdictional issues as framed by the parties, in particular, whether a valid and binding ICC arbitration agreement had come into existence as a matter of law. In his First Partial Award dated 15 April 2016 ("Award"), he found that a valid ICC arbitration agreement was indeed concluded between the parties by 18 July 2013 principally on the basis that mutual assent to the arbitration agreement could be inferred from the exchange of drafts subsequent to the second draft SPA containing an identical arbitration provision coupled with the plaintiff's statement that it was ready to sign the sixth draft, which contained the arbitration clause. This judgment will examine, in the context

of negotiations of a contract which incorporates an arbitration clause, when and under what circumstances parties would intend to create legal relations by entering into a discrete arbitration agreement independently and, more critically, *prior to* the conclusion of the contract itself.

7 The plaintiff has filed this application under s 10(3) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") for a declaration that the Arbitrator has no jurisdiction to hear any claim advanced by the defendant under the SPA in the arbitration. Owing to the circumstances under which this application was filed, it is imperative to bear in mind that the issue before me is *not* whether the dispute as to the existence of the SPA fell within the arbitration clause. Instead, this court has been specifically tasked by the parties to decide, on a balance of probabilities, whether an arbitration agreement, independent of the SPA, was concluded between the parties by 18 July 2013. This inquiry goes to the heart of the Arbitrator's jurisdiction.

Background facts

8 I start by recounting, as far as is relevant to these proceedings, the course of the negotiations leading to the aborted SPA.

The negotiations

9 The plaintiff is a foreign bank and was at all material times the owner of the Shares. The defendant, a foreign company, was a special-purpose vehicle incorporated on 29 April 2013 to be the contracting party to the SPA. The director and sole shareholder of the defendant is one Mr Z, who is also the director and sole shareholder of another foreign related company ("Y"). The defendant and Y were the claimants in the arbitration. During the course of the negotiations relating to the SPA, neither Mr Z nor his lawyers expressly distinguished as to whether they were negotiating on behalf of Y or the defendant.

10 The sale of the Shares was first discussed between the plaintiff's investment specialist and Mr Z on 8 December 2012. The plaintiff and Y entered into a confidentiality undertaking dated 11 December 2012, by which the plaintiff agreed to make available confidential information relating to the Shares that Y was obliged to hold in confidence. They also entered into an exclusivity agreement dated 8 January 2013, by which the plaintiff agreed not to solicit or accept any proposals for the purchase of the Shares from any other person other than Y until 31 April 2013.

11 By an offer letter dated 30 April 2013 ("the Offer Letter"), Y wrote to the plaintiff offering to purchase the Shares through the defendant. The offer was subject to, among other things, the "execution of a mutually acceptable [SPA]", and the offer price was subject to the parties "entering into a definitive SPA". The offer was stated to be valid until 15 May 2013.

This was later extended, by consent of the plaintiff and defendant, to 31 May 2013.

The draft SPAs

12 The first draft SPA was sent by Mr Z to the plaintiff on 17 June 2013. Article 9.13.1 provided for New York law as the governing law of the agreement. This choice remained the same in all seven drafts of the SPA. Article 9.13.2 provided for any disputes arising out of or in connection with the agreement to be referred to the New York courts.

13 Meetings were held in Washington DC between 24 and 27 June 2013 to discuss the SPA. These were attended by representatives of the plaintiff, the defendant, and another foreign bank ("W") which would later become a co-purchaser of the Shares.

14 The second draft SPA was sent by the defendant to the plaintiff and W on 25 June 2013. Notably, Art 9.13.2 was replaced with an arbitration clause:

> **9.13 Governing Law and Dispute Resolution**
>
> 9.13.1 This Agreement and any non-contractual obligations arising out of or in connection with it are governed by and shall be construed in accordance with the Laws of the State of New York of the United States of America.
>
> 9.13.2 All disputes (including a dispute, controversy or claim regarding the existence, validity or termination of this Agreement – a 'Dispute') arising out of or in connection with this Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules, such arbitration to take place in Singapore.

15 The third draft SPA was circulated by the defendant to the plaintiff and W on 26 June 2013. It was in this draft SPA that W was added as a co-purchaser. Article 9.13 of the SPA remained unchanged.

16 On 12 July 2013, the fourth draft SPA was circulated by the plaintiff to the defendant and W following the Washington DC meetings. Two amendments were made to Art 9.13.2: any dispute was now to be referred only to one arbitrator and Singapore was specified as the seat of arbitration:

> All disputes (including a dispute, controversy or claim regarding the existence, validity or termination of this Agreement – a 'Dispute') arising out of or in connection with this Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one arbitrator appointed in accordance with the said Rules, such arbitration to take place in Singapore. The seat of the arbitration shall be Singapore.

There were no further amendments to Art 9.13 in the subsequent draft SPAs.

17 The fifth draft SPA was sent on 17 July 2013 by the plaintiff to the defendant and W.

18 The sixth draft SPA was sent on 18 July 2013 by the plaintiff's investment specialist to its external legal counsel, but was copied to the defendant and W. The plaintiff's investment specialist indicated in the covering e-mail ("the 18 July e-mail") that it was "ready to sign" the SPA that day:

> [The plaintiff] is ready to sign the SPA today.
>
> There is some minor typos and blank for filling up. Please see attached file.
>
> Kindly print out engrossed copy for signature in counterparts.

19 W replied on the same day that its legal counsel was still "finalising the draft". The plaintiff expressed its disappointment at this "last minute review". Thereafter, further negotiations between the parties ensued.

20 A seventh draft SPA was circulated by e-mail on 25 July 2013 by W to the plaintiff and defendant. This was stated to be the "final and agreed SPA" which the defendant and W were "available to sign". This draft, however, contained "significant changes"; for example, the definitions of key terms such as "sale consideration" and "dividend payment" were materially amended.

21 On 27 August 2013, the plaintiff, through its external legal counsel, informed Mr Z, in his capacity as president of Y that it had decided not to proceed with the sale of the Shares due to "recent changes in the business climate". By a letter dated 29 August 2013 signed off by Mr Z, Y demanded that the plaintiff proceed to sign the SPA before 30 September 2013. The SPA was never executed and consequently, the Shares were never transferred to the defendant.

The arbitration

22 The defendant and Y commenced arbitration on 9 February 2015 pursuant to the rules of the ICC. Y is not a party to these proceedings but for convenience, I will use "the defendant" in the context of the arbitration to refer to both the defendant and Y.

23 In the arbitration, the defendant brought, *inter alia*, the following claims against the plaintiff based on New York law:

(a) damages for breach of the SPA in failing to complete the transfer of the Shares;

(b) a claim for promissory estoppel based on an alleged promise by the plaintiff to sell the Shares to Y; and

(c) a claim for unjust enrichment based on actions taken in reliance on the promise.

24 The plaintiff raised a preliminary objection to the Arbitrator's jurisdiction on the basis that no arbitration agreement had been concluded between the plaintiff and the defendant and/or Y.

25 In the Terms of Reference submitted to the Arbitrator dated 3 August 2015, the issues to be determined in the arbitration were categorised under two headings, "Jurisdiction" and "Merits". Two of those issues are relevant here. Issue 1, under the heading of "Jurisdiction", was whether there was a valid and binding ICC arbitration agreement and, if so, (a) how and when it came into existence as a matter of law; and (b) who the parties to that agreement were. Issue 14, under the heading of "Merits", was whether a binding SPA came into existence as a matter of law and, if so, when and how.

26 Although Issue 1 concerned when the arbitration agreement came into existence, the defendant did not, in the Terms of Reference itself, identify any specific date on which the arbitration agreement was allegedly concluded. It only asserted that the SPA became a binding contract either on 18 July 2013, when the plaintiff communicated its readiness to execute the sixth draft of the SPA, or on 25 July 2013, when the seventh draft SPA was circulated. But as I have noted, the defendant's position has always been that the arbitration agreement was concluded *prior* to the purported conclusion of the SPA itself. This can be gleaned from at least three other documents in the arbitration.

27 First, in its initial submission pursuant to Arbitral Communication No 6, dated 29 May 2015, the defendant submitted, in response to the Arbitrator's question, that the arbitration agreement "came into existence no later than 25 June 2013" when the parties replaced Art 9.13.2 with an arbitration clause providing for arbitration in Singapore according to the ICC Rules. In response to the Arbitrator's query as to whether the arbitration agreement had come into existence at the same time as the SPA, the defendant's answer was:

> *No*. A binding SPA came into existence *after* the binding ICC arbitration agreement. The ICC arbitration agreement became binding on the parties no later than 25 June 2013. The SPA became binding once the parties reached agreement on all material terms, and [the plaintiff] expressed its intention to sign the written contract on 18 July 2013, subject to the correction of 'minor typos' and the filling in of a non-substantive 'blank'. On 25 July 2013, a final draft was circulated incorporating [the plaintiff's] edits and to which the purchasers indicated their intention to sign. Accordingly, a binding SPA was established no later than 25 July 2013. [emphasis added]

28 Second, in its statement of case, dated 12 August 2015, the defendant submitted that the plaintiff's words and conduct indicated that it assented to be bound by the arbitration clause on 25 June 2013 (the date of the second draft SPA), and at the very latest, by 18 July 2013 (the date of the sixth draft SPA).

29 Third, in its opening submission on the jurisdictional issues dated 7 December 2015, the defendant asserted that the binding arbitration agreement was formed on 25 June 2013, when Art 9.13.2 in the second draft SPA was amended to include the arbitration clause. The defendant added that the plaintiff never objected to the arbitration clause and had, on 18 July 2013, agreed to sign the sixth draft SPA. That marked "the latest date" that the arbitration clause became binding.

30 Given the defendant's position that the arbitration agreement was formed either on 25 June 2013 or on 18 July 2013, before the SPA was concluded, it was anticipated that there would be an overlap in evidence on the formation of the arbitration agreement and the formation of the SPA. The Arbitrator suggested that both questions be determined together in the jurisdictional phase of the arbitration. The plaintiff adopted this suggestion. The defendant preferred not to deal with the formation of an arbitration agreement as a preliminary issue of jurisdiction. The parties eventually agreed that the Arbitrator would only deal with the jurisdictional issues without dealing with the formation of the SPA.

The Award

31 Only the Arbitrator's findings on the formation of the arbitration agreement are relevant for present purposes.

32 The Arbitrator found that the proper law of the arbitration agreement was New York law. He held, applying *Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102 ("*Sulamérica*"), that if the parties did not identify an express choice of law for the arbitration agreement, there was a rebuttable presumption that their implied choice of law was the governing law of the main contract. Since the governing law of the main contract was New York law, the proper law of the arbitration agreement would be the same. There were no factors displacing that rebuttable presumption.

33 Applying New York law on contract formation, the Arbitrator found, on the basis of the words and conduct of the parties, that the arbitration agreement came into existence between the plaintiff and the defendant by 18 July 2013. That was the date on which the plaintiff had indicated its preparedness to sign the sixth draft SPA. The Arbitrator rejected the defendant's submission that the arbitration agreement had come into existence upon the exchange of the second draft SPA on 25 June 2013 – there was no objective manifestation of mutual assent to be bound by the arbitration agreement at that time. Mutual assent could, however, be inferred from the exchange of subsequent drafts of the SPA, which had the same arbitration clause throughout, and the 18 July e-mail.

34 The Arbitrator also found that only the plaintiff, the defendant, and W were parties to the arbitration agreement, and that Y was not a party.

The present application

35 This originating summons is the plaintiff's application for a declaration, pursuant to s 10(3) of the IAA, that the Arbitrator has no jurisdiction to hear and determine any claim advanced by the defendant in the arbitration ("Prayer 1"), or, in the alternative, that the Arbitrator only has jurisdiction to hear the claim for breach of the unexecuted SPA (but not the promissory estoppel or unjust enrichment claims).

36 Pursuant to s 10(3) of the IAA, the court undertakes a *de novo* review of the issue of whether an arbitral tribunal has jurisdiction over any particular dispute. While the tribunal's own views may be persuasive, "the court is not bound to accept or take into account the arbitral tribunal's findings on the matter" (see *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [41]).

37 Although the question whether there was a legally binding SPA is not before the court since it has been reserved for the merits stage of the arbitration, it is common ground that for the purposes of this originating summons, the court must necessarily take into account the factual matrix in which the SPA was negotiated in determining whether the arbitration agreement was formed

Governing law of the arbitration agreement

38 It is also common ground in these proceedings, as it was in the arbitration, that whether an arbitration agreement was formed is to be decided in accordance with the governing law of the arbitration agreement. The plaintiff submitted that the governing law of the arbitration agreement was Singapore law. The defendant submitted that the Arbitrator had correctly found it to be New York law.

39 Determining the governing law of the arbitration agreement would have negligible, if any, influence on the primary question of whether an arbitration agreement was formed. This is because both parties acknowledged that there were no material differences between New York law and Singapore law on the formation of an arbitration agreement.Indeed, both sides argued that applying Singapore or New York law would lead to the same result they sought. The only alleged material difference is that New York law permits claims to be brought for unjust enrichment and promissory estoppel. However, this difference is only relevant to the heads of claim and has no bearing on the substantive issue which pertains to the *formation* of the arbitration agreement. In any event, Mr Herman Jeremiah, counsel for the defendant, confirmed during the hearing that the defendant will not be pursuing any claim for unjust enrichment or promissory estoppel. I observed in an unrelated case that it is unnecessary to introduce and prove foreign law if the application of foreign law would lead to the same result as applying the law of the forum (see

The Chem Orchid [2015] 2 SLR 1020 at [157]). Nonetheless, given the divergence of authorities and academic opinions, I shall express my views on this issue with the benefit of the full and well-developed arguments which have been presented by both parties.

40 It is not disputed that the governing law of an arbitration agreement is to be determined in accordance with a three-step test: (a) the parties' express choice; (b) the implied choice of the parties as gleaned from their intentions at the time of contracting; or (c) the system of law with which the arbitration agreement has the closest and most real connection (see *Sulamérica* ([32] *supra*) at [9] and [25]).

41 Since the arbitration agreement in this case does not contain an express choice of governing law, the dispute here is over the application of the second step of the test. The Arbitrator found (and the defendant submits) that the parties impliedly chose the governing law of the main contract to govern the arbitration agreement as well. The plaintiff disagrees and submits that decisive weight should be accorded to the law of the seat of the arbitration in determining the parties' implied choice of law. In this regard, the plaintiff relies on *FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12 ("*FirstLink*"), which, it claims, represents the law in Singapore.

Sulamérica

42 I start by examining *Sulamérica*, which was the basis for the Arbitrator's decision. In that case, several Brazilian companies made claims under two insurance policies. The policies were stated to be governed exclusively by Brazilian law and contained a two-tiered arbitration clause: if the parties were unable to first resolve the dispute through meditation, the dispute would be referred to arbitration. London was chosen as the seat of arbitration. The insurers denied liability and gave notice of arbitration without referring the dispute to mediation. The insured companies commenced court proceedings in Brazil. The insurers were thereafter granted an injunction by the English High Court to restrain the insured companies from continuing with court proceedings in Brazil. The insured companies appealed against the injunction, arguing that under the law of Brazil, the arbitration clause could not be invoked against them without their consent. Whether the injunction should continue was thus dependant on whether the arbitration clause could be invoked against the insured companies, which was to be determined by the law governing the arbitration agreement. The English Court of Appeal found that it was governed by English law. Applying English law, it found, first, that the clause requiring parties to submit their dispute to mediation was not a binding obligation (at [36]), and second, either party could refer to arbitration any dispute arising out of or in connection with the policy

(at [41]). Hence, the insurers validly referred the dispute to arbitration and the High Court was right to grant the injunction.

43 The starting point of Moore-Bick LJ's analysis, with which Hallett LJ agreed, was that in the absence of any indication to the contrary, parties are assumed to have intended the whole of their relationship to be governed by the same system of law. This meant that in the absence of an express choice of law for the arbitration agreement, the "natural inference" was that the proper law of the main contract should also govern the arbitration agreement (at [11]).

44 Moore-Bick LJ then drew a distinction between the following two scenarios (at [26]):

> (a) If there was a "free-standing agreement to arbitrate" containing no express choice of law, it is unlikely that there would be sufficient basis for finding an implied choice of law and it would be necessary to identify the law with which the arbitration agreement had the closest and most real connection. The significance of the choice of seat, in such a case, would be "overwhelming" and the law of the seat would most likely be the governing law of the arbitration agreement.
>
> (b) If, however, the arbitration agreement formed part of a substantive contract, the express choice of proper law governing the substantive contract would be a "strong indication of the parties' intentions in relation to the agreement to arbitrate", with the result that the implied choice of law for the arbitration agreement was likely to be the same as the expressly chosen law of the substantive contract. This conclusion might be displaced by the terms of the arbitration agreement itself or the consequences for its effectiveness of choosing the proper law of the substantive contract.

45 The facts of *Sulamérica* ([32] *supra*) fell within the second scenario. Moore-Bick LJ found that the starting point that Brazilian law was the implied choice of law of the arbitration agreement was displaced for two reasons. The first was that London was chosen as the seat of the arbitration, which tended to suggest that parties intended for English law to govern all aspects of the arbitration agreement (at [29]). The second was that the principle under Brazilian law that an arbitration agreement could only be invoked with the insured companies' consent undermined the clear words of the agreement, which clearly allowed either party to refer any dispute to arbitration. This implied that the parties did not intend the arbitration agreement to be governed by Brazilian law (at [30]). Since it could not be said that the parties impliedly chose Brazilian law to govern the arbitration agreement, Moore-Bick LJ went on to the third step of the choice-of-law analysis and found that the arbitration agreement had the closest and most real connection with the law of the seat of the arbitration, which was English law (at [32]).

46 Moore-Bick LJ's holding that the implied choice of law of the arbitration agreement would likely be the same as the expressly chosen law of the main contract was itself a departure from the view of the Court of Appeal in *C v D* [2008] 1 All ER (Comm) 1001 where Longmore LJ held at [26] that:

> … *it would be rare for the law of the (separable) arbitration agreement to be different from the law of the seat of the arbitration*. The reason is that an agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate than with the place of the law of the underlying contract in cases where the parties have deliberately chosen to arbitrate in one place disputes which have arisen under a contract governed by the law of another place. [emphasis added]

In *Sulamérica*, Lord Neuberger MR, who issued a separate concurring opinion, agreed that the governing law was English law but considered (at [59]) that it was unnecessary to choose between two seemingly inconsistent strands of authority, one favouring the view that it is rare for the law of the arbitration agreement to be other than the governing law of the contract, the other (represented mainly by *C v D*) saying it would be rare for the governing law not to be the law of the seat.

FirstLink

47 This brings me to *FirstLink* ([41] *supra*), which is the principal authority relied on by the plaintiff. In that case, the plaintiff commenced an action against the defendants for breach of contract and the first defendant applied to stay the court proceedings under s 6 of the IAA based on the following arbitration agreement in the contract (at [4]):

> Any claim will be adjudicated by Arbitration Institute of the Stockholm Chamber of Commerce. [The plaintiff] and [the first defendant] agree to submit to the jurisdiction of the Arbitration Institute of the Stockholm Chamber of Commerce. Both parties expressly agree not to bring the disputes to any other court jurisdictions, except as agreed here to the Arbitration Institute of the Stockholm Chamber of Commerce

The choice of law clause stated that the agreement as a whole was "governed by and interpreted under the laws of Arbitration Institute of the Stockholm Chamber of Commerce" (at [9]). The plaintiff sought to resist the stay by arguing that the arbitration agreement was null and void, inoperative, or incapable of being performed – in other words, that it was invalid (at [5]).

48 The assistant registrar ("AR") found that the governing law of the arbitration agreement was Swedish law and that, since the plaintiff had not submitted that the arbitration agreement was invalid under Swedish law, it failed to show that the arbitration agreement was invalid (at [17]). In arriving at this decision, the AR adopted the three-step test in *Sulamérica* but disagreed with the "*rebuttable* presumption that the express substantive law of the contract would be taken as the parties' implied choice of the

proper law governing the arbitration agreement" (at [11]) [emphasis in original]. The AR's view (at [13]) was that:

> … it cannot always be assumed that commercial parties want the same system of law to govern their relationship of performing the substantive obligations under the contract, and the quite separate (and often unhappy) relationship of resolving disputes when problems arise.

The AR then held (at [16]) that in the absence of indications to the contrary, the law should find that parties have impliedly chosen the law of the seat as the proper law to govern the arbitration agreement, in a situation of "direct competition between the chosen substantive law and the law of the chosen seat of arbitration". In short, the AR found, contrary to Moore-Bick LJ's view in *Sulamérica*, that in the absence of an express choice, the default position is that the law of the seat should be the governing law of the arbitration agreement. Applying this approach, the AR found that the parties had selected Sweden as the seat of arbitration, and therefore, that they had impliedly selected the law of Sweden as the governing law of the arbitration agreement (at [17]).

My view

49 I agree with Moore-Bick LJ's approach in *Sulamérica* that the implied choice of law for the arbitration agreement is likely to be the same as the expressly chosen law of the substantive contract. This presumption is supported by the weight of authority and is, in any event, preferable as a matter of principle.

50 As to the weight of authority, I disagree with the plaintiff that *FirstLink* represents the law in Singapore. There are other decisions of the High Court where the governing law of the arbitration agreement was implied from that of the main contract. The defendant referred me to two such cases: *Piallo GmbH v Yafriro International Pte Ltd* [2014] 1 SLR 1028 ("*Piallo*") and *Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pte Ltd* [2016] 1 SLR 79 ("*Rals*").

51 I should first say that in both these cases, the court did not specifically address the competing approaches in *Sulamérica* ([32] *supra*) and *FirstLink* ([41] *supra*). There was no reason to do so since there was no divergence between the law of the main contract and the law of the seat of the arbitration. That does not mean, however, that they are not authorities for the applicability of the presumption; it only means that in those cases, there was no occasion to consider what factors, if any, might displace the law of the main contract as the implied choice of law for the arbitration agreement.

52 In *Piallo*, the governing law of the contract was Swiss law and the seat of the arbitration was Geneva. At issue was the scope of the arbitration agreement, which was to be decided in accordance with the applicable law

of the arbitration agreement. Belinda Ang Saw Ean J found that, since the governing law of the main agreement was Swiss law, the scope of the arbitration agreement "[stood] properly to be decided under Swiss law" (at [20]). I note that *Sulamérica* was not cited in this judgment. I should add that the outcome would have been the same even if the law of the seat was the governing law of the arbitration agreement.

53 *Sulamérica* was, however, cited in *Rals*. A supply agreement was expressly governed by Singapore law. The arbitration clause provided for Singapore as the seat of arbitration. The court had to decide whether a party was bound by the arbitration agreement. This could be a matter for the law of the supply agreement or the law of the arbitration agreement, although Vinodh Coomaraswamy J preferred the latter (at [88]). Since Singapore law governed both the supply agreement and the arbitration agreement, there was no competition between the two possible governing laws. As to the governing law of the arbitration agreement, however, Coomaraswamy J had observed at [76] that it was Singapore law because:

> Singapore law governs the broader agreement … in which the arbitration agreement is found and there is, in this case, no reason to move beyond the starting assumption that the parties intended the same law to govern both agreements (*Sulamérica Cia Nacional de Seguros SA v Enesa Engelharia SA* [2013] 1 WLR 102 ('*Sulamérica*') at [11]–[14]).

54 In my view, it was strictly unnecessary, on the facts of *FirstLink*, for the AR to depart from *Sulamérica* in favour of a starting presumption in favour of the law of the seat. This issue would only arise for consideration in a situation where, in the AR's words, there is a "direct competition" between the law of the main contract and the law of the seat. There was no such competition in *FirstLink* because, unlike in *Sulamérica* and the present case, neither the governing law of the main contract nor the seat of the arbitration was *explicitly* chosen to begin with. The choice of law clause did not specify a national system of law. Instead, it provided for the laws of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") to apply. Further, the arbitration clause (reproduced above at [47]) was imprecisely drafted and did not *explicitly* state that the seat of arbitration was Sweden. The AR found this to be the case from the reference to disputes being submitted to the SCC (at [17]). I agree with the Arbitrator that the mere reference to rules of the SCC did not necessarily point to Sweden as the seat of the arbitration. This is because under the SCC rules, it would have been for the board of the SCC to decide the seat in the absence of the parties' express agreement. This is not to say that the outcome in *FirstLink* would have been different; indeed, the application of the third stage of the choice-of-law analysis would probably have pointed to Swedish law as the law with which the arbitration agreement had the closest connection. The plaintiff submitted that even if the AR was incorrect in resolving the case at the second stage of the test, *ie*, finding that the parties

impliedly chose Swedish law as the governing law of the arbitration agreement, it did not mean that the reasoning in *FirstLink* was wrong as a matter of principle. For the reasons to follow (see [59] onwards), I prefer the *Sulamérica* approach as a matter of principle.

55 Further support for *Sulamérica* can be found in two first-instance decisions of the English courts which the defendant brought to my attention. These also establish that although in *Sulamérica* the choice of seat was accepted as one of the factors pointing away from the main contract's choice of law, it would be insufficient on its own to negate the presumption that parties intended the governing law of the main contract to govern the arbitration agreement.

56 In *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2013] 2 All ER (Comm) 1 ("*Arsanovia*"), the governing law of the main contract being Indian law was a strong indicator of the arbitration agreement's governing law. The choice of London as the seat of the arbitration agreement was not a sufficiently contrary intention. Smith J observed at [21]:

> [T]he parties to the SHA are to be taken to have evinced an intention that the arbitration agreement in it be governed by Indian law for the reasons that Moore-Bick LJ explained [in *Sulamérica*]. The governing law clause is, at the least, a strong pointer to their intention about the law governing the arbitration agreement and there is *no contrary indication other than choice of a London seat for arbitrations*. [emphasis added]

57 In *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Coy Ltd* [2013] EWHC 4071 (Comm) ("*Habas*"), Hamblen J considered *Sulamérica* ([32] *supra*) and *Arsanovia* and noted that the choice of a different country for the law of the seat "may not in itself be sufficient to displace the indication of choice implicit in the express choice of law to govern the matrix contract" (see [101]). On the facts of that case, given that there was no express choice of law in the main contract, the applicable law of the arbitration agreement was that of the seat (at [103]).

58 Academic commentaries on this issue post-*Sulamérica* are divided and support can be found for both approaches. I will mention just two such commentaries. Prof Adrian Briggs suggests that it would be "surprising" if the governing law of the main contract would not also govern the arbitration agreement since a choice of law expressed in customarily broad and general terms would ordinarily draw no distinction between the main contract and the arbitration agreement (see Adrian Briggs, *Private International Law in English Courts* (Oxford University Press, 2014) at para 14.39). By contrast, David Joseph QC suggests that if there is no express choice of governing law for the arbitration agreement, the courts "will require the presence of some further particular circumstance to apply a governing law other than the law of the seat" (see David Joseph, *Jurisdiction and Arbitration Agreements* (Sweet & Maxwell, 3rd Ed, 2015)

at para 6.36). *FirstLink* ([41] *supra*) is the only authority cited in support of this proposition.

59 The foregoing review demonstrates that more cases appear to favour the *Sulamérica* approach. Though none of them are binding precedents, in my view, the approach in *Sulamérica* is to be preferred. Where the arbitration agreement is a clause forming part of a main contract, it is reasonable to assume that the contracting parties intend their entire relationship to be governed by the same system of law. If the intention is otherwise, I do not think it is unreasonable to expect the parties to specifically provide for a different system of law to govern the arbitration agreement. In practice, parties rarely specify the law applicable to the arbitration agreement as distinct from the main contract (see Gary B Born, "The Law Governing International Arbitration Agreements: An International Perspective" (2014) 26 SAcLJ 814 at para 34). When a choice of law clause (such as the one here) stipulates that the "agreement" is to be governed by one country's system of law, the natural inference should be that parties intend the express choice of law to "govern and determine the construction of *all* the clauses in the agreement which they signed *including the arbitration agreement*" [emphasis added] (see *Arsanovia* at [22]). To say that the word "agreement" contemplates all the clauses in the main contract save for the arbitration clause would in fact be inconsistent with its ordinary meaning.

60 The suggestion that the arbitration agreement is a distinct agreement with a governing law distinct from that of the main contract is often justified by the doctrine of separability. However, the doctrine of separability serves to give effect to the parties' expectation that their arbitration clause – embodying their chosen method of dispute resolution – remains effective even if the main contract is alleged or found to be invalid. It does not mean that the arbitration clause forms a distinct agreement from the time the main contract is formed. Resort need only be had to the doctrine of separability when the validity of the arbitration agreement itself is challenged. This is clear from Art 16 of the UNCITRAL Model Law on International Commercial Arbitration set out in the First Schedule of the IAA ("Model Law"):

> Article 16. Competence of arbitral tribunal to rule on its jurisdiction
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. *For that purpose*, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
>
> [emphasis added]

61 Separability serves the narrow though vital purpose of ensuring that any challenge that the main contract is invalid does not, in itself, affect the

validity of the arbitration agreement. This is necessary because the challenge to the validity of the arbitration agreement often takes the form of a challenge to the validity of the main contract. However, as Moore-Bick LJ noted in *Sulamérica*, separability does not "insulate the arbitration agreement from the substantive contract for all purposes" (at [26]). It is one thing to say that under the doctrine of separability, a party cannot avoid the obligation to submit a dispute to arbitration by merely denying the existence of the underlying contract; it is quite different to say that because of this doctrine, parties intended to enter into an arbitration agreement independent of the underlying contract. This does not reflect commercial reality. As the AR himself noted in *FirstLink*, such arbitration clauses are "midnight clauses": they are typically included (or finalised) at the last minute (see *FirstLink* at [1]). In any event, they are typically negotiated as part of the main contract and hence are unlikely to be negotiated independently from it.

62 The AR's preference for the law of the seat in *FirstLink* ([41] *supra*) was premised on two main reasons. With respect, neither leads inexorably to a presumption in favour of the law of the seat. The first was that when a dispute arises between commercial parties, the natural inference is that primacy is to be accorded to the neutral law selected by parties to govern the proceedings of dispute resolution (at [13]). That neutral law, the AR found, would be the law of the seat. The plaintiff argued that this accorded with commercial sensibility.

63 It is correct that the seat of arbitration is chosen based on a desire for a neutral forum, and that the law of the seat will usually be different from the law governing the main agreement (see *Sulamérica* ([32] *supra*) at [15]). But the law of the seat governs *the procedure of the arbitration*; it does not necessarily follow that the seat's substantive law – *ie*, the law of contract which would govern the formation of an arbitration agreement – would be neutral. Moreover, this argument ignores the fact that the choice of law clause in the main contract could equally be driven by a preference for neutrality. That choice of law may in some cases have no apparent connection with any of the parties or the place of performance of their obligations. The present case provides a convenient illustration: New York is not the place of business of the plaintiff, the defendant, W, or Y; nor is it where the Shares are situated. Therefore, the presumed desire for neutrality is not necessarily a strong enough reason for favouring the law of the seat over the law of the main contract.

64 The AR's second reason was that parties would not intend an arbitration agreement valid under the law of the main contract only for it to be declared invalid under the law of the seat, for that would run a serious risk of creating an unenforceable award (see *FirstLink* at [14]). He reasoned that "rational businessmen *must* commonly intend the awards to be binding and enforceable" and hence "would *primarily* be focused on the law

of the seat" [emphasis in original]. He relied on this reason in support of his view that the law of the seat should ordinarily be the governing law of the arbitration agreement. The AR referred to the fact that an arbitral award may be set aside, or refused to be enforced, if the arbitration agreement is invalid either under the law to which the parties have subjected it *or*, failing any indication thereon, the law of the seat (see Arts 34(2)(*a*)(i) and 36(1)(*a*)(i) of the Model Law). However, validity under the law of the seat only arises for consideration if there is no indication of the law the parties have "subjected" the agreement to. The law that the parties have subjected the agreement to would include their implied choice. As Gary Born observes, Arts 34(2)(*a*)(i) and 36(1)(*a*)(i) aim at "giving effect to any express or implied choice-of-law by the parties and, failing such agreement, prescribing a default rule, selecting the law of the arbitral seat" (Gary B Born, *International Commercial Arbitration* Vol I (Wolters Kluwer, 2nd Ed, 2014) ("Born, *International Commercial Arbitration*") at p 526). Therefore, this argument only brings us back to the question of what the implied choice of law is and whether that should be the law of the main contract or the law of the seat. It does not necessarily support a presumption in favour of the law of the seat.

65 Therefore, where the arbitration agreement is part of the main contract, I would hold, adopting *Sulamérica*, that the governing law of the main contract is a strong indicator of the governing law of the arbitration agreement unless there are indications to the contrary. The choice of a seat different from the law of the governing contract would not in itself be sufficient to displace that starting point.

66 How does this choice-of-law analysis apply to a freestanding arbitration agreement? It is first important to be clear what exactly the term "freestanding arbitration agreement" is intended to mean. Arbitration agreements are typically never concluded in a vacuum and are usually part of a substantive contract. Freestanding arbitration agreements may arise, though comparatively rarely, in limited situations. I can think of two such situations. In the case of "highly complex transactions", for example, parties may execute a separate arbitration agreement providing for the arbitration of disputes relating to several contracts or to an overall project (see Born, *International Commercial Arbitration* at p 491). However, Born adds that this will rarely be done. Another example of a freestanding arbitration agreement is one concluded by parties after a dispute has arisen. In *Viscous Global Investments Ltd v Palladium Navigation Corporation "Quest"* [2014] EWHC 2654 (Comm), there were four bills of lading which each purported to incorporate the arbitration clause of a charterparty without identifying any particular charterparty. The plaintiff's cargo was damaged and the defendant's P & I Club issued a letter of undertaking providing security for the plaintiff's claims. The letter of undertaking contained an arbitration clause, which Males J found to be "perfectly capable of operating as a new

and free standing agreement" (at [22]). In both these cases, the arbitration agreement is freestanding because it is not intended to be a term of any other contract. Therefore, there is no question of any express choice of governing law of a main contract to govern the arbitration agreement.

67 If an arbitration agreement is freestanding in that sense, then I agree that when determining the proper law of this freestanding arbitration agreement, if there is no express choice of law, the law of the seat would most likely be the governing law of the arbitration agreement. This accords with the broader principle that if there is no express choice of law for any contract, the law of seat can be an indicator of the implied choice of its governing law (see *Habas* ([57] *supra*) at [102]).

Application to this case

68 The Arbitrator found that there was a rebuttable presumption that the proper law of the arbitration agreement was New York law and that the choice of a Singapore seat did not, by itself, displace that presumption.

69 The plaintiff's fall back argument, in the event I chose to follow *Sulamérica* ([32] *supra*), was that the arbitration clause should, based on the defendant's case, be treated as a freestanding arbitration agreement. Therefore, the Arbitrator should have found that the choice of Singapore as the seat of arbitration meant that the implied proper law of the arbitration agreement was Singapore law.

70 The defendant submitted that New York law governs the arbitration agreement by a straightforward application of *Sulamérica*. I understood Mr Jeremiah to be submitting that even though the arbitration agreement was, on his case, formed before the SPA, it was still intended to be part of the SPA, and therefore the presumption that the governing law of the SPA would govern the arbitration agreement would still apply. Clearly, the defendant is relying on the SPA to support its submission that the governing law of the arbitration agreement and the SPA is one and the same. This suggests that it is not realistic to draw any fine distinction between the arbitration agreement found in the SPA and the SPA itself. In my view, this submission only serves to highlight the inherent difficulty in mounting an argument that the parties intended to enter into an arbitration agreement independent of and *prior* to the SPA.

71 In my judgment, the arbitration agreement here was clearly intended to be part of the SPA. It was at all times negotiated as part of the SPA. The question which I will address below is whether the parties agreed to be bound by the arbitration clause first, with agreement on the rest of the terms of the SPA to follow later when it was executed.

72 Therefore, as a starting point, the presumption is that New York law governs the arbitration agreement. The plaintiff relied on two factors which, it claimed, pointed away from this. The first factor is the choice of

Singapore as the seat. That would not be sufficient on its own to displace the presumption.

73 The second factor is this: the plaintiff submitted that New York law provides for the doctrine of equitable estoppel, which would allow a non-party to rely on the arbitration agreement. This would contradict Art 9.11 of the Draft SPA which states expressly that the SPA was "not intended to benefit any third party or be enforceable by any third party". This, in the plaintiff's submission, meant that the presumption in favour of New York law was rebutted, with the result that the governing law of the arbitration agreement would be the system of law with which it had the closest connection. That would be Singapore law.

74 I reject this argument for at least two reasons. First and more importantly, I think the governing law of the main contract should only be displaced if the consequences of choosing it as the governing law of the arbitration agreement would *negate* the arbitration agreement even though the parties have themselves evinced a clear intention to be bound to arbitrate their disputes. That was precisely what happened in *Sulamérica* ([32] *supra*): if Brazilian law were the proper law of the arbitration agreement, one party would not be bound to arbitrate unless it wished to. This would have completely undermined the clear intention evinced in the arbitration agreement that both parties would be bound to settle their disputes by arbitration. Only in such a situation would the consequences of using the governing law of the main contract as the proper law of the arbitration agreement be a decisive factor in displacing it in favour of the law of the seat of the arbitration. That is not the case here: the potential inconsistency of New York law under the SPA is not of a character that fundamentally undercuts the entire arbitration agreement altogether. That is not to say that the effect on the arbitration agreement of being governed by the law of the main contract will never be relevant. Anything which suggests the parties may not have intended to have their arbitration agreement governed by the same law as the main contract would still be a factor to consider.

75 Second, although the plaintiff submitted that the availability of equitable estoppel under New York law would be inconsistent with Art 9.11, it could well be that Art 9.11 was included to exclude reliance on equitable estoppel in the first place. That was the effect of the Arbitrator's finding. Equitable estoppel was invoked by Y, a non-party, to commence arbitration proceedings against the plaintiff. Notwithstanding the fact that the Arbitrator held that New York law was applicable and that, in principle, New York law permitted a non-signatory like Y to invoke arbitration proceedings against the plaintiff, he nevertheless found, on the facts, that Y was not a party to the arbitration. He relied on *Norcast SARL v Castle Harlan, Inc*, No 12 Civ 4973 (PAC) (SDNY 2014), the facts of which are very similar to the present case, in holding that Art 9.11 of the SPA would

disentitle Y from relying on the doctrine to advance claims in the arbitration against the plaintiff. In other words, the very article which the plaintiff is relying on to highlight the inconsistency between the laws of New York and Singapore was found, by the Arbitrator, to disentitle Y from pursuing the arbitration against the plaintiff. There is no challenge by any party on this ruling and hence for all practical purposes, the difference between New York law and Singapore law, if any, on this issue, is moot.

76 In the circumstances, I conclude, as did the Arbitrator, that New York law, as the express choice of law governing the SPA, is also the governing law of the arbitration agreement.

Whether there was a valid and binding arbitration agreement

77 This is the decisive issue in this application. The defendant's case is that the arbitration agreement was concluded on 18 July 2013. It no longer pursues its alternative case, which the Arbitrator rejected, that the arbitration agreement was concluded on 25 June 2013 at the time when the second draft SPA was circulated.

78 The facts which the defendant relies on in support of its argument can be distilled under the following four points:

(a) It was the plaintiff who proposed the arbitration clause in the second draft SPA. This demonstrated its intention to submit disputes to arbitration instead of court proceedings.

(b) There were no further changes to the arbitration agreement following the fourth draft SPA on 12 July 2013. By the time the sixth draft SPA was circulated on 18 July 2013, the plaintiff stated that it was ready to sign the SPA. The plaintiff's subsequent refusal to sign the seventh draft SPA had nothing to do with the arbitration agreement.

(c) Although the SPA was "subject to contract", this proviso was only meant to apply to the conclusion of the SPA; it did not extend to the negotiations over the arbitration agreement. The proviso could not prevent the formation of the arbitration agreement while the SPA might have remained subject to contract.

(d) The wording of the arbitration agreement was significant: it encompassed the right of the Arbitrator to decide on the validity or existence of the SPA.

79 Mr Jeremiah also submitted that the doctrine of separability supported his argument that the arbitration agreement could have been concluded *prior* to the SPA. However, as I have explained above, the doctrine of separability is only relevant where an arbitration agreement forms part of a main contract – the doctrine prevents a party from impugning the arbitration agreement simply by alleging that the main

agreement was invalid. In this case, Mr Jeremiah's case is that the arbitration agreement was concluded before the conclusion of the SPA. There is no need to invoke the doctrine of separability. The court's task, in deciding whether the Arbitrator had the jurisdiction to hear the dispute, is to consider the usual requirements for the formation of a contract under the applicable law. This was the way both parties agreed to address the jurisdictional issue.

80 Usually, where the arbitration agreement is intended to be part of an underlying contract, the validity and existence of the arbitration agreement and the underlying contract are resolved together. Here, the defendant made a deliberate decision to keep the two issues separate. It is not entirely clear why it chose to adopt this approach but what is clear is that the defendant must bear the consequences of its deliberate election.

81 As a consequence of adopting this strategy, however, the defendant bears the evidential burden of proving on a balance of probabilities that the parties intended and concluded a binding arbitration agreement on 18 July 2013 *prior* to the conclusion of the SPA. The Arbitrator held that all factual issues in the jurisdiction phase of the arbitration would be resolved on a balance of probabilities standard. Mr Jeremiah accepted that this was the evidential standard the defendant had to meet for the purpose of this application as well.

82 Under New York law, a contract is formed when there is offer, acceptance, consideration, mutual assent and intent to be bound. The court must look to the objective manifestations of the parties' intentions based on the attendant circumstances, the situation of the parties, and the objectives they were trying to attain. As authority for these propositions, both parties cited *Bazak International Corp v Tarrant Apparel Group* 491 F Supp 2d 403, 408 (SDNY 2007). Further, under New York law, the court will give effect to a "subject to contract" reservation unless there is conduct which is inconsistent with that reservation or could be construed as a waiver (see *Jordan Panel Systems Corp v Turner Construction Company* 45 AD 3d 165, 183, 841 NYS 2d 561 (1st Dept 2007).

83 Applying these principles, I find that there was no objective manifestation of any mutual intention by the parties to be bound by the arbitration agreement as at 18 July 2013. In my judgment, none of the four points raised by the defendant assists it.

Whether it was material that the plaintiff proposed the arbitration clause

84 Although the plaintiff proposed to substitute an arbitration clause in place of the choice-of-court clause in the second draft SPA, it does not follow that it intended to be bound by the arbitration clause independently of the SPA. The introduction of the arbitration clause was clearly part of the negotiations over the SPA. It was, after all, only one of the revisions which

the plaintiff proposed to the second draft SPA. This point is not decisive. The key question is whether the parties had intended to conclude an independent arbitration agreement giving rise to binding rights and obligations *absent* a concluded SPA.

Whether agreement to wording of arbitration agreement was agreement to be bound

85 The circulation of the fourth draft SPA on 12 July 2013 was preceded by the meetings in Washington DC. At these meetings, the parties reviewed each provision (including the arbitration agreement) on a screen, provided their input, and incorporated their discussions into an updated SPA draft.

86 Although the parties agreed on the wording of the arbitration clause by the fourth SPA and made no further changes to the arbitration agreement thereafter, this does not mean they intended to be bound by the arbitration agreement as an independent contract. Under New York law, the mere exchange of written draft agreements containing an arbitration clause does not indicate that a binding arbitration agreement was formed prior to the execution of a formal written agreement (see *Marion Coal Co v Marc Rich & Co International Ltd* 539 F Supp 903, 907 (SDNY 1982)). The following passages from Born, *International Commercial Arbitration* at pp 795–796, which both parties referred me to, make the same point:

> *In many instances, it will be difficult to show that the parties did not agree to be bound by an underlying commercial contract, but nonetheless intended to conclude an arbitration agreement associated with that contract.* For example, parties not infrequently exchange drafts of proposed contracts, including comments on both draft arbitration provisions and draft commercial terms; sometimes, parties reach agreement on the terms of an arbitration clause before doing so on commercial terms. If no agreement is ever reached on the commercial terms of the underlying contract, it is sometimes argued that the exchange of identical drafts of an arbitration clause, whose terms both parties accept, evidences an agreement on the arbitration provision (notwithstanding the lack of agreement on the underlying contract).
>
> Although dependent on the facts of individual cases, arguments of this sort are generally difficult to sustain. *The parties' agreement on the terms of an arbitration clause does not typically amount to a mutual intention to be legally bound by that provision, absent conclusion of the underlying contract. Rather, such exchanges typically indicate agreement on the text of an arbitration clause, but an intention to be legally bound by that arbitration provision when, but only when, the underlying contract is also concluded.* That conclusion is often reinforced by inclusion of caveats on negotiating materials indicating that the drafts are 'subject to contract,' 'without prejudice,' or otherwise conditional upon final agreement and formal execution of the contracts in question.
>
> [emphasis added]

87 Mr Jeremiah emphasised that, in this extract, the author accepted that it was at least conceivable that parties could negotiate and agree upon the terms of the arbitration clause without agreeing upon the terms of the underlying contract. He accepted, however, that the learned author did, in a footnote, cite two cases where arguments of this sort were made, but rejected. In both these cases a party who had commenced court proceedings successfully resisted a stay of proceedings in favour of arbitration by showing that it was not bound by any arbitration agreement. In *Barnmore Demolition and Civil Engineering Ltd v Alandale Logistics Ltd* [2010] IEHC 544, the Irish High Court found that an arbitration clause in an "unexecuted draft contract" was not a binding arbitration agreement (at [10]). In *APC Logistics Pty Ltd v CJ Nutracon Pty Ltd* [2007] FCA 136, the Federal Court of Australia (Queensland) found that despite an exchange of correspondence on a draft arbitration agreement, there was nothing "amounting to a confirmation or acceptance by the parties that they were in agreement on all terms and [considered] themselves to be bound to perform it"; it was also apparent from the correspondence that the parties envisaged a signed written agreement, which was not executed (at [26]).

88 Mr Jeremiah also drew my attention to an observation of Lord Hoffman in *Fiona Trust & Holding Corporation v Privalov* [2007] 2 All ER (Comm) 1053. Lord Hoffman explained that, as a consequence of the doctrine of separability, an allegation that the main contract was not concluded does not impinge on the validity of the arbitration agreement that has already been agreed. He said at [18]:

> Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.

89 The challenge to the arbitration clause in that case took the form of a challenge to the validity of the main contract on the ground that it had been procured by bribery. Given that the arbitration clause was not impugned on the basis that the main contract was not concluded, this observation takes us no further than the question of what it means for an arbitration clause to be "agreed" – whether that means agreement to the wording of the clause, or agreement to be bound by it.

90 The underlying principle, as I have found, is that agreeing to the wording of the arbitration clause does not *per se* equate to an intention to be contractually bound to arbitrate absent the conclusion of the contract under which the arbitration clause was negotiated.

91 In any case, there is no objective evidence of the parties' mutual intention to be bound by the arbitration clause. At the Washington DC

meetings, the plaintiff's legal counsel stated that any consensus reached regarding the SPA would still be subject to review and approval by the plaintiff's management. The 18 July e-mail does not support the defendant's case either. Being ready to sign the SPA plainly meant that the plaintiff was willing to be bound upon *all parties* signing the SPA. If the defendant's interpretation were right, the 18 July e-mail would have the effect of making all clauses which were not subsequently amended in the seventh draft SPA binding between the plaintiff and the defendant. That could not have been the parties' intention.

92 This submission also runs into an additional difficulty which the plaintiff highlighted: since the SPA was a tripartite agreement, the plaintiff could not have indicated its willingness to be bound by an arbitration clause with the defendant without W's acceptance or assent. There is no evidence that W gave any such assent as at 18 July 2013. In fact, the objective evidence before me is to the contrary. As noted at [19] above, W's reply to the 18 July e-mail was that it was still "finalising the draft". Even after W indicated that it was reviewing the draft, the plaintiff's investment specialist sent W an e-mail on 21 July 2013 asking for an update on the progress in their review of the SPA. There is no reason to assume that W was precluded from making any further change to the arbitration agreement given the general tenor of the response. We now know with the benefit of hindsight that W did not amend the arbitration clause but that does not mean that W could not have amended it if it wanted to after 18 July 2013.

Whether the arbitration agreement remained subject to contract

93 I agree with the plaintiff that the putative arbitration agreement and SPA were "subject to contract" and would only be binding upon execution. The parties' correspondence shows that all terms, including the arbitration agreement, remained subject to contract. This fortifies my conclusion that no binding arbitration agreement was formed before the conclusion of the SPA.

94 The Arbitrator found that the arbitration agreement was not subject to contract. He found that any reference to "subject to contract" in the 30 April letter was not "expressed to be referable to the proposed dispute resolution mechanism". The defendant makes the same argument in its submissions. In the alternative, it argues that even if the 30 April Letter made the arbitration clause "subject to contract" as well, that was no longer the case once the Offer Letter had lapsed on 31 May 2013. The first draft SPA circulated on 17 June 2013 therefore constituted a fresh offer and the parties' negotiations no longer proceeded on a "subject to contract" basis.

95 With respect to the Arbitrator, the "subject to contract" condition in the 30 April Letter could not be referable to any arbitration clause simply because, at the time of that Letter, there was no draft SPA in existence and certainly no arbitration clause either. The defendant's second argument is,

in my view, the more pertinent one. The defendant is right that the offer in the 30 April Letter was only open until a certain time after which it was deemed to be automatically revoked. So the question is whether there was evidence that the negotiations over the first to seventh draft SPAs were nevertheless conducted on a "subject to contract" basis. The answer is clearly in the affirmative – such evidence comprises the following:

(a) First, the terms of the SPA itself. In all seven draft SPAs, there were terms to the effect that the seller and buyer warranted that the SPA had been "duly executed". It is curious that the defendant tried to highlight the draft SPAs as having been circulated "without any conditions or qualifications" in support of its case. The qualifications were in the express terms of the SPAs themselves.

(b) Second, the testimony of those involved in the negotiations. The testimony of the plaintiff's investment specialist and the investment officer assisting her was not challenged by the defendant. According to them, the understanding among all parties was "that all provisions remained open for negotiation until the parties executed a final agreement" and that the plaintiff "never intended for any articles of the draft [SPA] to be binding until a final and agreed version of the document was signed by all Parties".

(c) Third, the parties' course of conduct. The fact that a seventh SPA was circulated with material amendments even after the plaintiff had indicated its readiness to sign the sixth SPA also shows that it in fact remained open for negotiation until it was actually signed.

Whether the wording of arbitration clause was significant

96 Finally, I do not accept the defendant's argument that the inclusion of the "existence of the SPA" in the scope of the arbitration clause shows that it was intended to be a binding agreement. I agree with the plaintiff that it is not unusual for an arbitration clause which is part of a contract to refer disputes concerning the existence of that main contract to arbitration. That is a consequence of its separability – its existence is not tied up with that of the main contract. It is for this same reason that both the Arbitrator and the plaintiff proposed that the jurisdiction phase should also deal with the issue whether and when the SPA was concluded. This was however rejected by the defendant. Even if the inclusion of the said words had been deliberate, it would not compel the conclusion that the arbitration clause was, in itself, a binding agreement. The inclusion of the words clarifies the scope of the arbitration agreement but does not go any way towards answering the question of whether it was meant to be contractually binding *absent* the conclusion of the SPA.

Conclusion

97 For these reasons, I find that, applying New York law as the governing law of the arbitration agreement, there was no binding arbitration agreement formed on 18 July 2013 *prior* to the unexecuted SPA. As a consequence of this finding based on the issue as framed by the parties, it must follow that the Arbitrator did not have jurisdiction to hear the claims.

98 Accordingly, I allow Prayer 1 and consequently Prayer 3 (to set aside the Arbitrator's costs order) of the originating summons with costs fixed at $40,000 inclusive of disbursements. In addition, the defendant is to pay the plaintiff reasonable costs and expenses incurred in the ICC arbitration, including the Arbitrator's fees and expenses as well the ICC administrative expenses, to be taxed by the Registrar of the Supreme Court if not agreed.

99 The plaintiff and the defendant are to take all necessary steps to secure to the plaintiff the release of the sum of US$100,000 (being the security for costs provided by the defendant) from the escrow account established by the ICC Secretariat.

Reported by Sim Bing Wen.

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FirstLink Investments Corp Ltd *v* GT Payment Pte Ltd and others

[2014] SGHCR 12

Case Number	:	Suit No 915 of 2013 (Summons No 5657 of 2013)
Decision Date	:	19 June 2014
Tribunal/Court	:	High Court
Coram	:	Shaun Leong Li Shiong AR
Counsel Name(s)	:	Joana Teo (Harry Elias Partnership LLP) for the plaintiff; Sarbrinder Singh (Kertar & Co) for the first defendant.
Parties	:	FirstLink Investments Corp Ltd — GT Payment Pte Ltd and others

Arbitration – International Arbitration Act (Cap. 143A, 2002 Rev Ed) - Applicable standard to determine the validity of an international arbitration agreement for the purposes of a stay pursuant to section 6 of the International Arbitration Act (Cap. 143A, 2002 Rev Ed)

Arbitration – Determining the implied proper law of an international arbitration agreement – Whether the implied proper law should be the substantive law or the law of the arbitral seat

Arbitration – Whether an international arbitration agreement which is not governed by national laws can be enforced

19 June 2014

Judgment reserved.

Shaun Leong Li Shiong AR:

Introduction

1 It is not uncommon that commercial parties omit to include in their contracts an express choice of law governing their international arbitration agreements. These "midnight clauses" may be included in the main contract very late in the day along with other standard terms just before the contract is signed, understandably so as most parties would be enthusiastic about concluding the negotiations on the contractual obligations, while failing to direct their minds to a possible breakdown of the commercial relationship and the attendant specifics of the dispute resolution process. The central question raised in the present case concerns how the court would determine the proper law governing an international arbitration agreement as impliedly chosen by parties in the absence of an express choice.

Background

2 The plaintiff is a public company incorporated in Singapore in the principal business activity of investment holding. The first defendant is a limited private company incorporated in Singapore in the business of online payment services for global merchants and consumers. The second defendant is a company incorporated in Singapore in the business of developing software for electronic commerce applications. The third defendant is allegedly the major beneficial owner and managing director of the first and second defendants.

3 The plaintiff registered itself on the first defendant's website as a member to use the first defendant's online payment services on 4 January 2012. By this registration, the plaintiff has agreed to be bound by the plaintiff's online user agreement ("the main contract"). The plaintiff deposited a sum of monies into the online payment account, which, according to the first defendant, was to be used for its online payment services. According to the first defendant, instead of using the online payment account kept with the first defendant for online purchases, the plaintiff used the account to make a personal payment of $83,820.60 to its own managing director Ling Yew Kong on 17 February 2012. This was allegedly in contravention of the terms of the main contract, and the first defendant suspended the online payment account pending investigation of the transaction. The plaintiff's profile was consequently exhibited in the first defendant's website as a suspended member. The plaintiff on the other hand claims that it had plans to enter into an investment with the defendants, and that the sum of monies it deposited into the online account was for "proof of funds" and to conduct a "due diligence" exercise into the business of the first defendant to test the robustness of the first defendant's online payment system. The plaintiff then claims that the outstanding monies remaining in the online payment account was a loan to all three defendants. It commenced a court action

against all defendants on 8 October 2013 for what it claims is a loan amount in the sum of S$1,010,000.

4 The first defendant (hereinafter referred to as "the defendant") applied for a stay of the court proceedings based on the following arbitration agreement in the main contract ("the arbitration agreement"):

> Any claim will be adjudicated by Arbitration Institute of the Stockholm Chamber of Commerce. You and GTPayment agree to submit to the jurisdiction of the Arbitration Institute of the Stockholm Chamber of Commerce. Both parties expressly agree not to bring the disputes to any other court jurisdictions, except as agreed here to the Arbitration Institute of the Stockholm Chamber of Commerce[.]

5 The defendant sought leave to correct a typographical error in the summons of the stay application so as to clarify that the stay is sought under the International Arbitration Act (Cap. 143A, 2002 Rev Ed) ("the IAA") and not the Arbitration Act (Cap. 143). The plaintiff consented to this amendment application on 10 January 2014 subject to the question of costs. Both parties therefore agree that the question before me is whether a stay of court proceedings should be granted in favour of arbitration under section 6 of the IAA. The plaintiff submits that the clause is invalid as it is null and void, inoperative or incapable of being performed. Before I proceed to consider the arguments made as to why the arbitration agreement is said invalid, it is important to first ascertain the applicable standard for determining the validity of an arbitration agreement.

My decision

The applicable standard to determine the validity of an international arbitration agreement for the purposes of a stay of court proceedings

6 It was decided in *The "Titan Unity"* [2013] SGHCR 28 ("*The 'Titan Unity'*") that an applicant for a stay of court proceedings pursuant to section 6(1) of the IAA must satisfy on a *prima facie* basis the pre-condition of showing the ***existence*** of an arbitration agreement, without which the court would have no jurisdiction to grant a stay. Where this jurisdiction is invoked, the court must grant a stay unless the agreement is shown to be "null and void, inoperative or incapable of being performed". This parallels the criteria used in Art II(3) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"), which has been commented to encompass a variety of methods of showing the ***invalidity*** of an arbitration agreement (Gary B. Born, *International Commercial Arbitration* (2nd ed, Kluwer International Law 2014) at p 77 ("*Gary Born*"):

> … Article II(3)'s "null and void" formula is expansive and encompasses all claims that an agreement is not valid and binding, including claims that an agreement was not validly concluded by reason of defects in the validity of consent. This conclusion is supported by the fact that the Convention was intended for global application and categorization of contract law defenses inevitably varies between jurisdictions. It is also supported by the fact that claims of lack of capacity, uncertainty, duress, lack of notice and the like cannot be distinguished, in a principled manner, from claims of mistake or fraud. Accordingly, the better view is that all challenges to the validity of an arbitration agreement should fall within Article II(3)'s "null and void" category. As a consequence, all such claims should be for the party challenging the validity of the arbitration agreement to prove, under generally-applicable rules of contract law, under standards of proof requiring a clear showing of invalidity.

7 The precise words used in s 6(2) of the IAA, in particular, that a stay shall be made "***unless***" the court is satisfied that the arbitration agreement is invalid, strongly suggests the *presumptive validity* of an arbitration agreement. Once an arbitration agreement is shown to exist in that the applicant is a party to the arbitration agreement under s 6(1) of the IAA, the agreement is presumed to be valid unless proved to be otherwise under s 6(2). In this regard, the following considerations expounded in *The "Titan Unity"* would apply here with even greater force and it would consequently be sufficient for the purposes of a stay application that the court be satisfied of the agreement's validity on a *prima facie* basis without having to descend to a full review:

> (a) First, the *prima facie* threshold gives effect to the intention of the drafters of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), to confer the requisite primacy to the doctrine of *Kompetenz-Kompetenz* enshrined in Art 16 of the Model Law, which is given the force of law via s 3 of the IAA. In particular, the drafters' decision to delete Art 17 found in the Working Group's Fourth draft dated 29 November 1983 (A/CN.9/WG.II/WP.48) (H. Holtzmann & J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 303 (2013) at p 500 ("*Holtzmann & Neuhaus*")), which expressly provided a party the recourse of seeking a court ruling on whether there is a valid arbitration agreement, was rationalised by the drafters in the Fifth working group report dated 6 March 1984 (A/CN.9/246) that this provision was not in harmony with the principle underlying Art 16 of the Model Law that it was initially and primarily for the arbitral tribunal to decide upon its own jurisdiction, subject to ultimate court control (see *The "Titan Unity"* at [14] – [18]).

(b) Second, the *prima facie* threshold is consistent with the carefully considered approach adopted in fellow common law jurisdictions which subscribes to the Model Law, including Hong Kong (*Pacific International Lines (Pte) Ltd v Tsinlien Metals and Minerals Co Ltd*, XVIII Y.B. Comm. Arb. 180 (H.K. S.Ct. 1992) (1993); *PCCW Global Ltd v Interactive Communications Service Ltd* [2006] HKCA 434; and *In Private Company 'Triple V' Inc v Star (Universal) Co Ltd and Anor* [1995] 3 HKC 129); Canada (*Gulf Canada Resources Ltd v Arochem Int'l Ltd* 66 B.C.L.R.2d 113; *Rio Algom Ltd v Sami Steel Co Ltd*, XVIII Y.B.Comm.Arb. 166 (1993); *Agrawest Investments Ltd v BMA Nederland BV* [2005] PEIJ No 48; *Morran v Carbone* [2005] OJ No 409; *ETR Concession Co v Ontario (Minister of Transportation)* [2004] OJ No 4516; and *Cooper v Deggan* [2003] BCJ No 1638); and India (*Shin-Etsu Chemical Co. Ltd v Aksh Optifibre Ltd* (2005) 3 Arb LR 1) (see *The "Titan Unity"* at [22] – [26]).

(c) Third, the position emanates from the judicial policy of consolidating the court's review of international arbitration disputes at the end of the arbitral life cycle, so that the court's fullest jurisdiction to determine the validity of an arbitration agreement remain with the same courts having jurisdiction to conduct a full review of an arbitral award under the limited grounds provided in Art V of the New York Convention (Emmauel Gaillard and Yas Banifatemi, *Negative effect of Competence-Competence: the Rule of Priority in Favour of the arbitrators*, in Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice 257-258 (Gaillard and Di Pietro, eds., 2008)) (see *The "Titan Unity"* at [29]).

(d) Finally, this is reinforced by the statutory framework of the IAA. In particular, section 10(2) of the IAA defers the decision on the arbitral tribunal's jurisdiction to the arbitral tribunal itself, where it is the *first* (although not the only) arbiter of its own jurisdiction, and the deeming mechanism of section 2A(6) of the IAA strongly suggests that the enquiry into the existence of a valid arbitration agreement is meant to be a quick and summary process (see *The "Titan Unity"* at [31] – [33]).

8 The party resisting the stay application in the present case made only a weak objection to this threshold question. The plaintiff did not assert that the court has to conduct a full review of the validity of the agreement but instead submitted without explanation that the applicable threshold is that of an "arguable case" (see written submissions dated 6 June 2014), and relied in support of this submission the material in Robert Merkin and Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (2009) at page 24, which based its opinion on case English authorities. The reasons why

authorities from England (where the Model Law does not have the force of law) are unhelpful in this context have been highlighted in the decision of *The "Titan Unity"* at [16] – [21]. Having ascertained the applicable threshold to determine the validity of an arbitration agreement for the purposes of a stay of court proceedings, I now proceed to consider the arguments raised by the plaintiff.

Departure from SulAmérica - determining the implied choice of law governing an international arbitration agreement

9 There is no express law governing the arbitration agreement in the present case. However, parties have expressly indicated the law governing the main contract (hereinafter referred to as "the substantive law") as follows:

> 16. General.
>
> This Agreement is governed by and interpreted under the laws of Arbitration Institute of the Stockholm Chamber of Commerce as such laws are applied to agreements entered into and to be performed entirely within Stockholm.

10 This is undoubtedly an unusual choice, for the substantive law expressly chosen by commercial parties are in practice national laws, whereas the rules of an international arbitral institution are commonly selected to complement the curial law or *lex arbitri* governing the procedure of an arbitration. There is therefore an obvious curiosity as to how the parties' substantive obligations can be governed by the rules of an arbitral institution, but this is not in and of itself an issue in the present case given that the validity of the main contract is not in question before this court. The arbitration agreement is, at the moment, shielded by the doctrine of separability. The choice of substantive law is however important here because the plaintiff takes the position that the same choice applies to the arbitration agreement, and submits that the agreement is consequently null and void, inoperative or incapable of being performed given that the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter referred to as "the SCC") only provides a framework of rules applicable to govern the procedure of an arbitration (see plaintiff's written submissions of 12 May and 6 June 2014). Counsel for the plaintiff argues that the agreement is invalid and unenforceable as "it does not make sense" for an arbitration agreement to be governed by the "laws" of an international arbitral institute such as the SCC (see notes of evidence for hearing on 14 May 2014). Counsel for the defendant on the other hand submits that the substantive law was only chosen to govern the main contract and not the arbitration agreement (see notes of evidence for hearing on 14 May 2014).

11 The general methodology to determine the law governing an arbitration agreement (hereinafter referred to as "the proper law") was pronounced in the leading decision of the English Court of Appeal in *SulAmérica Cia Nacional De Seguros S.A. and others v Enesa Engenharia S.A.* [2012] 1 Lloyd's Rep 671 ("*SulAmérica*") as a three-stage enquiry into (i) the express choice; (ii) the implied choice in the absence of an express choice; and (iii) where the parties had not made any choice, the proper law would be the law which the arbitration agreement has its closest and most real connection with. It was held that as a matter of principle, each stage ought to be embarked on separately and in that order, in view that any choice made by parties must be respected. This methodology mirrors the three-stage enquiry which the Singapore Court of Appeal has used to determine the substantive law governing commercial contracts (see *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491 at [36], and *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [79]). Given the Singapore Court of Appeal's observation in *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 3 SLR(R) 936 at [30] ("*Insigma*") that an arbitration agreement should be construed like any other form of commercial contracts, the *general* methodology pronounced in *SulAmérica* would be welcomed in Singapore's jurisprudence for determining the proper law of an arbitration agreement. The *precise application* of the methodology in *SulAmérica* may however require further consideration. In particular, with regard to stage two of the enquiry where there is no express proper law such as the situation in the present case, the English Court of Appeal essentially created a *rebuttable* presumption that the express substantive law of the contract would be taken as the parties' implied choice of the proper law governing the arbitration agreement (at [26]):

> In the absence of any indication to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the agreement to arbitrate. A search for an implied choice of proper law to govern the arbitration agreement is therefore likely … to lead to the conclusion that the parties intended the arbitration agreement to be governed by the same system of law as the substantive contract, unless there are other factors present which point to a different conclusion. These may include the terms of the arbitration agreement itself or the consequences for its effectiveness of choosing the proper law of the substantive contract[.]

12 This was accepted in *Asranovia Ltd & Ors v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm), and in *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Company Ltd* [2013] EWHC 4071 (Comm). In the latter decision, the English Commercial Court at [101] interpreted *SulAmérica* as prescribing that the choice of the seat of arbitration is likely to be overwhelmingly significant in a situation where no substantive law

is expressed in the main contract; but where the substantive law is expressed in the main contract, this is a "strong indication" in relation to the parties' intention as to the proper law governing the arbitration agreement, so much so that parties' choice of the seat may not in itself be sufficient to displace the indication of choice implicit in the express choice of substantive law. The purport of this line of authorities essentially boils down to the following principle: - in a competition between the chosen substantive law and the law of the chosen seat of arbitration, all other facts being equal (in a situation where there are no sufficiently strong indications to the contrary), the law will make an inference that the parties have impliedly chosen the substantive law to be the proper law applicable to the arbitration agreement. The English Court of Appeal rationalised this by the fact that commercial parties would ordinarily intend to have the whole of their relationship governed by the same system of law (see *SulAmérica*, in particular at [11]):

> It has long been recognized that in principle the proper law of an arbitration agreement which itself forms part of a substantive contract may differ from that of the contract as a whole, but it is probably fair to start from the assumption that, in the absence of any indication to the contrary, ***the parties intended the whole of their relationship to be governed by the same system of law.*** It is common for parties to make an express choice of law to govern their contract, but unusual for them to make an express choice of the law to govern any arbitration agreement contained within it; and where they have not done so, the ***natural inference*** is that they intended the proper law chosen to govern the substantive contract also to govern the agreement to arbitrate. [emphasis added]

13 Notwithstanding so, this court takes the view that it cannot always be assumed that commercial parties want the same system of law to govern their relationship of performing the substantive obligations under the contract, and the quite separate (and often unhappy) relationship of resolving disputes when problems arise. In fact, the more commercially sensible viewpoint would be that the latter relationship often only comes into play when the former relationship has already broken down irretrievably. There can therefore be no natural inference that commercial parties would want the same system of law to govern these two distinct relationships. The natural inference would instead be to the contrary. When commercial relationships break down and parties descend into the realm of dispute resolution, parties' *desire for neutrality* comes to the fore; the law governing the performance of substantive contractual obligations prior to the breakdown of the relationship takes a backseat at this moment (it would take the main role subsequently when the time comes to determine the merits of the dispute), and primacy is accorded to the neutral law selected by parties to govern the proceedings of dispute resolution. In this regard, I find more guidance from the House of Lords' decision in *Premium Nafta Products*

Limited and others v Fili Shipping Company Limited and others [2007] UKHL 40 that the construction of an arbitration agreement should start from the assumption that parties to a contract who have entered into an arbitration agreement intend that any dispute arising out of their relationship should be decided in accordance with the dispute resolution procedure chosen by parties.

14 In the province of international arbitration, the arbitral seat is the juridical centre of gravity which gives life and effect to an arbitration agreement, without which the seed of an agreement would not grow into a full-fledged arbitration resulting in the fruit of an enforceable award. As emphasized in a decision prior to *SulAmérica*, and without descending the analysis here from stage 2 to stage 3 of the general methodology, the English Court of Appeal in *C v D* [2007] EWCA Civ 1282 held that it would be "*rare*" for the proper law to be different from the law of the seat, the reason being that an arbitration agreement has a closer and more real connection with the place where the parties have chosen to arbitrate rather than with the place of the law of the main contract. The significance of the seat is recognized by more than 140 countries; Art V(1)(a) of the New York Convention renders an arbitration award unenforceable if the arbitration agreement is not valid under the law of the country where the award was made in the absence of a selected proper law (see also Art 36(1)(a)(i) of the Model Law, where the seat subscribes to the Model Law). In addition, an award may be set aside if the arbitration agreement is invalid under the law of the seat pursuant to Art 34(2)(a)(i) of the Model Law. Given that rational businessmen *must* commonly intend the awards to be binding and enforceable (putting aside the subjective ex *post facto* views of the losing party), their attention with regard to the validity of their arbitration agreements would *primarily* be focused on the law of the seat (as, in this context, opposed to the substantive law). Seen from this light, the very choice of an arbitral seat presupposes parties' intention to have the law of that seat recognise and enforce the arbitration agreement. This must necessarily be so because parties would not intend to have an arbitration agreement be valid under other laws, including the chosen substantive law, only for if to be declared invalid under the law of the seat, for that would run a serious risk of creating an unenforceable award. In other words, parties would not have intended a specific place to be the arbitral seat if there is a serious risk that the law of the seat would invalidate the agreement, or if they had not intended the laws of that seat to give life to the agreement in the first place. I should add here parenthetically that the choice of a seat may very well be implied in the circumstances. Until and unless a delocalised arbitration is internationally recognised, there will necessarily be a seat, expressly or impliedly chosen; and the determination of this choice would in turn require a nuanced exercise in construction (see for example, the case of *Braes of Doune Wind Farm v Alfred McAlpine* [2008] EWHC 426 (TCC) where parties expressly stated that the seat of the arbitration shall be in Glasgow, Scotland, but the

court determined that parties had intended England to be the seat instead, based on, *inter alia*, the express reference to arbitration under the English Arbitration Act 1996 and the fact that the proper law of the arbitration agreement was English law; and the case of *Naviera Amazonia Peruma SA v Compania International de Seguros de Peru* [1988] 1 Lloyd's Rep 116 where the seat of an arbitration located in Peru but subject to the *lex arbitri* of England was determined to be in England).

15 In addition, parties' selection of the neutral seat would invariably come with the implicit acceptance of the *lex arbitri* of that chosen seat to govern their arbitration. This also means that parties have implicitly selected the *lex arbitri* of the seat to govern matters including the supervisory court's powers to determine a jurisdictional dispute in relation to the validity of an arbitration agreement (see, for example, Art 16(3) of the Model Law where the seat subscribes to the Model Law). It is therefore entirely conceivable that parties would demand to have this same system of law to govern the validity of the arbitration agreement to ensure *consistency* between the *law and the procedure* of determining the validity of the arbitration agreement. This is reinforced by the fact that commercial parties would not, in my view, select a place to be the seat if they do not at least have the notional confidence that the supervisory court would recognise and give effect to the arbitration agreement in the first place.

16 In the absence of indications to the contrary, the reasons above would ordinarily compel the law to find that parties have impliedly chosen the law of the seat as the proper law to govern the arbitration agreement, in a direct competition between the chosen substantive law and the law of the chosen seat of arbitration. All things being equal, the mere fact of an express substantive law in the main contract would not in and of itself be sufficient to displace parties' intention to have the law of the seat be the proper law of the arbitration agreement. Nevertheless, I must caution that the determination of the implied proper law ultimately remains a question of construction; each case will have to turn on its own facts. I will at this juncture direct my attention to the facts of the present case.

17 The parties' intention to arbitrate is clear in the present case given that they have deliberately agreed to refer all their disputes to a specific international arbitration institution. In the face of defects afflicting arbitration clauses, the law should give the fullest effect to this clear intention such that an interpretation which confers validity to the arbitration agreement should be preferred to other interpretations which would invalidate the agreement (see *Insigma* at [31] and *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) (Emmanuel Gaillard & John Savage eds) ("*Fouchard*") at p 258). The specific reference of disputes to the SCC in the present case, in the absence of any express clause prescribing a different place in which

the arbitration proceedings will be conducted, evinces an objective intention to elect the *lex arbitri* of Sweden as the curial law applicable to the arbitration, because section 46 of the Swedish Arbitration Act (1999) ("the Act") states that the Act shall apply to arbitral proceedings which take place in Sweden notwithstanding that the dispute has an international connection. In the absence of factors pointing to the contrary, it follows naturally that parties have selected Sweden as the seat of arbitration. Applying the analysis above at [13] – [16], parties have impliedly selected the law of Sweden as the proper law applicable to the arbitration agreement, unless the plaintiff can prove otherwise. This is reinforced to some extent by the position in the *lex arbitri* of Sweden, where section 48 of the Act provides that in the absence of parties' agreement on a proper law, an arbitration agreement shall be governed by the law of the country in which the proceedings shall take place; and this would, in the absence of any express clause to the contrary, be in the Sweden where the SCC. In addition, there are no contrary indications in the main contract to show that parties intend to have some law other than the law of Sweden govern the arbitration agreement. Indeed, the choice of the substantive law here, unusual as it may be, reinforces parties' intention to have the law of Sweden govern the arbitration agreement. Having determined parties' implied choice of the proper law, it would not be necessary to proceed to the third stage of the inquiry to determine which law has the closest and most real connection with the agreement. It was not submitted that the arbitration agreement is invalid under the laws of Sweden. In the circumstances, the plaintiff has failed to show that the arbitration agreement is invalid.

Whether an international arbitration agreement governed by the rules of an international arbitral institution instead of a national law can be enforced

18 In any event, taking the plaintiff's case at its best; assuming *arguendo* if the arbitration agreement is governed by the "laws" of the SCC as opposed to any national law, this does not necessarily demand a conclusion that the agreement is invalid and consequently unenforceable for the purposes of a stay application. While there should be no excuse for poor drafting, it would be safe to assume that not all commercial men and women (or lawyers for that matter) are avid students of jurisprudence with an acute philosophical understanding of what "law" is. It follows that, in so far as parties' intentions are to be given effect to, the reference to "law" need not necessarily be read as "law" in the conventional Hartian, Dworkinian or Razian sense. At least in the realm of international arbitration, it is not entirely inconceivable that a dispute over the validity of an arbitration agreement may be resolved by *rules of law* as opposed to national laws. Article 28(1) of the Model Law, which has the force of law in Singapore, allows an arbitral tribunal to determine a dispute in accordance with such *rules of law* chosen by parties as applicable to the substance of the dispute. There is commentary that this may be interpreted to allow

for the application of *non-national* rules of law (*Gary Born* at p 2661), such as *lex mercatoria* or transnational principles of commercial law found, for example, in the UNIDRIOT principles of international commercial contracts 2010. If the rules of law chosen by parties can be applied to determine the substance of the dispute, it is questionable why the position should be different for the determination of the validity of an arbitration agreement. Indeed, this is reminiscent of the case of *Municipalité de Khoms El Mergeb v Société Dalico* (Judgment of 20 December, 1994 Rev. arb. 166 (French Cour de Cassation civ. 13)) ("*Dalico*") where the French Cour de Cassation famously pronounced that the validity of an international arbitration agreement can be determined by the direct determination of parties' common intention without reference to any national laws:

> by virtue of a substantive rule of international arbitration, the arbitration agreement is legally independent of the main contract containing or referring to it, and the existence and effectiveness of the arbitration agreement are to be assessed, subject to the mandatory rules of French law and international public policy, on the basis of the parties' common intention, there being no need to refer to any national law.

19 There are serious questions to be asked about the viability of such a position. Such a principle surely cannot escape from the fact that this remains ultimately an application of *French private international law*, which in and of itself provides no normative impetus for other countries to adopt. There is in addition the very real "*fori* bias". The direct determination of "parties' common intention" would necessarily be made by a court of law, and it may artificial to think that such an exercise can be fully shielded from the fori's legal conceptions of contractual validity. The less compelling criticisms assert that there surely *must be a law* to determine if an arbitration agreement is void for lack of capacity or lack of consent (Pierre Mayer, *L'autonomie de l'arbitre international dans l'appréciation de sa propre compétence*, in collected courses of the Hague Academy of International Law, Vol 217, Year 1989, Part V; B. Oppetit, note following CA Paris, Dec. 13, 1975, *Menicucci v. Mahieux*, 104 J.D.I. 106 (1977); referred to in *Fouchard* at para 438). Yet the true difficulty is not that *no law exists* in which to answer these questions – there exists such a law – this would, according to *Dalico*, be the body of substantive international law on the formation of international arbitration agreements; the real issue here is that there is as yet no recognised body of international substantive rules ***which can provide the certainty*** the commercial world requires to determine the validity of an international arbitration agreement (*Gary Born* at p 554). This however does not mean that such a recognised body of international substantive rules applicable to international arbitration agreement will *never* be formed. For a start, there is much to be said of the fact that countries of different legal traditions have agreed upon a *common* international standard of determining the substantive validity of international arbitration agreements as not being "null and void,

inoperable or incapable of being performed" under Art II(3) of the New York Convention, which may be considered a self-executing provision which prescribes *substantive rules of international law* applicable to the formation and validity of international arbitration agreement. (*Gary Born* at p 550). In this regard, a court seized of an application to enforce an international arbitration agreement should, when determining its validity, defer parochial notions to internationally harmonious and uniform conceptions of validity, so as to give effect to the *internationalized* form of dispute resolution process selected by parties. The US court of appeals said as much in *Ledee v Ceramiche Ragno*, 684 F.2d 184 (1st Cir. 1982), that Art II(3) must be interpreted to encompass only contractual notions of validity which can be "applied neutrally on an international scale … such as fraud, mistake, duress and waiver"; and in *Rohne Mediterranee v Lauro*, 712 F. 2d 50 (3d Cir. 1983):

> [under Art II(3) of the New York Convention], an agreement to arbitrate is "null and void" only (1) when it is subject to an internationally recognised defense such as duress, mistake, fraud or waiver, (2) when it contravenes fundamental policies of the forum state. The "null and void" language must be read narrowly, for the signatory nations have jointly declared general policy of enforceability of agreements to arbitrate. …
>
> …signatory nations have effectively declared a joint policy that presumes the enforceability of agreements to arbitrate. Neither the parochial interests of the forum state, nor those of states having more significant relationships with the dispute, should be permitted to supersede that presumption. The policy of the Convention is best served by an approach which leads to upholding agreements to arbitrate. The rule of one state as to the required number of arbitrators does not implicate the fundamental concerns of either the international system of [judicial enforcement] forum, and hence the agreement is not void.

20 In so far as an international arbitration agreement may *in theory* be governed by a substantive body of international law instead of a national law, and to the extent where the rules and principles of an international arbitral institution reflect the legal principles and best practices found in this body of international law, a good argument can be made that there should be no conceptual limit on parties' autonomy in the present case to decide that the validity of their arbitration agreement should be determined by a clear system of rules and body of principles of the SCC. It may be beneficial in this regard to have a brief consideration of the SCC's rules and cases (for a fuller discourse, see David Ramsjö and Siri Strömberg, *Manifest Lack of Jurisdiction? A selection of decisions of the Arbitration Institute of the Stockholm Chamber of Commerce concerning the* prima facie *existence of an arbitration agreement*; and Annette Magnusson and Hanna Larsson, *Recent practice of*

the Arbitration Institute of the Stockholm Chamber of Commerce, prima facie *decisions on jurisdiction and challenges of arbitrators*). Art 9(i) of the SCC rules gives the SCC Board the power to decide whether the SCC manifestly lacks jurisdiction over the dispute; and Art 10 gives the SCC Board the power to dismiss a case, in whole or in part if the SCC manifestly lacks jurisdiction over the dispute. The cases suggest that the jurisdictional disputes would be decided in an objective manner, and certainly shows that contrary to what many believe about arbitral institutions, they need not necessarily be too zealous about finding itself to have the requisite jurisdiction. This is despite commentary that the SCC Board's decisions reveal a "pro-arbitration" approach (Felipe Mutis Tellez, Prima Facie *decisions on jurisdiction of the Arbitration Institute of the Stockholm Chamber of Commerce: Towards consolidation of a "pro-arbitration" approach*). For example, in the case of SCC Arbitration V (002/005), the respondent to an agreement which prescribes that the dispute be decided "without recourse to the ordinary courts by a court of arbitration in Stockholm consisting of three arbitrators to be appointed" objected to the SCC's jurisdiction on the basis that there was no express reference to the SCC Rules. The SCC Board decided that the SCC manifestly lacks jurisdiction over the dispute despite the fact that the arbitration agreement expressly conferred upon the "Chamber of Commerce in Stockholm" the power to appoint arbitrators. Likewise, In Arbitration case F 086/2010, the SCC Board found that it manifestly lacks jurisdiction over the dispute even though the agreement refers disputes to a "Court of Arbitration in Stockholm" and expressed that Swedish law will apply to the arbitration proceedings. On the other hand, seemingly parochial notions of validity are rejected by the SCC Board, consistent with international norms of contractual validity. This is seen in the case of SCC Arbitration V (010/2005), where the Austrian claimant commenced arbitration proceedings against the Egyptian respondent over the alleged mis-delivery of construction equipment. The respondent contended that the Egyptian courts would consider an agreement to arbitrate in Sweden a dispute such as this to be null and void, but the SCC decided that it was not evident that the SCC lacks jurisdiction over the dispute.

21 Notwithstanding the above, the SCC itself (and not this court) would be best placed to decide if it does indeed have a consistent and clear body of rules and principles to determine the validity of an international arbitration agreement. In view that it has already been decided above that the proper law of the arbitration agreement is the law of Sweden, there is no need to determine the question of whether an arbitration agreement governed by the "laws" of the SCC can be enforced, suffice to say that there does appear to be a clear system of rules and consistent application of principles of the SCC which would guide arbitrants in determining the validity of an arbitration agreement, and which may persuade a court to find that, *at least on the prima facie threshold*, such an arbitration agreement would be valid, but only for the specific purpose of staying court proceedings, which does

not preclude a full jurisdictional challenge before the arbitral tribunal, or a complete review of the question by the enforcement court.

Other arguments made by the plaintiff

22 The plaintiff made several other arguments in its attempt to prevent a stay of court proceedings. It should be emphasized at the outset that these arguments could arguably be dismissed *in liminie* given that the plaintiff failed to show how, and to assert that, any of the following arguments would invalidate the arbitration agreement under the laws of Sweden.

23 First, the plaintiff tried to find fault with a separate clause titled "Arbitration" in the main contract (clause 15.1) which provides for arbitration with the "Stockholm International Arbitration Centre", and asserts that this clause is defective as there is no such institution. This is irrelevant as the defendant is not seeking to rely on this clause, which is only applicable where the total claim sought is less than US$10,000. The plaintiff then draws this court's attention to another clause (clause 15.3) which states that all claims between the parties must be resolved using the dispute resolution mechanism selected in accordance with "this Section" by the party first to assert a claim, either through a court filing or commencement of arbitration. Given that there are only two parts in this "Section", being clause 15.1 and the arbitration agreement in question (clause 15.2), the reference to "a court filing" must necessarily refer to the arbitration agreement in question. This is reinforced by the header of the arbitration agreement in question which is erroneously titled as "Court", and the statement in the arbitration agreement that parties agree not to "bring the disputes to any other court jurisdictions, except as agreed here to the Arbitration Institute of the Stockholm Chamber of Commerce". This essentially means that the only form of dispute resolution contemplated by the parties is by way of international arbitration. Where the claim is less than US$10,000, clause 15.1 applies. The arbitration agreement in question is applicable for claims of a higher amount, which is the situation in the present case.

24 The plaintiff further argued that the dispute falls outside the scope of the arbitration agreement. After hearing submissions at the first hearing, this court was initially minded to agree with the plaintiff and this was communicated to both parties in a subsequent hearing. Despite the fact that this position was against the defendant, and already in the plaintiff's favour, *the plaintiff* applied to make further arguments to argue, *inter alia*, that the dispute does not fall within the scope of the arbitration agreement, after parties were asked to consider if they wished to make further arguments (see plaintiff's written submissions dated 12 May 2014 at [3(d)] and [35] – [45], and notes of evidence for hearing on 14 May 2014). It should be emphasized that both parties *accepted* that further arguments could

be heard. On hearing further arguments as applied by the plaintiff, it became evident that the plaintiff's case cannot be accepted. The plaintiff contends that the dispute falls outside the arbitration agreement in view that the main contract is not applicable, as the plaintiff had not in fact agreed to use the first defendant's user online payment services. This argument is disingenuous because to agree with the plaintiff would be in effect to wholly determine the merits of the dispute which the plaintiff seeks to resolve with its action in the first place. The question of whether the registration to use the first defendant's online services was meant for investment purposes is the very central question which relates to the merits of the dispute to be determined by the arbitral tribunal. What is significant to this court is that it is not disputed that the plaintiff had registered itself as a user of the first defendant's online payment services, and by doing so, made a deliberate act to formally accept the terms of the main contract. There is also no explanation as to why the alleged "proof of funds" for the purposes of an alleged investment must be done by registering itself as a user of the first defendant's online payment services and also by way of a deposit with the first defendant's payment system, when this could have been easily done via other simpler means; nor was there any explanation given by the plaintiff to explain why such a huge sum of monies needs to be deposited in the first defendant's account merely for "due diligence" purposes. In addition, there are indications that the plaintiff did sign on to use the first defendant's online services, such as the multiple withdrawals from the online account, and the fact that the plaintiff inserted a special remark on the online registration page that for any transaction above $5,000, or if there are more than three transactions a day, the user should contact the managing director of the plaintiff, Ling Yew Kong. This court is, in this regard, guided by the decision of *Tjong Very Sumito and other v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 where the Court of Appeal held that it is only in the clearest of cases where the dispute did not fall within the arbitration agreement that the court would not have jurisdiction to grant a stay, and if it was at least arguable that the matter is the subject of the arbitration agreement, then a stay of proceedings should be ordered. In view of the above factors, there is a substantial dispute over the question of whether the plaintiff had registered itself as a user of the first defendant's online payment services for investment purposes, and it consequently cannot be said that the dispute clearly falls outside of the arbitration agreement.

25 Last, the plaintiff sought to adduce evidence of a competing version of a main contract which does not have an arbitration agreement. This appears to be quite a convenient argument given that the only apparent differences between the two contracts are the dispute resolution clauses. The plaintiff asserts that the defendant, who has "a propensity to adopt falsehoods whenever it suits them", has "altered" the terms of the main contract "as an afterthought to support its application to stay these proceedings" (see affidavit of Ling Yew Kong dated 18 November 2013 at [16]). Given that the plaintiff

is essentially claiming that the defendant has committed perjury and produced a forged document, it has to do better than to make a bare assertion that it had entered into a competing version of the contract without an arbitration agreement (see affidavit of Ling Yew Kong dated 18 November 2013 at [15]). This appears to be a question which would be properly resolved via the necessary examination of witnesses instead of mere affidavits, and the plaintiff may bring this challenge before the arbitral tribunal if it wishes to do so.

Conclusion

26 In the circumstances, the plaintiff's action against the first defendant is stayed in favour of arbitration at the Arbitration Institute of the Stockholm Chamber of Commerce. I will hear parties on costs.

Delhi High Court

Gmr Energy Limited vs Doosan Power Systems India ... on 14 November, 2017

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Reserved on: 14th September, 2017
Decided on: 14th November, 2017

\+ CS(COMM) 447/2017

GMR ENERGY LIMITED ..... Plaintiff

Represented by: Mr. Rajiv Nayar and
Mr. Darpan Wadhwa,
Sr. Advocates with Mr. Rishi
Agrawala, Ms. Malavika Lal,
Mr. Karan Luthra and
Mr. Saurabh Seth, Advocates.

versus

DOOSAN POWER SYSTEMS INDIA
PRIVATE LIMITED & ORS ..... Defendants

Represented by: Mr. Nakul Dewan, Mr. Sumeet
Lall, Mr. Sidhant Kapoor,
Ms. Neelu Mohan and Mr. Zain
Maqbool, Advocates for
defendant No.1.
Mr. A.S. Chandhiok,
Sr. Advocate with Ms. Shally
Bhasin, Advocate for defendant
Nos. 2 and 3.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA
I.A. No. 7248/2017 (under Order XXXIX Rule 1 and 2 CPC), 9068/2017 (under Order XXXIX Rule 4 CPC) and 9069/2017 (under Section 45 of Arbitration and Conciliation Act, 1996)

1. The present suit has been filed by the plaintiff GMR Energy Limited (in short 'GMR Energy') against Dossan Power Systems India Pvt. Ltd. (in short 'Doosan India'), the sole contesting defendant being the defendant No.1 and GMR Chhattisgarh Energy Limited (in short 'GCEL') and GMR

Infrastructure Ltd. (in short 'GIL'), proforma defendants impleaded as defendant Nos. 2 and 3 respectively. In the suit GMR Energy inter alia seeks a decree of permanent injunction restraining Doosan India and its representatives, agents etc. from instituting or continuing or proceeding with arbitration proceeding against GMR Energy before the Singapore International Arbitral Centre (SIAC) being SIAC Arbitration No. 316/2016 (Arb. 316/16/ACU). SIAC Arbitration No. 316/2016 is based on the three agreements between Doosan India and GCEL all dated 22nd January, 2010 (for convenience 'EPC agreements' dated 22nd January, 2010) being (i) the Agreement for Civil Works, Erection, Testing and Commissioning (in short 'CWETC Agreement') executed between GCEL and Doosan India; (ii) the Onshore Supply Agreement executed between GCEL and Doosan India;

(iii) the BTG Equipment Supply Agreement (in short 'Offshore Supply Agreement') also executed between GCEL and Doosan India; and (iv) the Corporate Guarantee dated 17th December, 2013 (in short 'Corporate Guarantee') executed between GCEL, GIL and Doosan India besides the two Memorandum of Understandings (in short the two 'MOUs') between Doosan India and GMR Energy dated 1st July, 2015 and 30th October, 2015

2. Basing its claim on the three agreements, that is, EPC agreements dated 22nd January, 2010, the Corporate Guarantee dated 17th December, 2013 and the two MOUs, Doosan India sent a notice of arbitration dated 11th December, 2016 to GIL as first respondent, GMR Energy as second respondent and GCEL as third respondent seeking enforcement of the liability of the three respondents therein jointly and severally towards Doosan India, GCEL being liable in terms of three EPC agreements, GIL in terms of the Corporate Guarantee and GMR Energy, though not a party to

the three EPC Agreements and the Corporate Guarantee, but by virtue of the two MOUs, common family governance, transfer of shareholding and being the alter ego of GCEL and GIL. In the plaint GMR Energy claims that since it was not a party to the three EPC agreements or the Corporate Guarantee which contained arbitration clause, it responded to the correspondence received from SIAC, objecting to its being arrayed as a party and sought discharge of GMR Energy as a party, respondent and termination of the reference, wrongfully and incorrectly initiated against GMR Energy by Doosan India. Since SIAC neither acceded to nor rejected the request of GMR Energy and was proceeding to appoint an arbitrator on behalf of GMR Energy, the present suit was filed with the prayers as noted above. Along with the suit, GMR Energy filed an application being I.A. No. 7248/2017 under Order XXXIX Rule 1 and 2 of Civil Procedure Code, 1908 (in short 'CPC') seeking an ad-interim ex-parte stay.

3. When the present suit came up before this Court on 4th July, 2017 as GMR Energy was not a party either to the three EPC agreements or to the Corporate Guarantee, this Court passed an ad-interim ex-parte order staying operation of the letter dated 8th June, 2017 addressed from Ms. Adriana noting that "in the circumstances, the President of the Court of Arbitration of SIAC will now proceed to appoint all three arbitrators and shall designate one of them to be the presiding arbitrator pursuant to Rule 12.2 of the SIAC Rules." and directed that no arbitrator be appointed on behalf of GMR Energy till the next date of hearing which interim order is continuing till date.

4. Pursuant to the service of summons two applications have been filed by Doosan India being I.A. No. 9068/2017 under Order XXXIX Rule 4 CPC

and I.A. No. 9069/2017 under Section 45 of the Arbitration and Conciliation Act, 1996 (in short 'Arbitration Act'). On completion of pleadings arguments have been heard on behalf of both the parties in the three applications, that is, under Order XXXIX Rule 1 and 2 CPC, Order XXXIX Rule 4 CPC and Section 45 of the Arbitration and Conciliation Act, 1996 (in

short the Arbitration Act).

5. In support of the applications claim of Doosan India is that a valid and binding arbitration agreement exists between Doosan India, GCEL, GIL and GMR Energy being an alter ego and a guarantor of GCEL. Further as per the Independent Auditor Report of GCEL dated 27th May, 2016, GMR Energy is a holding company of GCEL and has taken over GCEL liabilities towards Doosan India. GMR Energy guaranteed to make payments and in fact made certain payments on behalf of GCEL in partial discharge of the liability of GCEL towards Doosan India and at that material time GMR Energy owned 100% stakes in GCEL, co-mingled funds, was run by the same family, had the same Directors and officers, interchangeably used each other's addresses and telephone numbers, observed little, if not any, corporate formality and separation and as such being the alter ego of GCEL, GMR Energy is bound by the arbitration agreement between Doosan India, GCEL and GIL for resolution of dispute. Further GCEL is represented to be a "special purpose vehicle established by GMR Group specifically for development of the Project" and entered into the three EPC contract agreements with Doosan India which is wholly owned subsidiary of Doosan India Heavy Industries and Construction, (in short 'Doosan Korea'), a company registered and existing under the laws of Korea. After GCEL failed to discharge its liability GMR Energy and Doosan India entered into a

Memorandum of Understanding dated 1st July, 2015 being MOU-I between GMR Energy, GCEL, Doosan India and Doosan Korea followed by the second Memorandum of Understanding dated 30 th October, 2015 being MOU-II between GMR Energy, GCEL and Doosan India.

6. Since the three EPC agreements and Corporate Guarantee Agreement, all contain arbitration clause with the intention to resolve any dispute through arbitration under SIAC Rules with the seat in Singapore and the two MOUs are also governed by the same agreements, the payment obligation being undertaken by GMR Energy for assuring proper execution of three EPC agreements between Doosan India and GCEL, the arbitration clause would also extend to GMR Energy.

7. Learned counsel for GMR Energy submits that the three EPC agreements and the Corporate Guarantee agreement before this Court all prescribe; (1) the law governing the contract shall be Indian law (2) "the arbitration shall be conducted in Singapore" and (3) that the "arbitration shall be as per SIAC Rules". Since the relationship between GCEL, GIL and Doosan India is only domestic in nature, all parties being Indian, Part-I of the Arbitration Act would apply in view of the amendment in the definition of "international commercial arbitration" under Section 2 (1) (f) (iii) of the Arbitration Act. Reliance is placed on the decision of the Supreme Court in 2008 (14) SCC 271 TDM Infrastructure Private Limited vs. UE Development India Private Limited. Further observation of the Supreme Court in TDM Infrastructure (supra) has been followed by Bombay High Court in 2012 MhLJ 822 Seven Islands Shipping Ltd. vs. Sah Petroleums Ltd., as well as 2015 SCC Online Bombay 7752 Aadhar Mercantile Private Limited vs. Shree Jagdamba Agrico Exports Private Ltd.

Since the arbitration is between two Indians, it cannot be termed as international commercial arbitration and the Indian substantive law cannot be derogated from by and between two Indian parties as held by the Constitution Bench in the decision reported as 2012 (9) SCC 552 Bharat Aluminum Company and Ors. etc. etc. vs. Kaiser Aluminium Technical Service, Inc. and Ors. etc. etc.

8. Distinguishing the decision in 1998 (1) SCC 305 Sumitomo Heavy Industries Ltd. vs. ONGC Ltd. & Ors. relied upon by learned counsel for Doosan India reliance is placed on 2013 (3) CTC 709 National Highway Authority of India vs. Oriental Structure Engineers Ltd. - Gammon India Ltd. (JV) to contend that the Arbitration Act is "matter of substantive law" and since governing law of the contract is Indian law, in the absence of a specific choice of law governing the arbitration agreement, the law governing the arbitration agreement would also be Indian law as held in the decision reported as 2005 (7) SCC 234 Shin-Etsu Chemical Co. Ltd vs M/S. Aksh Optifibre Ltd. & Anr. Reliance is placed on the decision reported as 2014 (5) SCC 1 ENERCON (INDIA) Ltd & Ors. vs. ENERCON GMBH & Anr. wherein interpreting a similar arbitration agreement it was held that the arbitration clause only provided that venue of arbitration was London however, the seat of arbitration was in India, as the Arbitration Act was made applicable by the parties. Further the identification of the parties to an agreement is a question of substantive law and not procedural law as held by the Commercial Court of England in 2002 EWHC 121 (Comm) Peterson Farms Inc. and C & M Farming Ltd. Since two Indians cannot contract out of the law of India and the Arbitration Act of 1996 is a substantive law, exclusion of Part-I of the Arbitration Act which Doosan India seeks to do,

would be hit by Section 28 of the Indian Contract Act. Simply because the place of arbitration is out of India, Part-II of Arbitration Act would not apply and as per the proviso to Section 2 (2) of the Arbitration Act engrafted through the amendment dated 23rd October, 2015 Part-I of the Arbitration Act would apply. Once the arbitration amongst two Indians ceases to be an "international commercial arbitration", it would automatically cease to be "considered as commercial under the law enforced in India" which is the principle condition for defining "a foreign award" under Section 44 of the Arbitration Act. Despite the fact that GMR Energy is not a party to the arbitration agreement Doosan India seeks to contend that GMR Energy must comply with SIAC Rules, be governed by the laws of Singapore and only file proceedings before the Court at Singapore which is clearly oppressive and vexatious apart from being illegal. Since Part-II of the Act would not apply the application filed by Doosan Indian under Section 45 of the Act is not maintainable.

9. Learned counsel for GMR Energy further contends that even if it is held that the Singapore Arbitration Laws are applicable to the arbitration amongst Doosan India, GCEL, GIL however, GMR Energy not being a signatory to any of the arbitration agreements, it cannot be roped into an international arbitration by applying the principle of alter ego or "it being a guarantor" without there being a written guarantee. Doosan India invoked

the arbitration by virtue of the three EPC agreements however, Clause 25.12 of CWETW Agreement and Clauses 23.12 of the onshore and offshore supply agreements clearly provided that the parties have entered into the agreement entirely on their own and in no manner, for and on behalf of any shareholder of either party and neither party shall take recourse against such

persons for any act omission, obligation whether based upon piercing of the party's corporate veil or any other legal theory based upon exercise or control over the parties or otherwise. Reliance is placed on the decision reported as 2003 (4) SCC 341 Modi Entertainment Network & Anr. vs. W.S.G. Cricket PTE Ltd. and Peterson Farms (Supra).

10. Further even the principle of alter ego would not entitle Doosan India to invoke arbitration against GMR Energy. Relying upon the decisions reported as 2010 (5) SCC 306 Indowind Energy Ltd. vs. Wescare (India) Ltd., 2017 SCCOnline Del 8345 Sudhir Gopi vs. Indira Gandhi National Open University and 2014 (9) SCC 407 Balwant Rai Saluja & Anr. vs. Air India Ltd. & Ors. it is contended that the principle of alter ego as being sought to be invoked cannot be invoked by Doosan India as each company is a separate and distinct legal entity and the mere fact that the two companies have common shareholders or common board of directors will not make the two companies a single entity. Reference is also made to the decision reported as 2017 (4) ArbLR 1(Delhi) Ameet Lalchand Shah vs. Rishabh Enterprises decided by Division Bench of this Court. Even in the decision reported as 2013 (1) SCC 641 Chloro Controls India Pvt. Ltd. vs. Severn Trent Water Purification Inc. & Ors. relied upon by learned counsel for Doosan India, Supreme Court held that a heavy onus lies on the party seeking to claim under or through the principle of alter ego a non-signatory party to an arbitration and Doosan India cannot get away by showing that only a prima facie view has to be formed. Reliance is also placed on the decisions reported as 2011 (11) SCC 375 Deutsche Post Bank Home Finance Ltd. vs. Taduri Sridhar and 2017 (1) MhLJ 681 Integrated Sales Services Limited vs. Arun Dev and Ors.

11. Learned counsel for GMR Energy further contends that GMR Energy is also not liable to be made a party to the arbitration on the basis of being guarantor by virtue of the two MOUs for the reason admittedly the two MOUs stood terminated vide letter dated 3rd November, 2016 of Doosan India which letter was not made a part of the notice of arbitration. Relying upon the decision reported as 1994 Suppl. (3) SCC 126 M/s P.K. Ramaiah and Co. vs. Chairman & Managing Director, National Thermal Power Corpn, it is contended that having terminated the two MOUs, Doosan India cannot claim that there is arbitrable dispute. Referring to Rule 7 of the SIAC Rules it is contended that GMR Energy being a non-signatory of the arbitration agreement its impleadment was permissible only after compliance of Section 7 of the SIAC Rules which admittedly Doosan India has not complied with. Reliance is also placed on 2013 SGCA 57 PT First Media TBK (formerly known as PT Broadband Multimedia TBK) vs. Astro

Nusantara International BV & Ors.

12. Since admittedly there is no arbitration clause governing GMR Energy and Doosan India in view of the decision of this Court in 2009 SCCOnline Del 3213 Lucent Technologies Inc. vs. ICICI Bank Limited & Ors. GMR Energy has remedy before this Court and cannot be compelled to defend itself in proceedings before the Arbitral Tribunal which are without jurisdiction and would cause irreparable loss and damage to GMR Energy. Reliance is also placed on the decisions reported as in 2011 EWHC 1624 (Comm) Excalibur Ventures LLC and Texas Keystone Inc. & Ors. and 2002 (7) SCC 46 Prakash Narain Sharma vs. Burmah Shell Cooperative Housing Society Ltd.

13. Countering the arguments advanced on behalf of GMR Energy, learned counsel for Doosan India submits that invocation of arbitration against the alter ego of a signatory is a well recognized principle not only in India but also in Singapore which is the chosen seat of arbitration. Reliance is placed on the decision reported as Chloro Controls (supra). Relying upon 2009 SGHC 42 Jiang Haiying vs. Tan Lim Hui and Anr. a decision of the High Court of Singapore, learned counsel contends that since parties agreed to arbitration under the SIAC Rules with the seat of arbitration being at Singapore, Part-II of the Arbitration Act would apply. Referring to Sections 44 and 45 of the Arbitration Act it is contended that the two provisions recognize a situation where an arbitration agreement would extend to a non-signatory to a contract.

14. Learned counsel for Doosan India further submits that if there is an ex-facie or a prima facie basis for arbitration to proceed against the non party to the agreement, Section 45 of the Arbitration Act warrants that the judicial proceedings must be stayed in favour of the arbitration. Reliance is placed on Shin-Etsu Chemical (supra), 2016 (4) Arb. LR 250 Delhi Mcdonald's India Private Limited vs. Vikram Bakshi and Ors. and 2015 SGHC 225 Malini Ventura vs. Knight Capital Pte. Ltd. & Ors. which decision of the Singapore High Court has been affirmed in the decision reported as 2015 SGHC 57 Tomolugen Holdings Ltd & Anr vs. Silica Investors Ltd. and Ors. It is further contended that the Arbitral Tribunal is the appropriate forum to adjudicate on the issue of alter ego and the same being determinable by the Arbitral Tribunal, this Court will not proceed with the present suit to determine whether GMR Energy is liable to be proceeded in the arbitration or not. Reliance is placed on the decision of Division

Bench of Bombay High Court in Integrated Sales Services (supra), of the High Court of Singapore reported as 2006 (3) SGHC 78 Aloe Vera of America, Inc. vs. Asianic Food (S) Pte. Ltd. & Anr., and M/s Sai Soft Securities Ltd. vs. Manju Ahluwalia, FAO(OS) No. 65/2016 decided by the Division Bench of this Court. Distinguishing the decision of the learned Single Judge of this Court in Sudhir Gopi (supra) it is contended that in the said matter this Court was not dealing with an international arbitration but

under Part-I of the Arbitration Act, hence the said decision has no application to the facts of the present case.

15. Rebutting the arguments on behalf of GMR Energy that the parties being Indian entities, the arbitration between them cannot be construed as an International arbitration under Section 2 (1) (f) of the Arbitration Act and they cannot choose a foreign seat of arbitration as the same would contravene Section 28 of the Act, it is contended that even Indian parties can agree to choose a foreign seat as has been done in the present case and as held by the Supreme Court in 1998 (1) SCC 305 Sumitomo Heavy Industries Ltd. vs. ONGC Ltd. & Ors. which recognizes that once arbitration commences three laws are applicable, that is, substantive law of contract, curial law and the proper law of the arbitration agreement. Reference is also made to Redfern and Hunter on International Arbitration, 6th Edn. (Blackaby, Partasides, Redfern, el al.; Sep 2015 at pp. 157) and the decisions reported as 1999 (7) SCC 61 Atlas Exports Industries vs. Kotak & Co. and 2015 SCCOnline M.P. 7417, Sasan Power Limited vs. North American Coal Cornpn (India) (P) Ltd

16. Refuting the reliance of learned counsel for GMR Energy on TDM Infrastructure (supra), it is contended that the observations of the Supreme

Court in the said case was in respect of proceedings under Section 11 of the Arbitration Act and for no other purpose, thus the decision would not constitute a binding precedent as held by the Supreme Court in the decision reported as 2015 (3) SCC 49 Associate Builders vs. Delhi Development Authority. Neither of the two decisions relied upon by learned counsel for GMR Energy i.e. Seven Islands (supra) and Aadhar Mercantile (supra) referred to the earlier decision of the Supreme Court in Atlas Exports (Supra).

17. It is further contended that the parties in the present case have agreed to seat the arbitration in Singapore in accordance with the SIAC Rules while the merits of the disputes to be conducted in accordance with laws of India which is permissible and not barred under the Indian law. Since the seat of arbitration is in Singapore, Part-II of the Arbitration Act would apply and the averments of learned counsel for GMR Energy that since all parties, that is, GMR Energy, GCEL, GIL and Doosan India are Indian parties, Part-I of the Arbitration Act would govern, is liable to be rejected. Reliance is placed on the decisions reported as Bharat Aluminum (supra), Sasan Power (supra), 2014 (7) SCC 603 Reliance Industries Limited and Anr. vs. Union of India, 2016 (11) SCC 508 Eitzen Bulk A/S and Ors. vs. Ashapura Minechem Ltd. and Ors., 2017 (5) SCC 331 IMAX Corporation vs. E-City Entertainment (I) Pvt. Ltd. and 2017 (7) SCC 678 Indus Mobile Distribution (P) Ltd. vs. Datawind Innovations (P) Ltd. It is further contended that the three EPC agreements do not set out the law governing arbitration and thus this issue must be determined.

18. Rebutting the contention of learned counsel for GMR Energy that lifting of the Corporate Veil or determining the issue of alter ego can only be

based on the allegation of fraud which can be determined by a judicial forum as held in 1996 (4) SCC 622 DDA vs. Skipper Construction Co. (P) Ltd. and Sudhir Gopi (supra), it is contended that fraud is not the only ground on which the corporate veil can be pierced as held by the Supreme Court in 1988 (4) SCC 59 State of U.P. and Ors. vs. Renusagar Power Co. and Ors. The concept of single common entity has been recognized by the House of Lords in 1976 (3) ALL ER 462 DHN Food Distributors Ltd. v. Tower Hamlets London BC. Reiterating that the principle of alter ego is arbitrable and it will be for the arbitral tribunal to decide the issue, reliance is placed on 2016 (10) SCC 386 A. Ayyasamy vs. A Paramasivam wherein the Supreme Court has laid down the categories which are non arbitrable and the issue of alter ego does not find mention therein.

19. Further refuting the contention of learned counsel for GMR Energy that a non-party to the arbitration agreement can be impleaded only after invocation of Rule 7 of the SIAC Rules it is contended that the concept of joinder is different from invoking an arbitration agreement against an alter ego. Rule 7 of the SIAC Rules would apply after Rule 3 and as GMR Energy has been named as a party to the arbitration in accordance with Rule 3, Rule 7 has no application. In any case, Rule 7 of the SIAC Rules is not mandatory but directory in nature and has no application to the facts of the present case. It is thus prayed that the injunction granted in favour of GMR Energy be vacated and arbitration be permitted to be carried out as the Tribunal under the Singapore law is competent to decide the issue of alter ego.

20. On contentions raised by the parties five issues which need determination by this Court are : (i) Whether the arbitration that commenced

at Singapore pursuant to Arb. 316/16/ACU would fall under Part-I or Part-II of the Arbitration Act ? (ii) Whether on the basis of pleas in the notice of arbitration issued by Doosan India a case is made out by Doosan India to subject GMR Energy to arbitration with GCEL and GIL? (iii) Whether the Arbitral Tribunal has no jurisdiction to pierce the corporate veil? (iv) In the present suit whether this Court will form a prima facie opinion on the issue of alter ego or return a finding? (v) Whether the invocation of arbitration against GMR Energy is contrary to Rule 7 of the SIAC Rules?

21. Before dealing with the rival contentions of the parties it would be appropriate to note the salient averments in the notice of arbitration dated 11th December, 2016 issued by Doosan India to GMR Energy, GCEL and GIL which is the foundation of subjecting GMR Energy to arbitration as under:

> B. GMR Infra - First Respondent
>
> 12. GMR Infra is a company incorporated and existing under the laws of India. According to GMR Infra's recent press release, GMR Infra operates in the name of GMR Group, which is "a leading global infrastructure conglomerate with interests in Airport, Energy, Transportation and Urban Infrastructure." GMR Infra is the flagship holding company formed to fund the capital requirements of GMR Group's various infrastructure projects, which it undertakes through its

various subsidiaries.
13. GMR Group represents that it is run by "Family Governance guided by Family Constitution." The founder and chairman of GMR Group is Mr. GM Rao. As of November 2016, GMR Infra's Chairman is Mr. G. Kiran Kumar, Mr. GM Rao's younger son. The chairman of the Energy arm of GMR Group (GMR Energy and other Energy assets) is Mr. GBS Raju, Mr. GM Rao's older son. The chairman of the Airports arm of GMR Group is Srinivas Bommidala, Mr. GM Rao's

son-in-law. The CEO of GMR Group's Corporate Affairs arm is Mr. G. Subba Rao, Mr. GM Rao's first cousin.
14. .....

C. GMR Energy's - Second Respondent
15. .....
16. GMR Energy is a company incorporated under the laws of India and is the Energy arm of GMR Group. While GMR Energy had a 100% stake in GCEL during their dealings with Doosan India, GMR Energy no longer owns GCEL. As noted above, its Chairman is the elder son of GM Rao and brother of GMR Infra's Chairman.
17. .....

D. GCEL- Third Respondent
18. GCEL is the owner of the Project and is registered and existing under the laws of India. GCEL is represented to be a "special purpose vehicle established by GMR Group specifically for development of the Project" and was wholly owned by GMR Energy until recently. As of November 2016, GMR Infra directly and indirectly owns a 100% stake in GCEL. During its dealings with Doosan India, Mr. S.N. Barde doubled as President of both GCEL and GMR Energy.
19. .....

C. GMR Energy and Doosan Korea negotiate a payment schedule for the Outstanding Debt, resulting in MOU I between GCEL and Doosan India

27. In recognition of its responsibility to pay the Outstanding Debt, GCEL agreed to a revised payment plan under which GCEL committed to pay the sums initially due 31 July 2013 (i.e., approximately USD 170 million and INR 186 Crores) by December 2013, and the remaining sums in the upcoming years of 2014 and 2015 as per the milestones and other terms of the EPC Agreements. After a few months, however, GCEL notified Doosan India that it would not be able to comply with the above payment plan due to "further complications with

some of the project lenders" and requested a meeting to discuss a modified payment plan for 2013.

28. Accordingly, on 14th November, 2013, senior executives representing the interests of Doosan India and GCEL met in Seoul. On behalf of GCEL, Mr. GBS Raju, Chairman of GMR Energy and elder son of GMR Group's Chairman (GM Rao), and Mr. Sanjay Barde, President of both GMR Energy and GCEL, negotiated.

29. During the Seoul meeting, the senior executives of GMR Energy and GCEl fully acknowledged their responsibility to pay the Outstanding Debt and agreed to a detailed revised payment and commissioning schedule, as well as terms relating to payment security and cost incurred during slow-down. These terms that were negotiated and agreed upon between GMR Energy/GCEL and Doosan Korea/ Doosan India were memorialized, signed and executed by Doosan India and GCEL in a Memorandum of Understanding dated 12th December, 2013 ("MOU I") , a copy of which is appended as Appendix A.

30. Among other things, MOU I stated that:"it is acknowledged between the GCEL and Doosan [India], that there was some delay on the part of GCEL for the reasons despite its best effort, in making timely payment to [Doosan India] as per the EPC Agreement, which resulted in impacting the execution of the project."

31. Under MOU I, GCEL without qualification acknowledged its obligation to pay the Outstanding Debt of over USD 400 million, including USD 311.50 million plus 619.85 Crores, to be broken down into the following payment stages (the "Revised Payment Schedule"):

Amount	Payment due date
INR 300 Crores (approximately USD 45 mil.)	On or before 20 December, 2013

INR 600 Crores (approximately USD 91 mil.)	June 2014
INR 600 Crores (approximately USD 91 mil.)	December 2014
USD 311.50 million + INR 619.85 Crores - 1,950 Crores (approximately USD 117 million)	Per milestones and other contractual provisions

32. As memorialized in MOU I, GCEL and Doosan representatives further agreed that "GMR Infrastructure Limited will provide a primary, independent and absolute Corporate Guarantee" by 20 December 2013, and that "in case GCEL fails to make any of the monthly payments in the Payment Plan or Corporate Guarantee...Doosan shall be entitled to enter into suspension of work immediately upon notice of suspension to GCEL notwithstanding anything stated in the EPC Agreements..." GCEL further "expressly agree [d] that GCEL shall not raise any objection or make any claims with regards to Doosan's decision to immediate suspension/ slowdown or the scope of such suspension/slowdown." See Appendix A, at 2. A copy of a draft "Corporate Guarantee" bearing the parties' initials is attached to MOU I.

E. GMR Energy acknowledges its responsibility for the Outstanding Debt and signs MOU II with Doosan India

37. However, even after Doosan India resumed the Works, GCEL continued to be delinquent in its payments, prompting Doosan India to demand further assurance.

38. Doosan India was able to achieve the Commercial Operations Date ("COD") for unit I on 2 May, 2015, despite GCEL's failure to make timely payments and ensuing subcontractor issues.

39. On 1 July, 2015, GMR Energy, which then owned a 100% stake in GCEL, represented in writing that it "agreed to make payment of [INR 500 crores] directly to [Doosan India]

and [Doosan Korea]". GMR Energy further represented that its payment to Doosan India will "amount to proper and effective discharge of [GCEL]'s payment obligations."

40. Subsequently, on 1 September, 2015, GMR Energy, in response to Doosan India's request for payment of INR 200 Crores owing by GCEL, represented that "we are already committing [INR] 62.5 + 51 Crores i.e. 113.5 Crores by December 2015.

41. However, GCEL continued to miss its payments. On 30 October, 2015, GCEL, Doosan India and GMR Energy entered into a Memorandum of Understanding ("MOU II"). Pursuant thereto, GCEL and GMR Energy agreed to make payment of INR 92.5 Crores by 20 December, 2015. GCEL also agreed to pledge to Doosan India its stock equivalent to any overdue amount not exceeding INR 437.50 Crores on the following due date until full payment was made on the overdue

amounts:

Amount	Payment due date
For overdue payment up to December 2015	By the end of January 2016
For any overdue payment in 2016	31 days following receipt of invoice by GCEL

42. MOU II further provided that "[GMR Energy] shall remain liable for the payment of overdue amount not exceeding 437.5 crores" and if GMR Energy failed to make payment, Doosan India was entitled to 30% of GCEL's profits in the preceding quarter.
43. .....
44. .....
51. On 19 April, 2016, when Doosan India sought clarification on the sum of USD 4,462,293.62 for RT #1 invoice which has not been paid, GCEL represented that GCEL's liability of USD 4,462,293.62 has been "transferred" to GMR Energy.

52. By June 2016, GCEL's overdue payments for the Outstanding Debt had grown once again- to a sum including USD 41,910,590 and INR 674,024,462. The late interest accruing from the delayed payment stood at USD 5,219,643 plus INR 962,153,023.
53. On 9 June 2016, GCEL informed Doosan India that INR 12 Crores has been paid "out of 430 Crores transferred to GMR Energy and Payment [was] also released directly from GMR Energy".

H. GMR Infra refuses to honor the GMR Infra Guarantee
61. .....
62. .....
63. Specifically, on 18 July, 2016, GMR Infra responded that it believed "only" INR 450 Crores (USD 65.8 million) of payment was outstanding, and falsely claimed that it should not have to honor its unconditional first demand guarantee as said outstanding amount was "only a small portion of the original contracted amount".

J. Respondents are jointly and severally liable to Doosan India
69. GMR Infra is liable to Doosan India pursuant to the terms of the GMR Infra Guarantee. Further and in the alternative, GMR Infra, GMR Energy and GCEL were at all relevant times one and the same. Upon information and belief, they freely co-mingle corporate funds, run by the members of one family under the guise of the "Family Governance." They

share directors and officers and use the same corporate letterhead and corporate signage. They often interchangeably use each other's address and phone numbers.

70. Indeed, not only did GMR Energy step in to bear GCEL's payment obligations under the EPC Agreements, GMR Energy in fact made payments to Doosan India on behalf of GCEL for GCEL's debts on several occasions.
71. No corporate formality is observed among GMR Infra, GMR Energy and GCEL. GCEL was 100% held by GMR Energy, but recently claimed to have gotten "transferred"

under the helm of GMR Infra. As of November 2016, GMR Infra directly and indirectly owns a 100% stake in GCEL.

72. In addition, as noted above, GCEL, GMR Energy and GMR Infra are all part of a family-owned business controlled by one of India's richest men, Mr. GM Rao. All the companies bear his name. Mr. G.M. Rao's elder son, Mr. G.B.S. Raju, is the chairman of GMR's Energy division and is responsible for the group's energy business. Mr. G.M's Rao's second son, Mr. Kiran Kumar Grandhi is the Corporate Chairman of GMR Group overseeing the group's finance and corporate strategy.

IV. ARBITRATION AGREEMENT

74. Doosan India, GCEL and GMR Infra have a valid arbitration agreement by which they have agreed to arbitrate the present dispute, as evidenced by the GMR Infra Guarantee, at Clause 17:

"17.1 All disputes arising between the parties relating to this Guarantee or the interpretation of performance of this Guarantee (each a "Dispute") or any question regarding its existence, validity or termination shall be finally settled by arbitration before an arbitral tribunal consisting of three arbitrators. The arbitration shall be conducted in accordance with the arbitration rules of the Singapore International Arbitration Centre ("SIAC Rules"). as in force at the time. The guarantor and EPC Contractor shall each nominate one arbitrator for confirmation by the Chairman of the Singapore International Arbitration Centre. Both arbitrators shall agree on the third arbitrator within 30 Days after their appointment. Should the two arbitrators fail to reach agreement on the third arbitrator within such 30 days period, the third arbitrator shall be selected and appointed by Chairman of the Singapore International Arbitration Centre. The Parties agree that the arbitral tribunal shall have jurisdiction to adjudicate disputes on whether amounts have become payable by GCEL and/or whether GCEL has failed to make payment due under the EPC Contract.

17.2 The place of arbitration shall be Singapore and the language of the arbitral proceedings shall be English.

17.3 The award rendered shall be in writing and shall set out in reasonable detail the facts of the Dispute and the reasons for the arbitrators' decision. The award rendered shall apportion the costs of the arbitration. The award rendered in any arbitration commenced under this Agreement shall be final and binding upon the Parties. "(Emphases added.)

75. In addition, Doosan India and GCEL have a valid arbitration agreement by which the parties have agreed to arbitrate the present dispute, as evidenced by the CWETC Agreement, the onshore Agreement, and the Offshore Supply Agreement.

76. The CWETC Agreement contains an arbitration agreement in the following terms:

"21.3.3 Unless the Parties agree otherwise and subject to Section 21.4, such Dispute may be referred to arbitration in accordance with Section 21.4, on or after the sixtieth (60 th) day after the day on which written notice of Dispute was given, even if no attempt at negotiation or senior level discussion has been made.

21.4.1 Any Dispute which has not been resolved by negotiation and mediation pursuant to Section 21.3 shall, following notice by either Party, be exclusively and finally decided by arbitration in Singapore by a panel of three (3) arbitrators in accordance with the provisions of the Singapore International Arbitration Centre or any re-enactment or modification thereof. Save as specified in this Section 21.4.1, no arbitration provisions contained in any other law, shall apply to arbitration of any Dispute.
21.4.2 Each arbitrator shall be and remain independent and impartial, and no arbitrator shall be of the same nationality as any party.
.....

21.4.5 The arbitral proceedings shall be conducted in the English language 21.4.6 The Parties agree that, where a Dispute arises and a dispute arises under one or more of the Other Contracts relating to the Project, which are so closely connected in the reasonable opinion of the Parties and the Parties deem it expedient for any Disputes and any such disputes, arising under one or more of the other contracts relating to the Project, to be resolved in the same proceedings, then the Parties may, at their option and by mutual agreement, consolidate and submit all such disputes for adjudication by the panel of arbitrators appointed hereunder and require such panel of arbitrators to adjudicate

upon the same. Upon the aforesaid requirement by the Parties the panel of arbitrators shall determine the Dispute and all other disputes which have been consolidated, in accordance with provisions of this Section 21.4.

21.4.7 The arbitral award shall be final and binding upon the Parties and enforceable by any court having jurisdiction for this purpose. The arbitral award may be enforced against the Parties to the arbitration proceeding or their assets wherever they may be found and a judgment upon the arbitral award may be entered in any court having jurisdiction."(Emphases added.)

77. The Onshore Agreement contains an arbitration agreement in the following terms:

"19.3.3 Unless the Parties agree otherwise and subject to Section 19.4, such Dispute may be referred to arbitration in accordance with Section 19.4 on or after the sixtieth (60 th) day after the day on which written notice of Dispute was given, even if no attempt at negotiation or senior level discussion has been made.

19.4.1 Any Dispute which has not been resolved by negotiation and mediation pursuant to Section 19.3 shall, following notice by either Party, be exclusively and finally decided by arbitration in Singapore by a panel of three (3) arbitrators in accordance with the provisions of the Singapore International Arbitration Centre(SIAC) or any re-enactment or modification thereof. Save as specified in this Section 19.4.1, no arbitration provisions contained in any other law, shall apply to arbitration of any Dispute.

19.4.2 Each arbitrator shall be and remain independent and impartial, and no arbitrator shall be of the same nationality as any party.

.....

19.4.5 The arbitral proceedings shall be conducted in the English language.

.....

19.4.7 The arbitral award shall be final and binding upon the Parties and enforceable by any court having jurisdiction for this purpose. The arbitral award may be enforced against the Parties to the arbitration proceeding or their assets wherever they may be found and a judgment upon the arbitral award may be entered in any court having jurisdiction. "(Emphases added.)

78. The offshore Supply Agreement contains an arbitration agreement in the following terms:

"19.3.3 Unless the Parties agree otherwise and subject to Section 19.4, such Dispute may be referred to arbitration in accordance with Section 19.4 on or after the sixtieth (60 th) day after the day on which written notice of Dispute was given, even if no attempt at negotiation or senior level discussion has been made.

19.4.1 Any Dispute which has not been resolved by negotiation and mediation pursuant to Section 19.3 shall, following notice by either Party, be exclusively and finally decided by arbitration in Singapore by a panel of three (3) arbitrators in accordance with the provisions of the Singapore International Arbitration Centre(SIAC) or any re-enactment or modification thereof. Save as specified in this Section 19.4.1, no arbitration provisions contained in any other law, shall apply to arbitration of any Dispute.

19.4.2 Each arbitrator shall be and remain independent and impartial, and no arbitrator shall be of the same nationality as any party.

.....

19.4.5 The arbitral proceedings shall be conducted in the English language.

.....

19.4.7 The arbitral award shall be final and binding upon the Parties and enforceable by any court having jurisdiction for this purpose. The arbitral award may be enforced against the Parties to the arbitration proceeding or their assets wherever they may be found and a judgment upon the arbitral award may be entered in any court having jurisdiction. "(Emphases added.) V. PLACE OF ARBITRATION

82. As noted, the four arbitration agreements in the EPC Agreements and GMR Infra Guarantee provide that the arbitration is to be submitted to the SIAC in Singapore, which is reasonably construed to mean that the Parties intended for the place of arbitration to be Singapore.

VI. NUMBER AND CHOICE OF ARBITRATORS

83. The arbitration agreements in the EPC Agreements and GMR Infra Guarantee provide for three arbitrators.

84. So as to settle the disputes, Doosan India requests that the procedures set out in SIAC Rule 12.2 for the appointment for arbitrators be applied. Doosan India will nominate one arbitrator and GCEL, GMR Energy and GMR Infra will collectively nominate one arbitrator. As not all parties have agreed upon another procedure for appointing the third arbitrator, the third arbitrator shall be selected and appointed by the President of the Singapore International Arbitration Centre in accordance with SIAC Rule 11.3.

22. Issue No. 1: Whether the arbitration that commenced at Singapore pursuant to Arb.316/16/ACU would fall under Part-I or Part-II of the Arbitration Act?

22.1. The four fold submission on behalf of GMR Energy on this issue is that firstly, on the plain reading of the arbitration clause, Singapore is not the seat of arbitration but only the venue; secondly, the parties to the arbitration being Indian entities, the arbitration cannot be construed to

be an international commercial arbitration under Section 2 (1) (f) of the Arbitration Act, thirdly, the parties being Indian, choice if at all of a foreign seat for arbitration is in contravention of Section 28 of the Contract Act and fourthly, in case the arbitration is seated in Singapore the same would amount to derogation of the Indian substantive law, hence not permissible. 22.2. Contention of learned counsel for the GMR Energy that on the plain reading of the arbitration clause, Singapore is not the seat of Arbitration but venue deserves to be rejected in view of the decision of the Supreme Court reported as (2011) 9 SCC 735 Yograj Infrastructure Ltd. v. Ssangyong Engineering & Construction Co. Ltd. wherein while interpreting a similar clause for arbitration in the agreement, it was held where the arbitration clause provides that the arbitration proceedings shall be in accordance with the Singapore International Arbitration Centre (SIAC) Rules, it means that Singapore shall be the seat of arbitration and the arbitration dispute will be governed by the Singapore International Arbitration Act. The report notes:

> 47. Clause 27 of the agreement provides for the arbitration and reads as follows:
>
> "27.Arbitration 27.1. All disputes, differences arising out of or in connection with the agreement shall be referred to arbitration. The arbitration proceedings shall be conducted in English in Singapore in accordance with the Singapore International Arbitration Centre (SIAC) Rules as in force at the time of signing of this agreement. The arbitration shall be final and binding. 27.2. The arbitration shall take place in Singapore and be conducted in English language.
>
> 27.3. None of the party shall be entitled to suspend the performance of the agreement merely by reason of a dispute and/or a dispute referred to arbitration."
>
> 48. Clause 28 of the agreement describes the governing law and provides as follows:
>
> "This agreement shall be subject to the laws of India. During the period of arbitration, the performance of this agreement shall be carried on without interruption and in accordance with its terms and provisions."
>
> 49. As will be seen from Clause 27.1, the arbitration proceedings are to be conducted in Singapore in accordance with the SIAC Rules as in force at the time of signing of the agreement. There is, therefore, no ambiguity that the procedural law with regard to the arbitration proceedings, is the SIAC Rules. Clause 27.2 makes it clear that the seat of arbitration would be Singapore.
>
> 50. What we are, therefore, left with to consider is the question as to what would be the law on the basis whereof the arbitral proceedings were to be decided?
>
> 51. In our view, Clause 28 of the agreement provides the answer. As indicated hereinabove, Clause 28 indicates that the governing law of the agreement would be the law of India i.e. the Arbitration and Conciliation Act, 1996. The learned counsel for the parties have quite correctly spelt out the distinction between the "proper law"

> of the contract and the "curial law" to determine the law which is to govern the arbitration itself. While the proper law is the law which governs the agreement itself, in the absence of any other stipulation in the arbitration clause as to which law would apply in respect of the arbitral proceedings, it is now well settled that it is the law governing the contract which would also be the law applicable to the Arbitral Tribunal itself. Clause 27.1 makes it quite clear that the curial law which regulates the procedure to be adopted in conducting the arbitration would be the SIAC Rules. There is, therefore, no ambiguity that the SIAC Rules would be the curial law of the arbitration proceedings. It also happens that the parties had agreed to make Singapore the seat of arbitration. Clause 27.1 indicates that the arbitration proceedings are to be conducted in accordance with the SIAC Rules.

22.3. Supreme Court later in the decision reported as (2012) 12 SCC 359 Yograj Infrastructure Ltd. v. Ssangyong Engg. & Construction Co. Ltd. clarified paras 50 to 56 of above report as under:

> 3. Mr Rautray then submitted that through inadvertence, in paras 50 to 52 of the judgment in Yograj Infrastructure [Yograj Infrastructure Ltd. v. Ssang Yong Engg. & Construction Co. Ltd., (2011) 9 SCC 735 : (2011) 4 SCC (Civ) 864] , it has been indicated that there was no ambiguity that the SIAC Rules would be the curial law of the arbitration proceedings and that the same had been subsequently clarified in para 54, wherein while indicating that the arbitration proceedings would be governed by the SIAC Rules as the curial law, which included Rule 32, which made it clear that where the seat of arbitration is Singapore, the law of the arbitration under the SIAC Rules would be the International Arbitration Act, 2002 (Chap. 143-A, 2002 Edn., Statutes of the Republic of Singapore). Mr Rautray submitted that it was a clear case of inadvertence in paras 50 to 52 that needs to be clarified by indicating that the curial law is the International Arbitration law of Singapore and not the SIAC Rules.
>
> 8. Having regard to the submissions made on behalf of the respective parties, we are inclined to agree with Mr Rautray that the corrections and clarifications sought for have to be allowed. In particular, the observations made in paras 50-52 and 54 in Yograj Infrastructure case [Yograj Infrastructure Ltd. v. Ssang Yong Engg. & Construction Co. Ltd., (2011) 9 SCC 735 : (2011) 4 SCC (Civ) 864] , if read together, indicate that, although, when the seat of arbitration was in Singapore, the SIAC Rules would apply, the same included Rule 32 which provides that it is the Singapore International Arbitration Act, 2002, which would be the law of the arbitration. Accordingly, it is clarified that while mention had been made in paras 50 to 52 that the curial law of the arbitration would be the SIAC Rules, what has been subsequently indicated in para 54 of the judgment is that the Singapore International Arbitration Act, 2002 would be the law of the arbitration.

22.4. Learned counsel for GMR Energy emphasizing on omission of the word "company" in Section 2 (1) (f) (iii) of the Arbitration Act states that pursuant to the amendment w.e.f. 23rd October, 2015 since all the four entities, that is, GMR Energy, GCEL, GIL and Doosan India are Indian companies

incorporated in India, the arbitration instituted is a domestic arbitration and not an international commercial arbitration. 22.5. Section 2 (1) (f) of the Arbitration Act reads as under:

> "2. (1) f. "International commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in for in India and where at least one of the parties is-
>
> i. an individual who is a national of, or habitually resident in, any country other than India; or ii. a body corporate which is incorporated in any country other than India; or iii. an association or a body of individuals whose central management and control is exercised in any country other than India; or"

22.6. In Chloro Controls (supra) the three Judge Bench of Supreme Court overruled the decision in Sumitomo Heavy Industries (supra) and held that the language of Section 45 of the Arbitration Act, 1996 cannot be narrowly construed using the definition of the word 'party' in Section 2 (1) (h) of the Arbitration Act. It was held:

> 116. As far as Sumitomo Corpn. [(2008) 4 SCC 91] is concerned, it was a case dealing with the matter where the proceedings under Sections 397 and 398 of the Companies Act had been initiated and the Company Law Board had passed an order. Whether the appeal against such an order would lie to the High Court was the principal question involved in that case. The denial of arbitration reference, as already noticed, was based upon the reasoning that disputes related to the joint venture agreement to which the parties were not signatory and the said agreement did not even contain the arbitration clause. On the other hand, it was the other agreement entered into by different parties which contained the arbitration clause. As already noticed, in para 20 of Sumitomo [(2008) 4 SCC 91] , the Court had observed that a party to an arbitration agreement has to be a party to the judicial proceedings and then alone it will fall within the ambit of Section 2(h) of the 1996 Act. As far as the first issue is concerned, we shall shortly proceed to discuss it when we discuss the merits of this case, in light of the principles stated in this judgment. However, the observations made by the learned Bench in Sumitomo Corpn. [(2008) 4 SCC 91] do not appear to be correct. Section 2(h) only says that "party" means a party to an arbitration agreement. This expression falls in the chapter dealing with definitions and would have to be construed along with the other relevant provisions of the Act. When we read Section 45 in light of Section 2(h), the interpretation given by the Court in Sumitomo Corpn. [(2008) 4 SCC 91] does not stand the test of reasoning. Section 45 in explicit language permits the parties who are claiming through or under a main party to the arbitration agreement to seek reference to arbitration. This is so, by fiction of law, contemplated in the provision of Section 45 of the 1996 Act.
>
> 117. We have already discussed above that the language of Section 45 is incapable of being construed narrowly and must be given expanded meaning to achieve the twin objects of arbitration i.e. firstly, the parties should be held to their bargain of

> arbitration and secondly, the legislative intent behind incorporating the New York Convention as part of Section 44 of the Act must be protected. Moreover, para 20 of the judgment in Sumitomo Corpn. [(2008) 4 SCC 91] does not state any principle of law and in any event it records no reasons for arriving at such a conclusion. In fact, that was not even directly the issue before the Court so as to operate as a binding precedent. For these reasons, respectfully but without hesitation, we are constrained to hold that the conclusion or the statement made in para 20 of this judgment does not enunciate the correct law.

22.7. Whether an arbitration between two Indian parties can be an international commercial arbitration and whether two Indian parties can choose a foreign seat was considered by the Madhya Pradesh High Court in Sasan Power (supra) and it was held that two Indian parties were free to arbitrate in a place outside India and an award rendered pursuant thereto would be a foreign award falling under Part-II of the Arbitration Act. The report notes:

> 57. On going through the scheme of the Arbitration and Conciliation Act, 1996, we find that based on the seat of arbitration so also the nationality of parties, an arbitration is classified to be an 'International Arbitration', and the governing law is also determined on the basis of the seat of arbitration. Therefore, it is clear that based on the seat of arbitration, the question of permitting two Indian companies/ parties to arbitrate out of India is permissible. In the case of Atlas Exports (supra) itself, the principle has been settled that two Indians can agree to have a seat of arbitration outside India. Now, if two Indian Companies agree to have their seat of arbitration in a foreign country, the question would be as to whether the provisions of Part I or Part II would apply. Section 44, of the Act of 1996, contemplates a foreign award to be one pertaining to difference between persons arising out of legal relationship, whether contractual or not, which is in pursuance to an agreement in writing for arbitration, to which the convention set forth in the first schedule applies.

22.8. The decision of Madhya Pradesh High Court in Sasan Power (supra) was taken up in appeal before the Hon'ble Supreme Court where this issue was given up however, the Supreme Court in 2016 (10) SCC 813 Sasan Power Ltd. vs. North American Coal Corpn (India) dealt with and rejected the last contention raised by the plaintiff that the choice of foreign seat if any by Indian parties is in derogation of Indian law and it was held as under that this was not the scope of enquiry under Section 45 of the Arbitration Act:

> 48. It is settled law that an arbitration agreement is an independent or "self-contained" agreement. In a given case, a written agreement for arbitration could form part of another agreement, described by Lord Diplock as the "substantive contract" [Aughton Ltd. v. MF Kent Services Ltd., (1991) 57 BLR 1 (CA) "the status of a so-called "arbitration clause" included in a contract of any nature is different from other types of clauses because it constitutes a "self-contained contract collateral or ancillary to" "the substantive contract". These are the words of Lord Diplock in Bremer Vulkan Schiffbau and Maschinenfabrik v. South India Shipping Corpn. Ltd.,

1981 AC 909: (1981) 2 WLR 141 (HL). It is a self- contained contract, even though it is, by common usage, described as an "arbitration clause". It can, for example, have a different proper law from the proper law of the contract to which it is collateral. This status of "self-contained contract" exists irrespective of the type of substantive contract to which it is collateral."] by which parties create contractual rights and obligations. Notwithstanding the fact that all such rights and obligations arising out of a substantive contract and the agreement to have the disputes (if any, arising out of such substantive contract) settled through the process of arbitration are contained in the same document, the arbitration agreement is an independent agreement. Arbitration agreement/clause is not that governs rights and obligations arising out of the substantive contract: It only governs the way of settling disputes between the parties. [See T.W. Thomas & Co. Ltd. v. Portsea Steamship Co. Ltd., 1912 AC 1 (HL)]

49. In our opinion, the scope of enquiry (even) under Section 45 is confined only to the question whether the arbitration agreement is "null and void, inoperative or incapable of being performed" but not the legality and validity of the substantive contract.

50. The case of the appellant as disclosed from the plaint is that Article X Section 10.2 is inconsistent with some provisions of the Indian Contract Act, 1872, and hit by Section 23 of the Indian Contract Act (as being contrary to public policy). It is a submission regarding the legality of the substantive contract. Even if the said submission is to be accepted, it does not invalidate the arbitration agreement because the arbitration agreement is independent and apart from the substantive contract. All that we hold is that the scope of enquiry under Section 45 does not extend to the examination of the legality of the substantive contract. The language of the section is plain and does not admit of any other construction. For the purpose of deciding whether the suit filed by the appellant herein is maintainable or impliedly barred by Section 45 of the 1996 Act, the Court is required to examine only the validity of the arbitration agreement within the parameters set out in Section 45, but not the substantive contract of which the arbitration agreement is a part.

[Emphasis supplied] 22.9. It is thus evident that an arbitration agreement is an independent self-contained agreement not dependant on the substantive agreement, therefore irrespective of the contractual rights and obligations parties can opt for an international arbitration. Undoubtedly the decision of Madhya Pradesh High Court in Sasan Power (Supra) and the Supreme Court in Sasan Power Ltd. (supra) was rendered pre amendment to Section 2(1)(f) of the Arbitration Act however, needless to note that even in the present case, the agreements between the parties are prior to 23rd October, 2015 i.e. pre-amendment to Section 2 (1) (f) of the Arbitration Act.

22.10. Learned counsel for GMR Energy has relied upon the decision in TDM Infrastructure (supra) wherein Supreme Court noted as under:

14. Whereas Part I of the 1996 Act deals with domestic arbitration, Part II thereof deals with the foreign award. The term "international commercial arbitration" has a definite connotation. It, inter alia, means a body corporate which is incorporated in any country other than India. However, according to the petitioner, it is a Company whose central management and control is exercised in any country other than India and, thus, despite the fact that the Company is incorporated and registered in India, its central management and control being exercised in Malaysia, it will come within the purview of sub-clause (iii) of Section 2(1)(f) of the 1996 Act.

15. Whenever in an interpretation clause, the word "means" is used the same must be given a restrictive meaning. "International commercial arbitration" and "domestic arbitration" connote two different things. The 1996 Act excludes domestic arbitration from the purview of international commercial arbitration. The company which is incorporated in a country other than India is excluded from the said definition. The same cannot be included again on the premise that its central management and control is exercised in any country other than India. Although sub-clause (iii) of Section 2(1)(f) of the 1996 Act talks of a company which would ordinarily include a company registered and incorporated under the Companies Act but the same also includes an association or a body of individuals which may also be a foreign company.

16. ....

17. ....

18. ....

19. Determination of nationality of the parties plays a crucial role in the matter of appointment of an arbitrator. A company incorporated in India can only have Indian nationality for the purpose of the Act. It cannot be said that a company incorporated in India does not have an Indian nationality. Hence, where both parties have Indian nationalities, then the arbitration between such parties cannot be said to be an international commercial arbitration.

20. The learned counsel contends that the word "or" being disjunctive, sub-clause (iii) of Section 2(1)(f) of the 1996 Act shall apply in a case where sub-clause (ii) shall not apply. We do not agree. The question of taking recourse to sub-clause

(iii) would come into play only in a case where sub-clause (ii) otherwise does not apply in its entirety and not where by reason of an exclusion clause, consideration for construing an agreement to be an international commercial arbitration agreement goes outside the purview of its definition. Once it is held that both the companies are incorporated in India, and, thus, they have been domiciled in India, the arbitration agreement entered into by and between them would not be an international

commercial arbitration agreement and, thus, the question of applicability of sub-clause (iii) of Section 2(1)(f) would not arise.

21. The Chief Justice of India or his designate, furthermore, having regard to sub-section (9) of Section 11 of the 1996 Act must bear in mind the nationality of an arbitrator. The nationality of the arbitrator may have to be kept in mind having regard to the nationality of the respective parties. Only in a case where, however, a body corporate which need not necessarily be a company registered and incorporated under the Companies Act, as for example, an association or a body of individuals, the exercise of central management and control in any country other than India may have to be taken into consideration.

22. Chapter VI of the 1996 Act dealing with making of an arbitral award and termination of proceedings in this behalf plays an important role. In respect of "international commercial arbitration", clause (b) of sub-section (1) of Section 28 of the 1996 Act would apply, whereas in respect of any other dispute where the place of arbitration is situated in India, clause (a) of sub-section (1) thereof shall apply. When, thus, both the companies are incorporated in India, in my opinion, sub-clause (ii) of Section 2(1)(f) will apply and not sub-clause (iii) thereof.

23. Section 28 of the 1996 Act is imperative in character in view of Section 2(6) thereof, which excludes the same from those provisions which parties derogate from (if so provided by the Act). The intention of the legislature appears to be clear that Indian nationals should not be permitted to derogate from Indian law. This is part of the public policy of the country.

24. Russell on Arbitration, 23rd Edn., p. 357, in his commentary on the English Arbitration Act, 1996, shows that although a distinction has been made between a domestic and non-domestic arbitration but the provisions relating to domestic arbitration had not been brought into force.

22.11. However, in para-36 of TDM Infrastructure (supra) Supreme Court clarified that any findings/observations made hereinabove were only for the purpose of determining the jurisdiction of the Court as envisaged under Section 11 of the 1996 Act and not for any other purpose and is also evident from the conclusions noted in para 20 and 22 of the report. Thus GMR Energy cannot rely upon the decision in TDM Infrastructure (supra) to contend that in the present case Part-I of the Arbitration Act would apply and not Part-II.

22.12. It is trite law that three sets of law may govern arbitration, that is, substantive law, curial law and appropriate law of contract which was duly recognized by the Supreme Court in Sumitomo Heavy Industries (supra) as under:

10. In the Law and Practice of Commercial Arbitration in England, 2nd Edn. by Mustill and Boyd, there is a chapter on "The Applicable Law and the Jurisdiction of

the Court". Under the sub-title "Laws Governing the Arbitration", it is said, "An agreed reference to arbitration involves two groups of obligations. The first concerns the mutual obligations of the parties to submit future disputes, or an existing dispute to arbitration, and to abide by the award of a tribunal constituted in accordance with the agreement. It is now firmly established that the arbitration agreement which creates these obligations is a separate contract, distinct from the substantive agreement in which it is usually embedded, capable of surviving the termination of the substantive agreement and susceptible of premature termination by express or implied consent, or by repudiation or frustration, in much the same manner as in more ordinary forms of contract. Since this agreement has a distinct life of its own, it may in principle be governed by a proper law of its own, which need not be the same as the law governing the substantive contract.

The second group of obligations, consisting of what is generally referred to as the 'curial law' of the arbitration, concerns the manner in which the parties and the arbitrator are required to conduct the reference of a particular dispute. According to the English theory of arbitration, these rules are to be ascertained by reference to the express or implied terms of the agreement to arbitrate. This being so, it will be found in the great majority of cases that the curial law, i.e., the law governing the conduct of the reference, is the same as the law governing the obligation to arbitrate. It is, however, open to the parties to submit, expressly or by implication, the conduct of the reference to a different law from the one governing the underlying arbitration agreement. In such a case, the court looks first at the arbitration agreement to see whether the dispute is one which should be arbitrated, and which has validly been made the subject of the reference, it then looks to the curial law to see how that reference should be conducted and then returns to the first law in order to give effect to the resulting award.

*** It may therefore be seen that problems arising out of an arbitration may, at least in theory, call for the application of any one or more of the following laws--

1. The proper law of the contract, i.e., the law governing the contract which creates the substantive rights of the parties, in respect of which the dispute has arisen.

2. The proper law of the arbitration agreement, i.e., the law governing the obligation of the parties to submit the disputes to arbitration, and to honour an award.

3. The curial law, i.e., the law governing the conduct of the individual reference.

***

1. The proper law of the arbitration agreement governs the validity of the arbitration agreement, the question whether a dispute lies within the scope of the arbitration agreement; the validity of the notice of arbitration; the constitution of the tribunal;

> the question whether an award lies within the jurisdiction of the arbitrator; the formal validity of the award;
>
> the question whether the parties have been discharged from any obligation to arbitrate future disputes.
>
> 2. The curial law governs the manner in which the reference is to be conducted; the procedural powers and duties of the arbitrator; questions of evidence; the determination of the proper law of the contract.
>
> 3. The proper law of the reference governs the question whether the parties have been discharged from their obligation to continue with the reference of the individual dispute.
>
> *** In the absence of express agreement, there is a strong prima facie presumption that the parties intend the curial law to be the law of the 'seat' of the arbitration, i.e., the place at which the arbitration is to be conducted, on the ground that that is the country most closely connected with the proceedings. So in order to determine the curial law in the absence of an express choice by the parties it is first necessary to determine the seat of the arbitration, by construing the agreement to arbitrate."
>
> 11. The conclusion that we reach is that the curial law operates during the continuance of the proceedings before the arbitrator to govern the procedure and conduct thereof. The courts administering the curial law have the authority to entertain applications by parties to arbitrations being conducted within their jurisdiction for the purpose of ensuring that the procedure that is adopted in the proceedings before the arbitrator conforms to the requirements of the curial law and for reliefs incidental thereto. Such authority of the courts administering the curial law ceases when the proceedings before the arbitrator are concluded.

[Emphasis supplied] 22.13. Relying upon the decision in Shin-Etsu Chemical (Supra) learned counsel for GMR Energy also contended that as per the three EPC agreements and Corporate Guarantee, the law governing the contract between the parties is Indian law and in the absence of a specific choice of the law governing arbitration agreement, the law governing arbitration agreement would also be Indian law. In Shin-Etsu Chemical (supra) Supreme Court was dealing with an arbitration clause wherein the parties agreed to be governed by and construed and interpreted under the laws of Japan. It was agreed that all disputes arising out or in relation to the said agreement which could not be settled by mutual accord shall be settled by arbitration in Tokyo, Japan in accordance with the Rules of Conciliation and Arbitration of International Chamber of Commerce. It is on this term of the agreement discussing the issue of final finding under Section 45 of the Arbitration Act, Supreme Court referring to its earlier decision reported as (1992) 3 SCC 551 National Thermal Power Corporation v. Singer Co., held that the proper law of arbitration agreement is normally the same as proper law of contract and only in exceptional cases that it is not so, even where the proper law of contract is expressly chosen by the parties. However, where there is

no express provision in the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement but that is only a rebuttable presumption. Supreme Court held:

> 80. There is yet another strange result which may come about by holding that Section 45 requires a final finding. This can be illustrated by reference to the facts of the present case. The parties here have subjected their agreement to the laws of Japan. The question that will arise is: When a court has to make a final determinative ruling on the validity of the arbitration agreement, under which law is this issue to be tested? This question of choice of law has been conclusively decided by the judgment of this Court in National Thermal Power Corpn. v. Singer Co. [(1992) 3 SCC 551] where it was observed:
>
> "23. The proper law of the arbitration agreement is normally the same as the proper law of the contract. It is only in exceptional cases that it is not so even where the proper law of the contract is expressly chosen by the parties. Where, however, there is no express choice of the law governing the contract as a whole, or the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement. But that is only a rebuttable presumption." [Ibid., at SCC p.
>
> 563, para 23, per Thommen, J.] [Emphasis supplied] 22.14. Expounding the territoriality principle of each part of the Act, the Supreme Court in Bharat Aluminum Company (supra) held:
>
> 89. That Part I and Part II are exclusive of each other is evident also from the definitions section in Part I and Part II. The definitions contained in Sections 2(1)(a) to (h) are limited to Part I. The opening line which provides "In this Part, unless the context otherwise requires....", makes this perfectly clear. Similarly, Section 44 gives the definition of a foreign award for the purposes of Part II (Enforcement of Certain Foreign Awards); Chapter I (New York Convention Awards). Further, Section 53 gives the interpretation of a foreign award for the purposes of Part II (Enforcement of Certain Foreign Awards); Chapter II (Geneva Convention Awards). From the aforesaid, the intention of Parliament is clear that there shall be no overlapping between Part I and Part II of the Arbitration Act, 1996. The two parts are mutually exclusive of each other. To accept the submissions made by the learned counsel for the appellants would be to convert the "foreign award" which falls within Section 44, into a domestic award by virtue of the provisions contained under Section 2(7) even if the arbitration takes place outside India or is a foreign seated arbitration, if the law governing the arbitration agreement is by choice of the parties stated to be the Arbitration Act, 1996. This, in our opinion, was not the intention of Parliament. The territoriality principle of the Arbitration Act, 1996, precludes Part I from being applicable to a foreign seated arbitration, even if the agreement purports to provide that the arbitration proceedings will be governed by the Arbitration Act, 1996.

22.15. Further in Reliance Industries Ltd. (supra) it was held:

45. In our opinion, it is too late in the day to contend that the seat of arbitration is not analogous to an exclusive jurisdiction clause. This view of ours will find support from numerous judgments of this Court. Once the parties had consciously agreed that the juridical seat of the arbitration would be London and that the arbitration agreement will be governed by the laws of England, it was no longer open to them to contend that the provisions of Part I of the Arbitration Act would also be applicable to the arbitration agreement. This Court in Videocon Industries Ltd. [(2011) 6 SCC 161:(2011) 3 SCC (Civ) 257] has clearly held as follows: (SCC p. 178, para 33) "33. In the present case also, the parties had agreed that notwithstanding Article 33.1, the arbitration agreement contained in Article 34 shall be governed by laws of England. This necessarily implies that the parties had agreed to exclude the provisions of Part I of the Act. As a corollary to the above conclusion, we hold that the Delhi High Court did not have the jurisdiction to entertain the petition filed by the respondents under Section 9 of the Act and the mere fact that the appellant had earlier filed similar petitions was not sufficient to clothe that High Court with the jurisdiction to entertain the petition filed by the respondents."

22.16. In IMAX Corporation (supra) Supreme Court further held:

35. The relationship between the seat of arbitration and the law governing arbitration is an integral one. The seat of arbitration is defined as the juridical seat of arbitration designated by the parties, or by the arbitral institution or by the arbitrators themselves, as the case may be. It is pertinent to refer to the following passage from Redfern and Hunter on International Arbitration [Redfern and Hunter on International Arbitration, 5th Edn. (Oxford University Press, 2009)] :

"This introduction tries to make clear, the place or seat of the arbitration is not merely a matter of geography. It is the territorial link between the arbitration itself and the law of the place in which that arbitration is legally situated:

When one says that London, Paris or Geneva is the place of arbitration, one does not refer solely to a geographical location. One means that the arbitration is conducted within the framework of the law of arbitration of England, France or Switzerland or, to use an English expression, under the curial law of the relevant country. The geographical place of arbitration is the factual connecting factor between that arbitration law and the arbitration proper, considered as a nexus of contractual and procedural rights and obligations between the parties and the arbitrators.

The seat of arbitration is thus intended to be its centre of gravity."

22.17. The decision in Reliance Industries (supra) and Imax Corporation (supra) have been reiterated by Supreme Court in Indus Mobile Distribution (supra). In the

present case the parties have agreed to be governed by SIAC Rules for arbitration and thus Singapore would not be a venue alone but also the seat of arbitration.

22.18. Responding to the contention of learned counsel for Doosan India, learned counsel for GMR Energy has also relied upon the decision of National Highway Authority (supra). In National Highway Authority (supra) the Full Bench of this Court was dealing with the issue of setting aside an arbitral award and held that there was a restriction under the Arbitration Act to issue notice limited to some or one of the grounds and if so done a reasoned order is required to be passed. For this reason, it was held that proceedings under Section 34 of the Arbitration Act do not necessarily take the shape of execution proceedings and while dealing with the issue whether the Court can pass an interim order even before arbitral proceedings commences or arbitrator is appointed, it was held that the provisions of 1996 Act were very different from the provisions of 1940 Act and that the 1996 Act is a self contained code and displaces all such aspects of substantive and procedural law in respect of which there is an explicit or implicit reference in the said Act. However, the Court indicated that by implication it cannot be held that every aspect of Code of Civil Procedure is excluded. 22.19. The plea of learned counsel for GMR Energy that two Indian parties cannot choose a foreign seat as the same would contravene to Section 23 read with Section 28 of the Contract Act was turned down by the Supreme Court in Atlas Exports (supra) wherein it was held:

> 10. It was however contended by the learned counsel for the appellant that the award should have been held to be unenforceable inasmuch as the very contract between the parties relating to arbitration was opposed to public policy under Section 23 read with Section 28 of the Contract Act. It was submitted that Atlas and Kotak, the parties between whom the dispute arose, are both Indian parties and the contract which had the effect of compelling them to resort to arbitration by foreign arbitrators and thereby impliedly excluding the remedy available to them under the ordinary law of India should be held to be opposed to public policy. Under Section 23 of the Indian Contract Act the consideration or object of an agreement is unlawful if it is opposed to public policy. Section 28 and Exception 1 to it, (which only is relevant for the purpose of this case) are extracted and reproduced hereunder:
>
> "28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.
>
> Exception 1.-- This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred."
>
> 11. The case at hand is clearly covered by Exception 1 to Section 28. Right of the parties to have recourse to legal action is not excluded by the agreement. The parties are only required to have their dispute/s adjudicated by having the same referred to

> arbitration. Merely because the arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement. Moreover, in the case at hand the parties have willingly initiated the arbitration proceedings on the disputes having arisen between them. They have appointed arbitrators, participated in arbitration proceedings and suffered an award. The plea raised before us was not raised either before or during the arbitration proceedings, nor before the learned Single Judge of the High Court in the objections filed before him, nor in the letters patent appeal filed before the Division Bench. Such a plea is not available to be raised by the appellant Atlas before this Court for the first time.

22.20. The two decisions relied upon by learned counsel for GMR Energy i.e. Seven Islands Shipping and M/s Aadhar Mercantile (supra) are per incuriam as have not considered the law laid by the Supreme Court in Atlas (supra).

22.21. Contention of learned counsel for GMR Energy that the judgment in Atlas (supra) was given prior to Arbitration and Conciliation Act, 1996, and therefore not applicable to the present case, also deserves to be rejected in view of the decision of the Supreme Court reported as 2011 (8) SCC 333 Fuerst Day Lawson vs. Jindal Exports Ltd wherein comparing the pre amendment and post amendment Arbitration Act it was observed that the new Act is more favourable to international arbitration than its previous incarnation. The report comparing the provisions of the two Acts noted:

> 64. The provisions of Chapter I of Part II of the 1996 Act along with the provisions of the Foreign Awards (Recognition and Enforcement) Act, 1961, insofar as relevant for the present are placed below in a tabular form:

Foreign Awards (Recognition and Enforcement) Act, 1961	Arbitration and Conciliation Act, 1996
Pt II : Enforcement of Certain Foreign Awards	Chapter I : New York Convention Awards
2. Definition.--In this Act, unless the context otherwise requires, 'foreign award' means an award on differences between persons arising out of legal relationships, whether between persons arising out of contractual or not, considered as legal relationships, whether commercial under the law in force in India, made on or after the 11th day of October, 1960--	44. Definition.--In this Chapter, context otherwise requires, 'foreign award' means an arbitral award on differences out of legal relationships, whether between persons arising out of contractual or not, considered as legal relationships, whether commercial under the law in force in contractual or not, considered as India, made on or after the 11th day commercial under the law in force of October, 1960-- in India, made on or after the 11th day of October, 1960--
(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the Schedule	(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the

applies, and (b) in one of such territories as the Central Government being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.	First Schedule applies, and (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.
3. Stay of proceedings in respect of matters to be referred to arbitration.--Notwithstanding anything contained in the Arbitration	45. Power of judicial authority to refer parties to arbitration.-- Notwithstanding anything contained in Part I or in the Code

Act, 1940 (10 of 1940), or in the Code of Civil Procedure, 1908 (5 of of Civil Procedure, 1908 (5 of 1908), 1908), a judicial authority, when if any party to an agreement to which seized of an action in a matter in Article II of the Convention set forth respect of which the parties have in the Schedule applies, or any person made an agreement referred to in claiming through or under him Section 44, shall, at the request of commences any legal proceedings in one of the parties or any person any court against any other party to claiming through or under him, the agreement or any person claiming refer the parties to arbitration, through or under him in respect of unless it finds that the said any matter agreed to be referred to agreement is null and void, arbitration in such agreement, any inoperative or incapable of being party to such legal proceedings may, performed. at any time after appearance and before filing a written statement or taking any other step in the proceedings, apply to the court to stay the proceedings and the court, unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not, in fact, any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

4. Effect of foreign awards.--(1) A 46. When foreign award foreign award shall, subject to the binding.--Any foreign award provisions of this Act, be enforceable which would be enforceable under in India as if it were an award made this Chapter shall be treated as on a matter referred to arbitration in binding for all purposes on the India. persons as between whom it was (2) Any foreign award which would made, and may accordingly be be enforceable under this Act shall be relied on by any of those persons treated as binding for all purposes on by way of defence, set-off or the persons as between whom it was otherwise in any legal made, and may accordingly be relied proceedings in India and any on by any of those persons by way of references in this Chapter to defence, set off or otherwise in any enforcing a foreign award shall be legal proceedings in India and any construed as including references references in this Act to enforcing a to relying on an award. foreign award shall be construed as including references to relying on an award.

5. Filing of foreign awards in court.--(1) Any person interested in a foreign award may apply to any court having jurisdiction over the subject-matter of the award that the award be filed in court.

(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

(3) The court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified why the award should not be filed.

6. Enforcement of foreign award.-- 49. Enforcement of foreign (1) Where the court is satisfied that awards.--Where the court is the foreign award is enforceable satisfied that the foreign award is under this Act, the court shall order enforceable under this Chapter, the award to be filed and shall the award shall be deemed to be a proceed to pronounce judgment decree of that court. according to the award.

(2) Upon the judgment so Appealable orders.--(1) An pronounced a decree shall follow, appeal shall lie from the order and no appeal shall lie from such refusing to--

decree except insofar as the decree is refer the parties to arbitration in excess of or not in accordance under Section 45;

with the award.	enforce a foreign award under Section 48, to the court authorised by law to hear appeals from such order. (2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.
7. Conditions for enforcement of foreign awards.--(1) A foreign award may not be enforced under this Act--	48. Conditions for enforcement of foreign awards.--(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that--
if the party against whom it is sought to enforce the award proves to the court dealing with the case that-- the parties to the agreement were under the law applicable to them, under some incapacity, or the said agreement is not valid under the law	the parties to the agreement referred to in Section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any

to which the parties have subjected it, indication thereon, under the law or failing any indication thereon, of the country where the award under the law of the country where was made; or the award was made; or the party against whom the award the party was not given proper notice is invoked was not given proper of the appointment of the arbitrator notice of the appointment of the or of the arbitration proceed-ings or arbitrator or of the arbitral was otherwise unable to present his proceedings or was otherwise case; or unable to present his case; or

(iii) the award deals with questions (c) the award deals with a not referred or contains decisions on difference not contemplated by or matters beyond the scope of the not falling within the terms of the agreement: submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that if the decisions on Provided that, if the decisions on matters submitted to arbitration can matters submitted to arbitration be separated from those not can be separated from those not submitted, that part of the award so submitted, that part of the which contains decisions on matters award which contains decisions submitted to arbitration may be on matters submitted to enforced; or arbitration may be enforced; or

(iv) the composition of the arbitral (d) the composition of the arbitral authority or the arbitral procedure authority or the arbitral was not in accordance with the procedure was not in accordance agreement of the parties or failing with the agreement of the parties, such agreement, was not in or, failing such agreement, was accordance with the law of the not in accordance with the law of country where the arbitration took the country where the arbitration place; or took place; or

(v) the award has not yet become (e) the award has not yet become binding on the parties or has been set binding on the parties, or has aside or suspended by a competent been set aside or suspended by a authority of the country in which, or competent authority of the country under the law of which, that award in which, or under the law of was made; or which, that award was made.

(b) if the court dealing with the case (2) Enforcement of an arbitral is satisfied that-- award may also be refused if the court finds that--

(i) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or	(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or
(ii) the enforcement of the award will be contrary to public policy.	(b) the enforcement of the award would be contrary to the public policy of India.
(2) If the court before which a foreign award is sought to be relied upon is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority referred to in sub-clause (v) of clause (a) of sub-	Explanation.--Without prejudice to the generality of clause (b) of this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced

section (1), the court may, if it deems or affected by fraud or corruption. proper, adjourn the decision on the (3) If an application for the setting enforcement of the award and may aside or

suspension of the award also, on the application of the party has been made to a competent claiming enforcement of the award, authority referred to in clause (e) order the other party to furnish of sub-section (1) the court may, if suitable security. it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

8. Evidence.--(1) The party applying 47. Evidence.--(1) The party for the enforcement of a foreign applying for the enforcement of a award shall, at the time of the foreign award shall, at the time of application, produce-- the application, produce before the original award or a copy thereof, the court-- duly authenticated in the manner the original award or a copy required by the law of the country in thereof, duly authenticated in the which it was made; manner required by the law of the the original agreement for country in which it was made;

arbitration or a duly certified copy thereof; and

such evidence as may be necessary to prove that the award is a foreign award.

(2) If the award or agreement requiring to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

the original agreement for arbitration or a duly certified copy thereof; and

such evidence as may be necessary to prove that the award is a foreign award.

(2) If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English diplomatic or consular agent of or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation.--In this section and all the following sections of this Chapter, 'court' means the Principal Civil Court of Original Jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-

matter of the award if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such Principal Civil Court, or any Court of Small Causes.

9. Saving.--Nothing in this Act shall--

prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this

51. Saving.--Nothing in this Chapter shall prejudice any rights which any person would have had of enforcing in India of any award or of availing himself in India of any award if this Chapter had not

Act had not been passed; or been enacted.
(b) apply to any award made on an

arbitration agreement governed by
the law of India.
10. Repeal.--The Arbitration 52. Chapter II not to apply.--
(Protocol and Convention) Act, 1937 Chapter II of this Part shall not

(6 of 1937), shall cease to have effect apply in relation to foreign in relation to foreign awards to awards to which this Chapter which this Act applies. applies.

11. Rule-making power of the High Court.--The High Court may make rules consistent with this Act as to--

the filing of foreign awards and all proceedings consequent thereon or incidental thereto;

the evidence which must be furnished by a party seeking to enforce a foreign award under this Act; and

(c) generally, all proceedings in court under this Act.

65. A comparison of the two sets of provisions would show that Section 44, the definition clause in the 1996 Act is a verbatim reproduction of Section 2 of the previous Act (but for the words "chapter" in place of "Act", "First Schedule" in place of "Schedule" and the addition of the word "arbitral" before the word "award" in Section 44). Section 45 corresponds to Section 3 of the previous Act.

66. Section 46 is a verbatim reproduction of Section 4(2) except for the substitution of the word "chapter" for "Act". Section 47 is almost a reproduction of Section 8 except for the addition of the words "before the court" in sub-section (1) and an Explanation as to what is meant by "court" in that section.

67. Section 48 corresponds to Section 7; Section 49 to Section 6(1) and Section 50 to Section 6(2).

68. Apart from the fact that the provisions are arranged in a far more orderly manner, it is to be noticed that the provisions of the 1996 Act are clearly aimed at facilitating and expediting the enforcement of the New York Convention Awards.

69. Section 3 of the 1961 Act dealing with a stay of proceedings in respect of matters to be referred to arbitration was confined in its application to "legal proceedings in any court" and the court had a wider discretion not to stay the proceedings before it. The corresponding provision in Section 45 of the present Act has a wider application and it covers an action before any judicial authority. Further, under Section 45 the judicial authority has a narrower discretion to refuse to refer the parties to

arbitration.

22.22. Yet another alternative argument raised by learned counsel for Doosan India which deserves to be accepted is that in case the contention of learned counsel for GMR Energy that the present arbitration is covered by Part-I is to be accepted then this Court will have no territorial jurisdiction to entertain the present suit for the reason in the jurisdictional para mentioned in the plaint GMR Energy submits that the closest connect of the parties to the present case is Chhattisgarh in India, thus the Court at Delhi is ousted of the territorial jurisdiction to try the suit and pass orders. 22.23. In view of the discussion aforesaid the contentions raised by learned counsel for GMR Energy are rejected and it is held that the arbitration that commenced at Singapore pursuant to Arb.316/16/ACU would fall under Part-II of the Arbitration Act and not Part-I.

23. Issue No.2: Whether on the basis of pleas in the notice of arbitration issued by Doosan India a case is made out by Doosan India to subject GMR Energy to arbitration with GCEL and GIL? 23.1. Learned counsel for GMR Energy further contends that assuming it is held that the International Arbitration law of Singapore is applicable to the arbitration amongst the three defendants, that is, Doosan India, GCEL and GIL, GMR Energy not being the signatory to any of the three agreements, or the corporate guarantee, it cannot be roped into an international arbitration by applying the principle of alter ego or it being a guarantor without there being a written guarantee. Further admittedly the MOU-I dated 1st July, 2015 and MOU-II dated 30th October, 2015 have been terminated by Doosan India and liability of GMR Energy, if any was discharged by virtue of letter dated 3rd November, 2016 which Doosan India deliberately suppressed in the notice of arbitration. Thus GMR Energy cannot be made a party to the arbitration agreement either by virtue of the three EPC agreements and the Corporate Guarantee or the two MOUs as noted above by applying the principle of alter ego.

23.2. Relying upon the decision reported as Indowind Energy Ltd (supra) learned counsel for GMR Energy contends that each company is a separate and distinct legal entity and the mere fact that two companies have common shareholders or common Board of Director will not make the two companies a single entity. Thus Doosan India cannot use the principle of alter ego to invoke the arbitration clause against GMR Energy on the basis of common shareholding and common Board of Directors of the two companies, that is, GMR Energy and GCEL. By invoking arbitration against GMR Energy, arbitration has proceeded in disregard of the corporate personality of GMR Energy. Even in Chloro Controls (supra) Supreme Court laid a word of caution that only in exceptional cases can a non-party to the arbitration agreement be subjected to arbitration without its prior consent. Reliance is also placed on the decisions reported as 2011 (1) SCC 320 S.N. Prasad, Hitek Industries (Bihar) Limited vs. Monnet Finance Ltd., Deutsche Post Bank (supra) and Ameet Lalchand Shah (supra).

23.3. Rebutting the contention of learned counsel for Doosan India that by virtue of MOU-1 and MOU-II, GMR Energy guaranteed the liability of GCEL it is contended that the MOU-I and MOU-II stood terminated by the letter of Doosan India dated 3rd November, 2016 and that since Doosan India is trying to approbate and reprobate at the same time, no arbitral dispute can be said to be subsisting as per the decision in M/s P.K. Ramaiah (supra). Further, in terms of the decision

reported as X vs. Y & Z, 4A_128/2008 dated 19th August, 2008 even a guarantor cannot be pulled into an arbitration in case there is no arbitration agreement with the guarantor. Distinguishing the decisions relied upon by learned counsel for Doosan India, it is contended that they were on their peculiar facts and not applicable to the present case. 23.4. Learned counsel for Doosan India countering the submissions of learned counsel for GMR Energy contends that in Chloro Controls (supra) Supreme Court recognized the legal basis to bind a non-signatory to an arbitration agreement which inter alia are implied consent, third party beneficiary, guarantors, assignment or other transfer mechanism of control/ rights, apparent authority, piercing of veil, agent principle relationship, agent vendor relations etc. In Jiang Haiying (supra) the High Court of Singapore referring to excerpts from Halsbury's Laws of Singapore held that privity rule, while strict, is not absolute and there are several situations where non- signatories may be considered as party to the arbitration agreement, one such being the corporate veil piercing on the basis of alter ego. It is further submitted that the principle of invoking arbitration against the non-signatory is consistent with Sections 44 and 45 of the Arbitration Act which recognizes situations where there can be arbitration even between the non-

signatories to a contract, as Section 44 recognizes the legal relationship "whether contractual or not".

23.5. Further relying upon the decision of this Court in M/s Sai Soft Securities (supra) it is contended that the Division Bench of this Court recognized the award wherein the corporate veil was lifted and arbitration proceeded against a non-party. It is further contended that fraud is not the only concept in which corporate veil can be pierced. Supreme Court in the Renusagar Power Co. (supra) reiterated the expanding horizon of modern jurisprudence enumerating certain circumstances besides fraud wherein lifting of the corporate veil was permissible. The House of Lords in DHN Food Distributors (supra) recognized the concept of single economic entity and by lifting the corporate veil held that three companies should be for the purpose treated as one. Contending that the decision in Sudhir Gopi (supra) was per incuriam for the reason it failed to consider the issue of arbitrability of alter ego and was passed without taking into consideration the decision of the Supreme Court in A. Ayyasamy (supra) wherein the Supreme Court carved out cases which cannot be sent for arbitration, fraud being one such category. Hence the decisions relating to lifting the corporate veil on the ground of fraud cannot be used to determine the present case where arbitration is being invoked on the principle of alter ego and not on the principle of fraud. Referring to the book tiled as International Commercial Arbitration (2nd Edition) by Gary B. Born it is contended that concept of domestic arbitrability differs from international arbitrability. Hence, the decisions rendered on domestic arbitration cannot be applied ipso facto to international commercial arbitrations.

23.6. The seven grounds on which Doosan India invokes the principle of alter ego against GMR Energy as also noted in the notice of arbitration above are:

> "(1) GMR Energy, GCEL and GMR Infra freely co-mingle corporate funds and are run by the members of one family.

(2) The entitles have common directors and use the same corporate signage and letterhead.

(3) There is no corporate formality maintained between the GMR Infra, GCEL and GMR Energy.

(4) At the time of execution of the EPC Agreements, GMR Energy was the 100% holding company of GCEL, which thereafter stands divested in favour of another sister entity, GMR Generation Assets Limited.

(5) GMR Infra at the relevant time held 93.5% stake in the plaintiff and thus has a controlling stake in GCEL indirectly.

(6) GMR Energy, GCEL and GMR Infra are all part of a family owned business controlled by Mr. G.M. Rao. (7) GMR Energy acknowledged the debt due by its subsidiary, GCEL towards Doosan and also made payments towards the release of such debt."

23.7. Supreme Court in the decision reported in Chloro Controls (Supra) held:

"70. Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlining (sic underlying) that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. These may create some difficult situations, but certainly, they are not absolute obstructions to law/the arbitration agreement. Arbitration, thus, could be possible between a signatory to an arbitration agreement and a third party. Of course, heavy onus lies on that party to show that, in fact and in law, it is claiming "through" or "under" the signatory party as contemplated under Section 45 of the 1996 Act. Just to deal with such situations illustratively, reference can be made to the following examples in Law and Practice of Commercial Arbitration in England(2nd Edn.) by Sir Michael J. Mustill:

"1. The claimant was in reality always a party to the contract, although not named in it.

2. The claimant has succeeded by operation of law to the rights of the named party.

3. The claimant has become a party to the contract in substitution for the named party by virtue of a statutory or consensual novation.

4. The original party has assigned to the claimant either the underlying contract, together with the agreement to arbitrate which it incorporates, or the benefit of a claim which has already come into existence."

71. Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the courts under the English law have, in certain cases, also applied the "group of companies doctrine". This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non- signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. [Russell on Arbitration (23rd Edn.)]

72. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, "intention of the parties" is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.

73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non- signatory parties would fall within the exception afore- discussed.

74. In a case like the present one, where origin and end of all is with the mother or the principal agreement, the fact that a party was non-signatory to one or other agreement may not be of much significance. The performance of any one of such agreements may be quite irrelevant without the performance and fulfilment of the principal or the mother agreement. Besides designing the corporate management to successfully complete the joint ventures, where the parties execute different agreements but all with one primary object in mind, the court would normally hold the parties to the bargain of arbitration and not encourage its avoidance. In cases involving execution of such multiple agreements, two essential features exist; firstly, all ancillary agreements are relatable to the mother agreement and secondly, performance of one is so intrinsically interlinked with the other agreements that they are incapable of being beneficially performed without performance of the others or

severed from the rest. The intention of the parties to refer all the disputes between all the parties to the Arbitral Tribunal is one of the determinative factors.

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102. Joinder of non-signatory parties to arbitration is not unknown to the arbitration jurisprudence. Even the ICCA's Guide to the Interpretation of the 1958 New York Convention also provides for such situation, stating that when the question arises as to whether binding a non-signatory to an arbitration agreement could be read as being in conflict with the requirement of written agreement under Article I of the Convention, the most compelling answer is "no" and the same is supported by a number of reasons.

103. Various legal bases may be applied to bind a non- signatory to an arbitration agreement:

103.1. The first theory is that of implied consent, third-party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. This theory relies on the discernible intentions of the parties and, to a large extent, on good faith principle. They apply to private as well as public legal entities.

103.2. The second theory includes the legal doctrines of agent- principal relations, apparent authority, piercing of veil (also called "the alter ego"), joint venture relations, succession and estoppel. They do not rely on the parties' intention but rather on the force of the applicable law.

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xxx xxx xxx

109. The New York Convention clearly postulates that there should be a defined legal relationship between the parties, whether contractual or not, in relation to the differences that may have arisen concerning the subject-matter capable of settlement by arbitration. We have referred to a number of judgments of the various courts to emphasise that in given circumstances, if the ingredients above-noted exist, reference to arbitration of a signatory and even a third party is possible. Though heavy onus lies on the person seeking such reference, multiple and multi-party agreements between the parties to the arbitration agreement or persons claiming through or under such parties is neither impracticable nor impermissible.

[Emphasis supplied] 23.8. In Renusagar Power Co. (supra) Supreme Court noting that the concept of lifting the corporate veil is a changing concept and is of expanding horizons held:

64. We are, however, of the opinion that these tests are not conclusive tests by themselves. Our attention was also drawn to the decision of the Madras High Court in Spencer & Co. Ltd. Madras v. CWT [AIR 1969 Mad 359 : 72 ITR 33 : 39 Com Cas 212 : ILR (1969) 2 Mad 450] where Veeraswami, J. held that merely because a company purchases almost the entirety of the shares in another company, there was no extinction of corporate character for each company was a separate juristic entity for the tax purposes. Almost on similar facts, are the observations of P.B. Mukharji, J. in Turner Morrison & Co. Ltd. v. Hungerford Investment Trust Ltd. [AIR 1969 Cal 238] where he held that holding company and subsidiaries are incorporated companies and in this context each has a separate legal entity. Each has a separate corporate veil but that does not mean that holding company and the subsidiary company within it, all constitute one company.

65. Mr Justice O. Chinnappa Reddy speaking for this Court in LIC v. Escorts Ltd.[(1986) 1 SCC 264 : AIR 1986 SC 1370 : 1985 Supp (3) SCR 909 : (1986) 59 Com Cas 548] had emphasised that the corporate veil should be lifted where the associated companies are inextricably connected as to be, in reality, part of one concern. It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depend on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected. After referring to several English and Indian cases, this Court observed that ever since A. Salomon & Co. Ltd. case [1897 AC 22] a company has a legal independent existence distinct from individual members. It has since been held that the corporate veil may be lifted and corporate personality may be looked in. Reference was made to Pennington and Palmer's Company Laws.

66. It is high time to reiterate that in the expanding horizon of modern jurisprudence, lifting of corporate veil is permissible. Its frontiers are unlimited. It must, however, depend primarily on the realities of the situation. The aim of the legislation is to do justice to all the parties. The horizon of the doctrine of lifting of corporate veil is expanding. Here, indubitably, we are of the opinion that it is correct that Renusagar was brought into existence by Hindalco in order to fulfil the condition of industrial licence of Hindalco through production of aluminium. It is also manifest from the facts that the model of the setting up of power station through the agency of Renusagar was adopted by Hindalco to avoid complications in case of take over of the power station by the State or the Electricity Board. As the facts make it abundantly clear that all the steps for establishing and expanding the power station were taken by Hindalco, Renusagar is wholly owned subsidiary of Hindalco and is completely controlled by Hindalco. Even the day-to-day affairs of Renusagar are controlled by Hindalco. Renusagar has at no point of time indicated any independent volition. Whenever felt necessary, the State or the Board have themselves lifted the corporate veil and have treated Renusagar and Hindalco as one concern and the generation in Renusagar as the own source of generation of Hindalco. In the impugned order the

profits of Renusagar have been treated as the profits of Hindalco.

67. In the aforesaid view of the matter we are of the opinion that the corporate veil should be lifted and Hindalco and Renusagar be treated as one concern and Renusagar's power plant must be treated as the own source of generation of Hindalco and should be liable to duty on that basis. In the premises the consumption of such energy by Hindalco will fall under Section 3(1)(c) of the Act. The learned Additional Advocate-General for the State relied on several decisions, some of which have been noted.

68. The veil on corporate personality even though not lifted sometimes, is becoming more and more transparent in modern company jurisprudence. The ghost of Salomon case [1897 AC 22] still visits frequently the hounds of Company Law but the veil has been pierced in many cases. Some of these have been noted by Justice P.B. Mukharji in the New Jurisprudence [Tagore Law Lectures, p. 183] .

69. It appears to us, however, that as mentioned the concept of lifting the corporate veil is a changing concept and is of expanding horizons. We think that the appellant was in error in not treating Renusagar's power plant as the power plant of Hindalco and not treating it as the own source of energy. The respondent is liable to duty on the same and on that footing alone; this is evident in view of the principles enunciated and the doctrine now established by way of decision of this Court in Life Insurance Corpn. of India [(1986) 1 SCC 264 : AIR 1986 SC 1370 : 1985 Supp (3) SCR 909 : (1986) 59 Com Cas 548] that in the facts of this case Sections 3(1)(c) and 4(1)(c) of the Act are to be interpreted accordingly. The persons generating and consuming energy were the same and the corporate veil should be lifted. In the facts of this case Hindalco and Renusagar were inextricably linked up together. Renusagar had in reality no separate and independent existence apart from and independent of Hindalco.

[Emphasis supplied] 23.9. Noting with approval observations of Lord Denning in the decision of the Court of Appeal in DHN Food Distributors (supra), Supreme Court in Renusagar Power Co. (supra) also noted:

55. In Kodak Ltd. v. Clark [(1903) 1 KB 505] the Court of appeal in England while dealing with an English company carrying on business in the U.K. owned 98 per cent of the shares in a foreign company, which gave it a preponderating influence in the control, election of directors etc. of the foreign company. The remaining shares in the foreign company were, however, held by independent persons, and there was no evidence that the English company had ever attempted to control or interfere with the management of the foreign company, or had any power to do so otherwise than by voting as shareholders. It was held that the foreign company was not carried on by the English company, nor was it the agent of the English company, and that the English company was not, therefore, assessable to income tax. Renusagar was not the

alter ego of Hindalco, it was submitted. On the other hand these English cases have often pierced the veil to serve the real aim of the parties and for public purposes. See in this connection the observations of the Court of appeal in DHN Food Distributors Ltd. v. London Borough of Tower Hamlets [(1976) 3 All ER 462] . It is not necessary to take into account the facts of that case. We may, however, note that in that case the corporate veil was lifted to confer benefit upon a group of companies under the provisions of the Land Compensation Act, 1961 of England. Lord Denning at p. 467 of the report has made certain interesting observations which are worth repeating in the context of the instant case. The Master of the Rolls said at p. 467 as follows:

"Third, lifting the corporate veil. A further very interesting point was raised by counsel for the claimants on company law. We all know that in many respects a group of companies are treated together for the purpose of general accounts, balance sheet and profit and loss account. They are treated as one concern. Professor Gower in his book on company law [Principles of Modern Company Law, 3rd Edn., p. 216 (1969)] says: 'there is evidence of a general tendency to ignore the separate legal entities of various companies within a group, and to look instead at the economic entity of the whole group'. This is especially the case when a parent company owns all the shares of the subsidiaries, so much so that it can control every movement of the subsidiaries. These subsidiaries are bound hand and foot to the parent company and must do just what the parent company says. A striking instance is the decision of the House of Lords in Harold Holdsworth & Co. (Wakefield) Ltd. v. Caddies [(1955) 1 All ER 725]. So here. This group is virtually the same as a partnership in which all the three companies are partners. They should not be treated separately so as to be defeated on a technical point. They should not be deprived of the compensation which should justly be payable for disturbance. The three companies should, for present purposes, be treated as one, and the parent company, DHN, should be treated as that one. So that DHN are entitled to claim compensation accordingly. It was not necessary for them to go through a conveyancing device to get it.

I realise that the President of the Lands Tribunal, in view of previous cases, felt it necessary to decide as he did. But now that the matter has been fully discussed in this Court, we must decide differently from him. These companies as a group are entitled to compensation not only for the value of the land, but also compensation for disturbance. I would allow the appeal accordingly."

[Emphasis supplied] 23.10. Learned counsel for GMR Energy relied on the decision reported as Balwant Rai Saluja (supra). In the said decision as noted below, Supreme Court held that mere ownership and control is not sufficient to pierce the corporate veil, however, in the present case not only the group companies issue is involved, there were two MOUs between the parties, wherein GMR Energy accepted its liability to pay and also made part payment:

70. The doctrine of 'piercing the corporate veil' stands as an exception to the principle that a company is a legal entity separate and distinct from its shareholders with its own legal rights and obligations. It seeks to disregard the separate personality of the company and attribute the acts of the company to those who are allegedly in direct control of its operation. The starting point of this doctrine was discussed in the celebrated case of Salomon v. A. Salomon and Co. Ltd. (1897) AC 22. Lord Halsbury LC (paragraphs 31-33), negating the applicability of this doctrine to the facts of the case, stated that:

...a company must be treated like any other independent person with its rights and liabilities legally appropriate to itself..., whatever may have been the ideas or schemes of those who brought it into existence.

xxxx xxxx xxx xxxx xxxx xxxx

82. The present facts would not be a fit case to pierce the veil, which as enumerated above, must be exercised sparingly by the Courts. Further, for piercing the veil of incorporation, mere ownership and control is not a sufficient ground. It should be established that the control and impropriety by the Air India resulted in depriving the Appellants-workmen herein of their legal rights. As regards the question of impropriety, the Division Bench of the High Court of Delhi in the impugned order dated 02.05.2011, noted that there has been no advertence on merit, in respect of the workmen's rights qua HCI, and the claim to the said right may still be open to the workmen as per law against the HCI. Thus, it cannot be concluded that the controller 'Air India' has avoided any obligation which the workmen may be legally entitled to. Further, on perusal of the Memorandum of Association and Articles of Association of the HCI, it cannot be said that the Air India intended to create HCI as a mere facade for the purpose of avoiding liability towards the Appellants-workmen herein.

23.11. The decision in S.N. Prasad (supra) relied by learned counsel for GMR Energy has no application to the facts of the case as even though GMR Energy was not a signatory to the three EPC agreements and the corporate guarantee by virtue of the two MOUs it undertook to discharge the liability of GCEL. Even in Deutsche Post Bank (supra), Supreme Court was dealing with an arbitration clause in a construction agreement to which the appellant was not a party but had only entered into a loan agreement. The Supreme Court was not dealing with the issue of 'alter ego' in the two decisions hence the decisions are not applicable to the facts of the present case.

23.12. As noted above the arbitration clause in the three EPC agreements provided that where a dispute arises and a dispute arises under one or more of the other contracts relating to the project which are so closely connected in the reasonable opinion of the parties and the parties deem it expedient for any dispute and any such disputes, arising under one or more of other contracts relating to the project may be resolved in the same proceedings, then the parties may at their option and by mutual agreement consult and all other disputes by the panel of arbitrators appointed and

require such panel of arbitrators to adjudicate upon the same. As per clause 17.1 of the Corporate Guarantee all the disputes arising between the parties relating to the guarantee or the interpretation of the performance of the guarantee or any question regarding its existence, validity or termination had also to be settled by arbitration. It was thus the intention of the parties to consolidate all the disputes relating to the project, refer the same by mutual agreement to the same panel of arbitrators and get resolved through arbitration. 23.13. In the two MOUs relied upon by Doosan India in the notice of arbitration, GMR Energy admitted its liability towards Doosan India and secondly during the pendency of the dealings between the parties, GMR Energy held 100% stakes in GCEL though the same were transferred again pending disputes between the parties.

23.14. Though the letter dated 3rd November, 2016 does not form the basis of the notice of arbitration however, since it has been heavily relied upon by learned counsel for GMR Energy it would be appropriate to note contents of the said letter:

> "November 3, 2016 Ref. No.: Raipur-DP-GH-L-0725 GMR Chhattisgarh Energy Ltd.
>
> Raikheda- Village, Tilda-Block, Dist.
>
> RAIPUR (C.G.) Pin-493 225 Attention: Mr. S.N. Barde/President C.C :Mr. Madhu Terdal/GMR Group CFO Mr. G.B.S. Raju/BCM Ref.1. [Raipur-DP-GH-L-0699] Ref.2. Standstill Agreement Subject: Corporate Guarantee Resolution Meeting with DPSI This letter is in continuation of the meeting held last week at Mumbai office of GMR Infrastructure Ltd.
>
> As we stressed during the meeting, the Contractor sincerely hopes that the prolonged overdue issues can be cleared in the next meeting to be held during the 4th week of November so that we can avoid having to initiate a legal action. In this regard, we would like to remind the Owner that the Tripartite Agreement among GCEL, GEL and Doosan became null and void as of 31st Dec., 2015 because the conditions precedent for effectiveness were not fulfilled by the agreed upon date. Further, the nullification was notified to GCEL via the Contractor's letter dated 4th Jan., 2016. Please be advised, therefore, that the payment obligation is not on GEL, but on GCEL and GIL, by the invocation of Corporate Guarantee.
>
> Also, as was discussed during the last week's meeting, it is necessary to execute the Standstill Agreement between GCEL, GIL and the Contractor to continue negotiation without initiating a legal proceeding right away. Please review the attached Standstill Agreement and let us know of your readiness to sign as soon as possible, but no later than 15th Nov., 2016.
>
> As you may well understand, the Contractor has been in serious financial trouble due to the overdue payment for a long time and is now strained to initiate a legal proceeding unless the Owner takes a tangible action immediately to clear the overdue payment. Therefore, the Contractor requests to the GCEL and GIL to provide a

detailed payment plan including the security of payment, methods of delay interest payment and higher interest rates for the deferred payment as soon as possible, but not later than 15 th Nov., 2016, so that the Contractor can make decisions internally before the next meeting in the 4 th week of November.

Kindly let us remind the Owner that the situation is such that the Contractor will have to commence a legal action as mentioned in the "Legal Notice" dated 14th Oct 2016, unless the Owner provides the Contractor with a repayment schedule acceptable to us, reliable payment security and commitment of interest payment, as well as GCEL and CIL's confirmation of the Standstill Agreement until 15 th Nov., 2016.

This letter is without prejudice to any of the rights and remedies available to the Contractor in respect of any breach of the Agreements, the MOU, the Corporate Guarantee and related documentation and agreements, whether now or in the future, under law or in equity. Sincerely, SD/-

Dong Jib Park Raipur PM"

23.15. From the contents of the letter noted above it is evident that though Doosan India stated that the tripartite agreement between GCEL and GMR Energy and Doosan India became null and void on 31 st December, 2015 and that the payment obligation was now on the GCEL and GIL by invocation of the corporate guarantee however, the said letter was without prejudice to the rights and remedies available to Doosan India in respect of any breach of agreements, MOUs, Corporate Guarantee and related documentation and agreements. Further whether a tripartite agreement resulting in the two MOUs between Doosan India, GCEL and GMR Energy could be novated by a unilateral letter is a question to be decided on merits during the arbitration and not in the present suit.

23.16. Learned counsel for GMR Energy heavily relied upon clause 23.12 of the agreement between the parties which provided as under:

"23.12 Parties Obligation Non-Recourse The Parties have entered into this Agreement entirely on their own behalf, and in no manner for or on behalf of any shareholder of either Party, or any partner, shareholder, officer, director, employee or agent of either Party and neither Party shall have any recourse against such persons for any act, omission, obligation or liability of the other Party or for any other matter pertaining in any way to this Agreement or the Other Contracts, whether based upon a piercing of the Party's corporate veil or any other legal theory based upon exercise of control over the party or otherwise." (emphasis supplied) 23.17. A perusal of clause 23.12 bars recourse to applications qua any partner, shareholder, office, director, employee or agent of either party even on the principle of piercing the parties' corporate veil or any other legal theory. However, the agreement did not bar other corporate entity to be made subject to arbitration based on the principle of piercing of the corporate veil or any such legal theory.

23.18. Considering the fact that firstly, GCEL was a joint venture of GMR Group, secondly, the group companies did not observe separate corporate formalities and comingled corporate funds, thirdly, by the two MOUs entered into between Doosan India, GMR Energy and GCIL, GMR Energy undertook to discharge liability and made part payments in discharge of GCEL's liability also, fourthly, when the two MOUs were entered into, GMR Energy had acquired GCEL and fifthly, whether the two MOUs being the tripartite agreement between Doosan India, GCEL and GMR Energy could or could not be novated by letter dated 31st December, 2015 being an issue to be decided on merits, it is held that from the notice of arbitration Doosan India has made out a case for proceeding against GMR Energy to subject GMR Energy to arbitration with GCEL and GIL.

24. Issue No.3: Whether the Arbitral Tribunal has no jurisdiction to pierce the corporate veil?

24.1. Learned counsel for GMR Energy contends that the concept of piercing the corporate veil is within the domain of the courts and not of the Arbitral Tribunal as held by the Supreme Court in Balwant Rai Saluja (supra). It is further contended that the principle of alter ego was considered by the Single Judge of this Court in Sudhir Gopi (supra) wherein the Court held that an arbitrator does not have the power to pierce the corporate veil which function is essentially of the Court.

24.2. Learned counsel for Doosan India contends that this Court in Sudhir Gopi (supra) failed to consider the issue of arbitrability of alter ego by the Arbitral Tribunal. Relying upon the decision in A. Ayyasamy (supra) wherein the Court laid down the non-arbitrability disputes, it is contended that the issue of alter ego does not fall in the category of non-arbitrable disputes hence can be determined by the Arbitral Tribunal. Reliance is also placed on the decision of the Bombay High Court in Integrated Sales (supra) wherein the High Court held that issues which were arbitrable can be gone into by a tribunal in a foreign seat arbitration. It is further contended that notions of international arbitration jurisprudence are different from notions of domestic arbitrability as noted in the book 'International Commercial Arbitration (Second Edition), 2nd edition by Gary B. Born'.
24.3. In Sudhir Gopi (supra) this Court was dealing with the arbitration agreement which falls in Part-I of the Arbitration Act, and held that whether a court will compel any person to arbitrate would have to be examined in the context of the specific provisions of the applicable statute. Though it is universally accepted principle that dispute resolution by arbitration must be encouraged, however, the courts determine the question whether an individual or an entity can be compelled to arbitrate, guided by the domestic law and the judicial standards of their country. This Court further held that the courts would undoubtedly have the power to determine whether in a given case the corporate veil should be pierced or not, however, an arbitral tribunal has no jurisdiction to lift the corporate veil, its jurisdiction being confined by the arbitration agreement which included the parties to arbitration and it would not be permissible for the arbitral tribunal to expand or extend the same to other persons. Continuing the discussion, this Court also noted that an arbitration agreement can be extended to a non-signatory in limited circumstances, firstly, where the Court comes to the conclusion that there is an implied consent and secondly, where there are reasons to disregard the corporate personality of a party, thus, making the shareholders answerable for the obligations of the company. Thus, this Court recognized that though limited, corporate veil could be lifted but it was for the court to do it and not the arbitral tribunal. To come to this conclusion this Court in Sudhir Gopi (supra) referred to the decision in DDA vs. Skipper Construction (supra)

wherein the Court lifted the corporate veil for the reason the corporate character was being employed for the purpose of committing illegality or for defrauding others. 24.4. The Constitution Bench comprising of seven judges of the Supreme Court in (2005) 8 SCC 618 SBP & Co. Vs. Patel Engineering Ltd. & Anr. held that an order of reference to an arbitration under Section 11 of the Arbitration Act was a judicial decision and not an administrative decision. The Chief Justice could also decide the question whether the claim was a dead one or a long barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It was further held that the Chief Justice is also required to enquire whether the conditions for exercise of his power under Section 11 (6) of the Arbitration Act have been fulfilled.

24.5. Following the Constitution Bench decision in SBP & Co. (supra) Supreme Court in 2009 (1) SCC 267 National Insurance Co.Ltd. Vs. Boghara Polyfab (P) Ltd. identified and segregated three categories for consideration in an application under Section 11 of the Arbitration Act, Category (1) being where the Chief Justice/his designate has to/must decide the issue; Category (2) where the Chief Justice/his designate may choose to decide the issues or leave them to the decision of the Arbitral Tribunal and Category (3) where the Chief Justice/his designate should leave the issues exclusively to the Arbitral Tribunal. Issues falling in the three categories were noted as under:-

> 22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section11, the duty of the Chief Justice or his designate is defined in SBP & Co. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide. 22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:
>
> (a) Whether the party making the application has approached the appropriate High Court.
>
> (b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.
>
> 22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:
>
> (a) Whether the claim is a dead (long-barred) claim or a live claim.
>
> (b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration."

24.6. In National Insurance Co.Ltd. (supra) Supreme Court also drew a distinction between a reference to arbitration under Section 11 of the Arbitration Act and a dispute referred to the Arbitral Tribunal without the intervention of the Court and noted the questions which could be decided by the Arbitral Tribunal as under:-

21. It is thus clear that when a contract contains an arbitration clause and any dispute in respect of the said contract is referred to arbitration without the intervention of the court, the Arbitral Tribunal can decide the following questions affecting its jurisdiction: (a) whether there is an arbitration agreement; (b) whether the arbitration agreement is valid; (c) whether the contract in which the arbitration clause is found is null and void, and if so, whether the invalidity extends to the arbitration clause also. It follows, therefore, that if the respondent before the Arbitral Tribunal contends that the contract has been discharged by reason of the claimant accepting payment made by the respondent in full and final settlement, and if the claimant counters it by contending that the discharge voucher was extracted from him by practising fraud, undue influence, or coercion, the Arbitral Tribunal will have to decide whether the discharge of contract was vitiated by any circumstance which rendered the discharge voidable at the instance of the claimant. If the Arbitral Tribunal comes to the conclusion that there was a valid discharge by voluntary execution of a discharge voucher, it will refuse to examine the claim on merits, and reject the claim as not maintainable. On the other hand, if the Arbitral Tribunal comes to the conclusion that such discharge of contract was vitiated by any circumstance which rendered it void, it will ignore the same and proceed to decide the claim on merits."

24.7. In A.Ayyasamy (supra) Supreme Court laid down that though the Arbitration Act does not specify but the courts have held that certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, cannot be referred to arbitration. The Court laid the categories of non-arbitrable disputes being: (i) patent, trademarks and copyright; (ii) antitrust/competition laws; (iii) insolvency/winding up; (iv) bribery/ corruption; (v) fraud; and (vi) criminal matters. 24.8. Following the decision in SBP & Co. (supra) and National Insurance Co.Ltd.(supra) Supreme Court in Chloro Controls (supra) held as under :-

"129. We are not oblivious of the principle "kompetenz kompetenz". It requires the Arbitral Tribunal to rule on its own jurisdiction and at the first instance. One school

of thought propagates that it has duly the positive effect as it enables the arbitrator to rule on its own jurisdiction as it widely recognized international arbitration. However, the negative effect is equally important, that the courts are deprived of their jurisdiction. The arbitrators are to be not the sole judge but first judge, of their jurisdiction. In other words, it is to allow them to come to a decision on their own jurisdiction prior to any court or other judicial authority and thereby limit the jurisdiction of the national courts to review the award. The kompetenz kompetenz rule, thus, concerned not only is the positive but also the negative effect of the arbitration agreement. (Refer Fouchard Gaillard Goldman on International Commercial Arbitration.)

130. This policy has found a favourable mention with reference to the New York Convention in some of the countries. This is one aspect. The more important aspect as far as Chapter I of Part II of the 1996 Act is concerned, is the absence of any provision like Section 16 appearing in Part I of the same Act. Section 16 contemplates that the arbitrator may determine its own jurisdiction. Absence of such a provision in Part II Chapter I is suggestive of the requirement for the court to determine the ingredients of Section 45, at the threshold itself. It is expected of the court to answer the question of validity of the arbitration agreement, if a plea is raised that the agreement containing the arbitration clause or the arbitration clause itself is null and void, inoperative or incapable of being performed. Such determination by the court in accordance with law would certainly attain finality and would not be open to question by the Arbitral Tribunal, even as per the principle of prudence. It will prevent multiplicity to litigation and reagitating of same issues over and over again. The underlining (sic underlying) principle of finality in Section 11(7) would be applicable with equal force while dealing with the interpretation of Sections 8 and 45. Further, it may be noted that even the judgment of this Court in SBP & Co. takes a view in favour of finality of determination by the Court despite the language of Section 16 in Part I of the 1996 Act. Thus, there could hardly be any possibility for the Court to take any other view in relation to an application under Section 45 of the 1996 Act. Since, the categorization referred to by this Court in National Insurance Co.Ltd. is founded on the decision by the larger Bench of the Court in SBP & Co., we see no reason to express any different view. The categorization falling under para 22.1 of National Insurance co. case would certainly be answered by the Court before it makes a reference while under para 22.2 of that case, the Court may exercise its discretion and decide the dispute itself or refer the dispute to the Arbitral Tribunal. Still, under the cases falling under para 22.3, the Court is expected to leave the determination of such dispute upon the Arbitral Tribunal itself. But wherever the Court decides in terms of categories mentioned in paras 22.1 and 22.2, the decision of the Court is unreviewable b the Arbitral Tribunal.

131. Another very significant aspect of adjudicating the matters initiated with reference to Section 45 of the 1996 Act, at the threshold of judicial proceedings, is that the finality of the decision in regard to the fundamental issues stated under

Section 45 would further the cause of justice and interest of the parties as well:

131.1 To illustratively demonstrate it, we may give an example. Where Party A is seeking reference to arbitration and Party B raises objections going to the very root of the matter that the arbitration agreement is null and void, inoperative and incapable of being performed, such objections, if left open and not decided finally at the threshold itself may result in not only parties being compelled to pursue arbitration proceedings by spending time, money and efforts but even the Arbitral Tribunal would have to spend valuable time in adjudicating the complex issues relating to the dispute between the parties, that may finally prove to be in vain and futile. Such adjudication by the Arbitral Tribunal may be rendered ineffective or even a nullity in the event the courts upon filing of an award and at execution stage hold that the agreement between the parties was null and void inoperative and incapable of being performed. The court may also hold that the Arbitral Tribunal had no jurisdiction to entertain and decide the issues between the parties.

131.2 The issue of jurisdiction normally is a mixed question of law and facts. Occasionally, it may also be a question of law alone. It will be appropriate to decide such questions at the beginning of the proceedings itself and they should have finality.

131.3 Even when the arbitration law in India contained the provision like Section 34 of the 1940 Act which was somewhat similar to Section 4 of the English Arbitration Act, 1889, this Court in Anderson Wright Ltd. took the view that while dealing with the question of grant or refusal of stay as contemplated under Section 34 of the 1940 Act, it would be incumbent upon the court to decide first of all whether there is a binding agreement for arbitration between the parties to the suit or not.

131.4 Applying the analogy thereof will fortify the view that determination of fundamental issues as contemplated under Section 45 of the 1996 Act at the very first instance by the judicial forum is not only appropriate but is also the legislative intent. Even the language of Section 45 of the 1996 Act suggests that unless the court finds that an agreement is null and void, inoperative and incapable of being performed, it shall refer the parties to arbitration."

24.9. Singapore High Court in the decision reported as 2006 SGHC 78 Aloe Vera of America, Inc. vs. Asianic Food (S) Pte. Ltd. & Anr. held:

72. In my opinion, the above submissions are misplaced. It is clear from the wording of the section itself that the determination of whether a matter is arbitrable or not is governed by Singapore law. The law of Arizona is irrelevant. As far as Singapore law is concerned, as para 20.149 of Halsbury's points out, no specific subjects have been identified by statute as being or as not being arbitrable. Instead, Halsbury's states:

> It is generally accepted that issues, which may have public interest elements, may not be arbitrable, for example citizenship or legitimacy of marriage, grants of statutory licences, validity of registration of trade marks or patents, copyrights, winding-up of companies ...
>
> Whether a person is the alter ego of a company is an issue which does not have a public interest element. It normally arises in a commercial transaction in which one party is trying to make an individual responsible for the obligations of a corporation. In my judgment, such an issue can in an appropriate case be decided by arbitration. In this case, the Arbitrator had first found an agreement between Mr Chiew to arbitrate as he found the latter to be "properly a party to this arbitration as a party under the broad definition found in paragraph 13.7 of the Agreement". It was only after hearing evidence at the final hearing that the Arbitrator found that Mr Chiew was the alter ego of Asianic based on Arizona law. As the Arbitrator had clearly found Mr Chiew to be a party to the arbitration agreement with AVA, he was entitled to go on and decide in the course of the arbitration whether or not Mr Chiew was the alter ego of Asianic. This issue was within the scope of the submission to arbitration and was clearly arbitrable.

24.10. In Chloro Controls (supra) the Supreme Court also drew distinction between the question of formal validity of the arbitration agreement and nature of parties to the agreement and held:

> 106. The question of formal validity of the arbitration agreement is independent of the nature of parties to the agreement, which is a matter that belongs to the merits and is not subject to substantive assessment. Once it is determined that a valid arbitration agreement exists, it is a different step to establish which parties are bound by it. The third parties, who are not explicitly mentioned in an arbitration agreement made in writing, may enter into its ratione personae scope. Furthermore, the Convention does not prevent consent to arbitrate from being provided by a person on behalf of another, a notion which is at the root of the theory of implied consent.

24.11. In Chloro Controls (supra) Supreme Court reiterated the decision in National Insurance Co.Ltd. (supra) wherein a distinction was carved out between a court referred arbitration and an arbitration without the intervention of the Court. In Chloro Controls (supra) Supreme Court was dealing with an application under Section 45 of the Arbitration Act seeking reference to arbitration. In the present case the arbitration was initiated without the intervention of the Court and only after initiation of the arbitration, GMR Energy filed the present suit invoking the jurisdiction of this Court seeking an injunction against arbitration to proceed against it on the basis of issue of alter ego. The issue of alter ego not falling within the categories of non-arbitrable disputes as specified in A.Ayyasamy (supra) and the nature of parties to the agreement being distinct from the formal validity of the arbitration agreement and a question of merit as held in Chloro Control (supra) would thus fall in the category (2) laid down by National Insurance Co.Ltd. (supra) even if considering that Doosan India has filed an application under Section 45 before this Court which is without prejudice to its right. Thus, the issue of alter ego based on the facts as noted in the present case and not on

fraud can be decided by the Court as well as the Arbitral Tribunal.

25. Issue No.4: In the present suit whether this Court will form a prima facie opinion on the issue of alter ego or return a finding? 25.1. Learned counsel for GMR Energy contends that the present case deals with a non-party to the agreement, which issue is covered by the decision of the Supreme Court in Chloro Controls (supra) wherein discussing the earlier judgment in Shin-Etsu Chemical (supra), Supreme Court held that the Court must return a final finding in an application under Section 45 of the Arbitration Act.

25.2. Learned counsel for Doosan India however contends that in the present suit this Court will only apply the prima facie test and if from the notice of arbitration a prima facie case is made out for proceeding against GMR Energy then ultimately whether GMR Energy is liable to be proceeded in the arbitration or an award passed against it would be in the sole domain of the arbitral tribunal and this Court will not return a finding of fact on the said issue. Reliance is placed on the decisions in Shin-Etsu Chemical (supra), Malini Ventura (supra) and Mcdonald's India Private Limited (supra) wherein the test of prima facie view was upheld. It is reiterated that the Arbitral Tribunal is the proper forum to adjudicate upon the issue of alter ego as held in Integrated Sales (supra).

25.3. Singapore High Court in the decision reported as Malini Ventura (supra) held:

> "19. This is where the chicken and the egg question arises. Mr Nakul Dewan, counsel for the defendants, says that the international arbitration regime in place in Singapore gives primacy to the Tribunal and it is the Tribunal that has the first bite at deciding whether or not there is an arbitration agreement which confers jurisdiction on it. The defendants further say that under s 6 of the IAA I have no choice but to refer the question of the existence, validity or termination of an arbitration agreement to the Tribunal. The plaintiff's riposte is that s 6 would only apply to an "arbitration agreement" and that since she did not sign the Guarantee, neither she nor the defendants are parties to an "arbitration agreement" within s 6(1) and therefore the defendants are not allowed to apply to court for a stay of this action. It is for the court to decide whether there is an arbitration agreement or not.
>
> 20. Essentially, my dilemma is how to apply s 6 of the IAA in the circumstances of this case. The first two subsections of that provision read:
>
> Enforcement of intentional arbitration agreement
>
> 6.-(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter. (2) The court to which an application has been made in accordance with subsection (1) shall

make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. [emphasis added]

36. Bearing in mind the differences in the regimes governing international arbitration in Singapore and in England, I do not think it will be correct for me to fully take on board the approach of the English courts as set out in Albon and Al-Naimi. The regime in force here gives primacy to the tribunal although, of course, the court still has an important role to play. If I were to hold that, in a situation where the conclusion of the arbitration agreement is in issue, the jurisdiction in s 6(2) to stay the court proceedings would not bite unless I could conclude, on the basis of the usual civil standard, that the arbitration agreement had been entered into, I would be imposing too high a burden on the party seeking the implementation of the arbitration agreement. I consider that it would satisfy the rights of both parties if the party applying for the stay was able to show on a prima facie basis that the arbitration agreement existed. The matter would then go to the tribunal to decide whether such existence could be established on the usual civil standard and then, if any party was dissatisfied with the tribunal's decision, such party could come back to the court for the last say on the issue. In another case regarding a tribunal's jurisdiction, albeit a different aspect not involving the formation of the arbitration agreement, the Court of Appeal observed that it was only in the clearest case that the court should decide that there was no jurisdiction instead of remitting the matter to the tribunal for an initial decision (see Tjong Very Sumito v Antig Investments Pte Ltd [2009] 4 SLR(R) 732 at [22]-[24]).

37. I note that "Commentary to the UNICTRAL Model Law" by Stavros L Brekoulakis and Laurence Shore in Concise International Arbitration, Loukas A Mistelis (ed) (Kluwer Law International, 2010) ("the Commentary") indicates at pp 601- 602 that there have been other national courts which have given priority to the arbitral tribunal to decide the issue of existence of an arbitration agreement, holding that evidence that an arbitration agreement existed prima facie only would be enough for the courts to refer the issue to the tribunal for final determination. The Commentary also notes (at p 602) that other national courts have taken the contrary position. Whilst I recognise that there is some degree of logical discomfort in the notion that an arbitral tribunal can be given authority to decide on its jurisdiction when it may end up deciding that because one party did not sign it, no arbitration agreement ever existed and therefore in fact the tribunal had no authority to decide the question, I think that having accepted and given effect to the principle of "kompetenz-kompetenz" for so many years we must disregard that discomfort. Otherwise we may find ourselves drawing finer and finer distinctions between situations in which the principle applies and situations in which it does not.

xxxxxxxxxxxxxx 42 I have held, however, that at this stage it is only necessary for me to be satisfied on a prima facie basis that an arbitration agreement exists. Having reached that conclusion, the defendants are, prima facie, parties to an arbitration agreement and entitled to make an application for a stay under s 6. Further, I must grant that stay application unless I am satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. I am satisfied that none of those situations exist here. As Lightman J observed in Albon, the formulation "null and void" means "devoid of legal effect" which would be the result of the agreement being procured by duress, mistake, fraud or waiver. It does not apply to a situation in which no agreement was concluded at all. Further, for an arbitration agreement to be "inoperative", it must have been concluded but for some reason ceased to have legal effect (see Albon at [18]).

25.4. Following Malini Ventura (Supra) in Tomolugen Holding (supra) it was held:

63 The prima facie approach was also the view urged upon us by the amicus curiae, Prof Boo. We agree that a Singapore court should adopt a prima facie standard of review when hearing a stay application under s 6 of the IAA. In our judgment, a court hearing such a stay application should grant a stay in favour of arbitration if the applicant is able to establish a prima facie case that:

(a) there is a valid arbitration agreement between the parties to the court proceedings;

(b) the dispute in the court proceedings (or any part thereof) falls within the scope of the arbitration agreement; and

(c) the arbitration agreement is not null and void, inoperative or incapable of being performed.

64. ....

65. We part company with the English position and adopt the prima facie approach for the purposes of the threshold question essentially for four reasons. First, the prima facie approach coheres better with what we consider was envisaged by the drafters of the IAA. The earliest iteration of the IAA (viz, the International Arbitration Act 1994 (Act 23 of 1994) ("the original IAA")) was enacted in 1994, and it drew heavily from the recommendations made in the Report of the Sub- committee on Review of Arbitration Laws (1993) (Chairman: Giam Chin Toon) ("1993 Report on Review of Arbitration Laws"). That report included a draft Bill, which was considered and adopted with amendments by the Singapore Academy of Law's Law Reform Committee, and this subsequently resulted in the enactment of the original IAA in 1994 (see the remarks of Assoc Prof Ho Peng Kee, the then Parliamentary Secretary to the Minister for Law, at the second reading of the International Arbitration Bill

1994 (Bill 14 of 1994) ("the 1994 International Arbitration Bill"): Singapore Parliamentary Debates, Official Report (31 October 1994) vol 63 ("Singapore Parliamentary Debates vol 63") at cols 627-

628).

67. Second, to require the court, on a stay application under s 6 of the IAA, to undertake a full determination of an arbitral tribunal's jurisdiction could significantly hollow the kompetenz-kompetenz principle of its practical effect. The full merits approach has the potential to reduce an arbitral tribunal's kompetenz-kompetenz to a contingency dependent on the strategic choices of the claimant in a putative arbitration. If the claimant decides to pursue its claim by arbitration, the arbitral tribunal will determine any challenge to its jurisdiction, and thus, its kompetenz-kompetenz will be given full vent. But, if the claimant decides to pursue its claim by bringing proceedings in court (instead of by recourse to arbitration), the court will be seized of jurisdiction, and will be able (and, indeed, on the full merits approach, obliged) to make a full determination on the existence and scope of the arbitration clause; this will deprive the putative arbitral tribunal of its kompetenz-kompetenz. In our view, the strength of the kompetenz-kompetenz principle cannot depend on the arbitrary choice of the claimant as to whether it will pursue its claim by way of court proceedings or by way of arbitration. That undermines the principles of judicial non-intervention and kompetenz-kompetenz which were at the forefront in the drafting of the Model Law and the enactment of the original IAA (see Assoc Prof Ho's remarks at the second reading of the 1994 International Arbitration Bill: Singapore Parliamentary Debates vol 63 at cols 625-626). We should point out that the strain which the English position puts on these principles of judicial non-intervention and kompetenz-kompetenz has not escaped criticism (see Arbitration Law (Robert Merkin gen ed) (informa, Looseleaf Ed, 15 August 2011 release) at para 8.21, as well as David Joseph QC, Jurisdiction and Arbitration Agreements and their Enforcement (Sweet & Maxwell, 2nd Ed, 2010) ("Jurisdiction and Arbitration Agreements") at pp 346-

347). This difficulty is avoided if the prima facie approach is adopted.

68 Third, we consider that the fear of resource duplication which, it is said, will arise from the prima facie approach is overstated. A robust recognition and enforcement of the kompetenz-kompetenz principle may, on the contrary, deter a plaintiff from commencing proceedings in court in the face of an arbitration agreement. The plaintiff will be well aware that the court will stay the proceedings in favour of arbitration except in cases where the arbitration clause is clearly invalid or inapplicable. The author of Jurisdiction and Arbitration Agreements also argues (at p 346), albeit anecdotally, that the parties to an arbitration are likely to accept a well-reasoned jurisdictional determination rendered by an arbitral tribunal without appealing against it, and this would avoid re-litigation of the same issue. Parties that

> attempt to protract proceedings by making unmeritorious appeals against an arbitral tribunal's jurisdictional determination also face the prospect of an adverse costs order under s 10(7) of the IAA.

25.5. The issue as to whether the Court should form a prima facie opinion or return a finding was also dealt in Chloro Controls (supra) and distinguishing the decision in Shin-Etsu Chemical (supra) Supreme Court held that if the decision of jurisdiction is left open and not decided finally at the threshold itself, the same may result not only parties being compelled to pursue arbitration proceedings by spending time, money and effort but even the arbitral tribunal would have to spend valuable time in adjudicating the complex issues relating to the dispute between the parties that may finally prove to be in vain and futile. It would be thus appropriate to determine the fundamental issues as contemplated under Section 45 of the Arbitration Act at the very first instance by the judicial forum as is the legislative intent. It was held:

> "128. The judgment of this Court in Shin-Etsu Chemical Co. Ltd. [(2005) 7 SCC 234] preceded the judgment of this Court in SBP & Co. [(2005) 8 SCC 618] Though the Constitution Bench in the latter case referred to this judgment in para 89 of the judgment but did not discuss the merits or otherwise of the case presumably for absence of any conflict. However, as already noticed, the Court clearly took the view that the findings returned by the Chief Justice while exercising his judicial powers under Section 11 relatable to Section 8 are final and not open to be questioned by the Arbitral Tribunal. Sections 8 and 45 of the 1996 Act are provisions independent of each other. But for the purposes of reference to arbitration, in both cases, the applicant has to pray for a reference before the Chief Justice or his designate in terms of Section 11 of the 1996 Act. We may refer to the exact terminology used by the larger Bench in SBP & Co. [(2005) 8 SCC 618] in relation to the finality of such matters, as reflected in para 12 of the judgment which reads as under: (SCC pp. 643-44) "12. Section 16 of the Act only makes explicit what is even otherwise implicit, namely, that the Arbitral Tribunal constituted under the Act has the jurisdiction to rule on its own jurisdiction, including ruling on objections with respect to the existence or validity of the arbitration agreement. Sub-section (1) also directs that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. It also clarifies that a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. Sub-section (2) of Section 16 enjoins that a party wanting to raise a plea that the Arbitral Tribunal does not have jurisdiction, has to raise that objection not later than the submission of the statement of defence, and that the party shall not be precluded from raising the plea of jurisdiction merely because he has appointed or participated in the appointment of an arbitrator. Sub-section (3) lays down that a plea that the Arbitral Tribunal is exceeding the scope of its authority, shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. When the Tribunal decides these two questions, namely, the question of jurisdiction and the question of exceeding the scope of authority or either of them, the same is open to immediate

challenge in an appeal, when the objection is upheld and only in an appeal against the final award, when the objection is overruled. Sub-section (5) enjoins that if the Arbitral Tribunal overrules the objections under sub-section (2) or (3), it should continue with the arbitral proceedings and make an arbitral award. Sub-section (6) provides that a party aggrieved by such an arbitral award overruling the plea on lack of jurisdiction and the exceeding of the scope of authority, may make an application on these grounds for setting aside the award in accordance with Section 34 of the Act. The question, in the context of sub- section (7) of Section 11 is, what is the scope of the right conferred on the Arbitral Tribunal to rule upon its own jurisdiction and the existence of the arbitration clause, envisaged by Section 16(1), once the Chief Justice or the person designated by him had appointed an arbitrator after satisfying himself that the conditions for the exercise of power to appoint an arbitrator are present in the case. Prima facie, it would be difficult to say that in spite of the finality conferred by sub-section (7) of Section 11 of the Act, to such a decision of the Chief Justice, the Arbitral Tribunal can still go behind that decision and rule on its own jurisdiction or on the existence of an arbitration clause. It also appears to us to be incongruous to say that after the Chief Justice had appointed an Arbitral Tribunal, the Arbitral Tribunal can turn round and say that the Chief Justice had no jurisdiction or authority to appoint the Tribunal, the very creature brought into existence by the exercise of power by its creator, the Chief Justice. The argument of the learned Senior Counsel, Mr K.K. Venugopal that Section 16 has full play only when an Arbitral Tribunal is constituted without intervention under Section 11(6) of the Act, is one way of reconciling that provision with Section 11 of the Act, especially in the context of sub-section (7) thereof. We are inclined to the view that the decision of the Chief Justice on the issue of jurisdiction and the existence of a valid arbitration agreement would be binding on the parties when the matter goes to the Arbitral Tribunal and at subsequent stages of the proceeding except in an appeal in the Supreme Court in the case of the decision being by the Chief Justice of the High Court or by a Judge of the High Court designated by him."

(Emphasis supplied) We are conscious of the fact that the above dictum of the Court in SBP case [(2005) 8 SCC 618] is in relation to the scope and application of Section 11 of the 1996 Act. It has been held in various judgments of this Court but more particularly in SBP [(2005) 8 SCC 618] which is binding on us that before making a reference, the Court has to dispose of the objections as contemplated under Section 8 or Section 45, as the case may be, and wherever needed upon filing of affidavits. Thus, to an extent, the law laid down by this Court on Section 11 shall be attracted to an international arbitration which takes place in India as well as domestic arbitration. This, of course, would be applicable at pre-award stage. Thus, there exists a direct legal link, limited to that extent.

129. We are not oblivious of the principle "kompetenz kompetenz". It requires the Arbitral Tribunal to rule on its own jurisdiction and at the first instance. One school of thought propagates that it has duly the positive effect as it enables the arbitrator to

rule on its own jurisdiction as it widely recognized international arbitration. However, the negative effect is equally important, that the courts are deprived of their jurisdiction. The arbitrators are to be not the sole judge but first judge, of their jurisdiction. In other words, it is to allow them to come to a decision on their own jurisdiction prior to any court or other judicial authority and thereby limit the jurisdiction of the national courts to review the award. The kompetenz kompetenz rule, thus, concerned not only is the positive but also the negative effect of the arbitration agreement. (Refer Fouchard Gaillard Goldman on International Commercial Arbitration.)

130. This policy has found a favourable mention with reference to the New York Convention in some of the countries. This is one aspect. The more important aspect as far as Chapter I of Part II of the 1996 Act is concerned, is the absence of any provision like Section 16 appearing in Part I of the same Act. Section 16 contemplates that the arbitrator may determine its own jurisdiction. Absence of such a provision in Part II Chapter I is suggestive of the requirement for the court to determine the ingredients of Section 45, at the threshold itself. It is expected of the court to answer the question of validity of the arbitration agreement, if a plea is raised that the agreement containing the arbitration clause or the arbitration clause itself is null and void, inoperative or incapable of being performed. Such determination by the court in accordance with law would certainly attain finality and would not be open to question by the Arbitral Tribunal, even as per the principle of prudence. It will prevent multiplicity to litigation and reagitating of same issues over and over again. The underlining (sic underlying) principle of finality in Section 11(7) would be applicable with equal force while dealing with the interpretation of Sections 8 and 45. Further, it may be noted that even the judgment of this Court in SBP & Co. takes a view in favour of finality of determination by the Court despite the language of Section 16 in Part I of the 1996 Act. Thus, there could hardly be any possibility for the Court to take any other view in relation to an application under Section 45 of the 1996 Act. Since, the categorization referred to by this Court in National Insurance Co.Ltd. is founded on the decision b the larger Bench of the Court in SBP & Co., we see no reason to express any different view. The categorization falling under para 22.1 of National Insurance co. case would certainly be answered by the Court before it makes a reference while under para 22.2 of that case, the Court may exercise its discretion and decide the dispute itself or refer the dispute to the Arbitral Tribunal. Still, under the cases falling under para 22.3, the Court is expected to leave the determination of such dispute upon the Arbitral Tribunal itself. But wherever the Court decides in terms of categories mentioned in paras 22.1 and 22.2, the decision of the Court is unreviewable b the Arbitral Tribunal.

131. Another very significant aspect of adjudicating the matters initiated with reference to Section 45 of the 1996 Act, at the threshold of judicial proceedings, is that the finality of the decision in regard to the fundamental issues stated under Section 45 would further the cause of justice and interest of the parties as well:

131.1. To illustratively demonstrate it, we may give an example. Where Party A is seeking reference to arbitration and Party B raises objections going to the very root of the matter that the arbitration agreement is null and void, inoperative and incapable of being performed, such objections, if left open and not decided finally at the threshold itself may result in not only parties being compelled to pursue arbitration proceedings by spending time, money and efforts but even the Arbitral Tribunal would have to spend valuable time in adjudicating the complex issues relating to the dispute between the parties, that may finally prove to be in vain and futile. Such adjudication by the Arbitral Tribunal may be rendered ineffective or even a nullity in the event the courts upon filing of an award and at execution stage hold that the agreement between the parties was null and void inoperative and incapable of being performed. The court may also hold that the Arbitral Tribunal had no jurisdiction to entertain and decide the issues between the parties.

131.2. The issue of jurisdiction normally is a mixed question of law and facts. Occasionally, it may also be a question of law alone. It will be appropriate to decide such questions at the beginning of the proceedings itself and they should have finality.

131.3. Even when the arbitration law in India contained the provision like Section 34 of the 1940 Act which was somewhat similar to Section 4 of the English Arbitration Act, 1889, this Court in Anderson Wright Ltd. [AIR 1955 SC 53 : (1955) 1 SCR 862] took the view that while dealing with the question of grant or refusal of stay as contemplated under Section 34 of the 1940 Act, it would be incumbent upon the court to decide first of all whether there is a binding agreement for arbitration between the parties to the suit or not.

131.4. Applying the analogy thereof will fortify the view that determination of fundamental issues as contemplated under Section 45 of the 1996 Act at the very first instance by the judicial forum is not only appropriate but is also the legislative intent. Even the language of Section 45 of the 1996 Act suggests that unless the court finds that an agreement is null and void, inoperative and incapable of being performed, it shall refer the parties to arbitration."

25.6. However, in Chloro Controls (supra) the Supreme Court was dealing with a case of reference to the arbitration under Section 45 and not an arbitration which had already been initiated. Carving out the distinction between the two in para 22 of the decision in National Insurance Co. Ltd. (supra) Supreme Court held that the Arbitral Tribunal was also competent to decide the issue including the validity of the arbitration agreement. In a case where the arbitration is not a court referred arbitration it would be thus in the domain of the Arbitral Tribunal to decide the issue of alter ego and Court in a suit filed by the opposite party is competent to form an opinion based on the affidavits filed by the parties as held in the Constitution Bench decision in SBP & Co. (supra) as under:

> 39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal.

25.7. The present arbitration not being a court referred arbitration and the application under Section 45 of the Arbitration Act filed by Doosan India without prejudice to its rights and contentions, for the reason this Court passed an interim injunction on the facts of this case it would be sufficient if this Court returns a finding based on the pleadings supported by affidavits by the parties without going into a full-fledged trial.

26. Issue No. 6: Whether the arbitration against GMR Energy is contrary to Rule 7 of SIAC Rules?

26.1. The last issue raised by GMR Energy is that assuming SIAC Rules, 2016 are applicable to the arbitration even then GMR Energy could not be impleaded as a party without compliance of Rule 7 of SIAC Rules and without entailing an opportunity of hearing to GMR Energy even prior to the constitution of Tribunal. Doosan India self impleaded GMR Energy and thus the objections to GMR Energy to SIAC went unheard. In this regard GMR Energy through its letters dated 21st December, 2016, 13th January, 2017, 15th March, 2017, 20th May, 2017 and 27th May, 2017 objected to the applicability of the arbitration agreement to GMR Energy and its inclusion in the arbitration proceedings which went undetermined by SIAC. Even after the impugned letter dated 8th June, 2017 issued by SIAC, GMR Energy on 13th June, 2017 requested SIAC to first determine its objections which were not determined and compelling GMR Energy to file the present suit. 26.2. Countering the contention of non-invocation of Rule 7 of SIAC Rules, learned counsel for Doosan India submits that the plea of GMR Energy is clearly an afterthought, after a period of five months from the date of notice of arbitration raised for the first time in the objections dated 20th May, and 27th May, 2017. Notwithstanding the objections, it is contended that Rule 7 of SIAC Rules has no

application to the present arbitral proceedings as the concept of joinder of parties is different from invoking an arbitration agreement against an alter ego. Furthermore Rule -7 of SIAC Rules applies at the stage, after the commencement of arbitration under Rule 3 and GMR Energy not being named as a party to the arbitration in accordance with Rule 3, Rule 7 would have no application. Even otherwise Rule 7 of SIAC Rules is not mandatory as it uses the term "May".

26.3. Rule 7 of SIAC Rules provide as under:

> 7.1 Prior to the constitution of the Tribunal, a party or non- party to the arbitration may file an application with the Registrar for one or more additional parties to be joined in an arbitration pending under these Rules as a Claimant or a Respondent, provided that any of the following criteria is satisfied.
>
> a. the additional party to be joined is prima facie bound by the arbitration agreement; or b. all parties, including the additional party to be joined, have consented to the joinder of the additional party.

26.4. The concept of joinder and consolidation while invoking an arbitration agreement against an alter ego was considered in Bernard Hanotiau, 'Non-signatories in International Arbitration: Lessons from Thirty Years of Case Law', in Albert Jan Van den Berg (ed), International Arbitration 2006; Back to Basics', ICCA Congress Series, Volume 13 (Kluwer Law International 2007) pp. 341-358 at pp 346 is as below:

> 7. Distinction of the Non-signatory Issue from Joinder and Consolidation The issue of "extension" of the arbitration clause to non- signatories should be clearly distinguished from the issues which are usually referred to as:
>
> - Joinder: that is, whether a non-party to the arbitration may intervene in the arbitration proceedings, once they have been initiated, or whether a party to the arbitration proceedings (Claimant on the one hand, Respondent on the other hand) may join a non-party during the arbitration;
>
> - Consolidation: that is, if multiple disputes that arise from, or in connection with, different contracts, must in the first place be the object of separate arbitration requests, can the arbitral proceedings subsequently be consolidated?...

26.5. Thus there being a distinction between invoking arbitration against a non-signatory and joinder of a non-party during arbitration, the contention of learned counsel for GMR Energy that the invocation of arbitration against GMR Energy is contrary to Rule 7 of the SIAC Rules is rejected. In any case GMR Energy would be at liberty to raise the plea before the arbitral tribunal.

27. This Court having held that the arbitration that has commenced at Singapore would fall under Part-II of the Arbitration Act and not Part-I; the arbitration pending in Singapore pursuant to Arb.316/16/ACU not on a reference by Court, the issue of piercing the corporate veil, in the facts the

present case, can be decided both by the Court as well as the Arbitral Tribunal; and this Court having formed an opinion based on the pleadings on affidavit that from the notice of arbitration Doosan India has made out a case for proceeding against GMR Energy to arbitration with GCEL and GIL; I.A. No. 7248/2017 under Order XXXIX Rule 1 and 2 CPC is dismissed and I.A. No. 9068/2017 under Order XXXIX Rule 4 CPC is disposed of. Interim order dated 4th July, 2017 is vacated. There being an arbitration pending at Singapore pursuant to Arb.316/16/ACU no further reference to arbitration is necessary under Section 45 of the Arbitration Act. I.A. No. 9069/2017 under Section 45 of the Arbitration and Conciliation Act, 1996 is accordingly disposed of as infructuous holding that GMR Energy is required to submit to the arbitration pursuant to SIAC Arbitration No. 316/2016 (Arb.216/16/ACU).

28. It is clarified that the finding of this Court on the issue of alter ego is for subjecting GMR Energy to arbitration and not a final determination on merits to pass an award against GMR Energy which would be in the domain of the Arbitral Tribunal.

(MUKTA GUPTA) JUDGE NOVEMBER 14, 2017 'vn'

Delhi High Court

Raffles Design International ... vs Educomp Professional Education ... on 7 October, 2016

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 07.10.2016

+ O.M.P.(I) (COMM.) 23/2015 & CCP(O) 59/2016,
IA Nos.25949/2015 & 2179/2016

RAFFLES DESIGN INTERNATIONAL INDIA
PRIVATE LIMITED & ANR. ..... Petitioners

Versus

EDUCOMP PROFESSIONAL EDUCATION
LIMITED &ORS. ..... Respondents

Advocates who appeared in this case:
For the Petitioners : Mr Abhinav Vashist and Mr Arun Kathpalia,
Senior Advocates with Mr Prashant Mishra,
Mr Piyush Prasad, Mr Shalin Arthwan and
Ms Jamal Joy and Mr Samaksh Goyal.
For the Respondents : Mr Suhail Dutt, Senior Advocate with Mr M.A.
Niyazi, Mr Achint Singh Gyani and Ms Prabjot
Kaur Chhabra.
Mr Sunil Mund, Mr Sanjiv Joshi and Ms
Badeshree for R-3.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioners have filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter the 'Act'), inter alia, praying as under:

> "(a) Direct that the Respondents through their directors (including but not limited to Mr Shantanu Prakash), officers, agents, representatives and employees (including but not limited to the Respondent No.3) to cease and desist forthwith from taking any actions that have the effect of depriving the Petitioners and their representatives of the exercise of their rights pursuant to clause 3.1.2 of the Share Purchase Agreement dated 12 March 2015 viz. to have an absolute say on the hiring and dismissal of employees of the Society;
>
> (b) Direct that the Respondents through their directors (including but not limited to Mr Shantanu Prakash), officers, agents, representatives and employees (including but not limited to the Respondent No.3) cease and desist from interfering with any aspect of the hiring and dismissal rights of the Petitioners pursuant to clause 3.1.2 of the Share Purchase Agreement dated 12 March 2015, including interfering in any manner whatsoever with prompt payments to employees hired and/or dismissed by

the Society.

(c) Direct the Respondent No. 3 (or any other person appointed in his capacity) to forthwith take steps to effect the payment of salaries to Dr. C.S. Sharma and/or take necessary steps to effect prompt payments of salaries to any other employees hired by the Society.

(d) Restrain the Respondents No. 1 and 2 including through their affiliates, related parties, directors, officers, agents, representatives and employees (including but not limited to the Respondent No.3) from taking any steps whatsoever in contravention of clause 3.1.2 of the Share Purchase Agreement dated 12 March 2015;"

2. At the outset, the respondents have taken a preliminary objection as to the maintainability of the present petition. The respondents contend that the present petition under Section 9 of the Act is not maintainable principally on the ground that Part-I of the Act is inapplicable to arbitral proceedings held outside India - in this case Singapore - and the parties have impliedly agreed to exclude the applicability of Section 9 of the Act. The respondents also contend that the Arbitration and Conciliation (Amendment) Act, 2015 (hereafter the Amendment Act') is inapplicable to the present proceedings as the arbitral proceedings had commenced prior to 23.10.2015. The petitioners contend otherwise.

3. At this stage, the limited controversy that arises for consideration is whether the petition filed by the petitioners is maintainable.

4. Briefly stated, the facts necessary to address the aforesaid controversy are as under:-

4.1 Raffles Education Corporation Limited (hereafter 'Raffles'), being parent company of the petitioners' and Educomp Solutions Limited (hereafter 'Educomp'), being parent company of the respondents' entered into a Master Joint Venture Agreement(Master JVA) dated 16.05.2008. Pursuant to the Master JVA, Educomp Raffles Higher Education Limited(hereafter 'ERHEL') was incorporated as a joint venture company for providing educational courses in management and designing at various locations in India. Shares of ERHEL were held by Raffles and Educomp in equal proportion.

4.2 ERHEL took control over the management of a Society namely, Jai Radha Raman Education Society (hereafter 'the Society') to establish a college in NOIDA (hereafter the 'Noida College'). Subsequently, Raffles increased its stake in ERHEL to 58.18%.

4.3 On 12.03.2015, the petitioners and the respondents entered into a Share Purchase Agreement (hereafter 'the Agreement') whereby, on fulfilling the conditions set out in the Agreement, shares of respondents in ERHEL were to be acquired by the Petitioners. The relevant clause of the Agreement reads as under:

> "3.1.2. On deposit of the 10% of the Purchase Price by the Purchasers to the Escrow Agent referred to in clause 3.1.1, the Sellers shall allow the Purchasers (i) to take control of the Company and JRRES, limited to the extent that the Purchasers shall have absolute say on the hiring and dismissal of employees (including existing employees); and (ii) to take charge of JRRES' application to the Government of Uttar Pradesh, India for becoming a deemed university. For clarification, upon the Execution Date, funding of the operations of the Company, JRRES, MIDL and MSB shall be the exclusive responsibility of the Purchasers, details of which shall be shared with the Sellers from time to time till closing. In the event the Closing does not take place as envisaged in this Agreement and this Agreement is terminated, the Sellers shall within 30 (Thirty) days, introduce an amount equivalent to the total funding contributed by the Purchasers in JRRES for the operations of JRRES in this period as working capital."

4.4 Certain disputes arose between the parties in relation to the Agreement. Clause 15 of the Agreement provides that the Agreement would be governed and construed in accordance with the laws of Singapore. Further the Arbitration would be held in Singapore under the Arbitration Rules of the Singapore International Arbitration Centre (hereafter 'SIAC Rules').

4.5 On 15.09.2015, the petitioners invoked the arbitration clause by filing a Notice of Arbitration with the Singapore International Arbitration Centre (hereafter 'SIAC') with a copy thereof to the respondents. Pursuant to Rule 26.2 of the SIAC Rules, a request for appointment of an Emergency Arbitrator was made by the petitioners to SIAC on 25.09.2015, which was opposed by the respondents. The respondents by a notice dated 25.09.2015, terminated the Agreement alleging that Petitioners were in repudiatory breach of the Agreement. Thereafter, on 28.09.2015, the Vice President of the Court of Arbitration, SIAC appointed Mr Michael Lee as the Emergency Arbitrator to consider the Emergency Application filed by the claimants (petitioners herein).

4.6 The Emergency Arbitrator passed an Interim Emergency Award dated 06.10.2015 (hereafter ' the Emergency Award') wherein the Interim relief sought by the claimants was granted and respondents were restrained from taking any action that deprived the rights of the claimants in the Agreement in respect of (a) hiring and dismissal of employees of the Society; (b) functioning and management of the society. The respondents were also restrained from instigating the terminated employees of the Society, including Professor Mahesh Gandhi, to act contrary to their respective termination letters and/or to indulge in any forcible entry into the premises of the Society or the Noida College.

4.7 Thereafter, the petitioners filed an application being Case No 929/2015 before the High Court of the Republic of Singapore (hereafter 'Singapore High Court') under Section 12 of the International Arbitration Act (hereafter 'IAA') seeking enforcement of the Emergency Award against respondent no 2. It is stated by the respondents that petitioners have secured an enforcement order dated 04.02.2016 against respondent no 2. 4.8 The respondents filed an application under paragraph 7 of schedule 1 of SIAC Rules praying for setting aside of the Emergency Award. However, on 14.01.2016, a consent order was passed by the sole arbitrator, Mr Andrew Jeffries, wherein the operative first

two paragraphs of the Emergency Award were reiterated but the parties also agreed that the said paragraphs of the Emergency award: (1) are negative or prohibitory in nature and not positive or mandatory in nature; and (2) do not require any member of the Society to act in breach of their fiduciary duty to the Society.

5. It is stated by the petitioners that despite passing of the Emergency Award, the respondents are acting in contravention of the rights of the petitioners under the Agreement inasmuch as respondents have refused to accept the appointment of Dr C.S Sharma, who was appointed by the petitioners to replace Professor Gandhi and further, respondent no 3 has also refused to sign the cheques for payment of salary to Dr Sharma. It is further stated the respondents are illegally and malafidely disrupting the functioning of the Society and the Noida College. It is under these circumstances, the petitioners have filed the present petition under Section 9 of the Act.

Submissions

6. At the outset, Mr Suhail Dutt, learned Senior Advocate appearing for the respondents submitted that present petition is not maintainable and is liable to be dismissed. He contended that since the seat of arbitration was Singapore and the Agreement was entered into after the Supreme Court had delivered the judgement in Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.: (2012) 9 SCC 552, Part I of the Act would not apply and therefore, the present petition is not maintainable. Mr Dutt drew the attention of this Court to Section 26 of the Amendment Act and contented that by virtue of Section 26 of the Amendment Act, it was not applicable in respect of arbitral proceedings that had commenced before the Amendment Act came into force, that is, 23.10.2015.

7. Next, he referred to Clause 15 of the Agreement and without prejudice to the contention that the Amendment Act did not apply, contended that since it was expressly agreed between the parties that the arbitration would be governed by the laws of Singapore and the arbitral proceedings would be conducted in accordance with the Rules of SIAC, the parties had impliedly excluded the applicability of Part I of the Act to the arbitral proceedings. He further submitted that proviso to Section 2(2) as amended by the Amendment Act provided that sections 9, 27, 37(1)(a) and 37(3) were applicable "subject to an agreement to the contrary". Mr Dutt earnestly contended that the seat of the arbitration was Singapore and the arbitration agreement was governed by the laws of Singapore and therefore, applicability of Part-I was excluded by the parties by implication. He submitted that in Bhatia International v. Bulk Trading S.A and Anr: (2002) 4 SCC 105, the Supreme Court held that Part I of the Act shall apply to the international commercial arbitrations which take place outside India, unless parties had expressly or impliedly excluded the applicability of the Act. He submitted that even if it is accepted that the Amendment Act applies, the position of law would revert to what had been held in Bhatia International (supra).

8. He further referred to the decisions of the Supreme Court in Videocon Industries Ltd. v. Union of India and Anr: (2011) 6 SCC 161; Reliance Industries Limited and Anr. v. Union of India: (2014) 7 SCC 603; and Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd. and Anr.: (2015) 9 SCC 172 and contended that once the parties had consciously agreed that the seat of arbitration would be

outside India and the arbitration agreement would be governed by a foreign law, it would not be open for the parties to contend that Part I would also be applicable to the arbitration agreement.

9. Next, Mr Dutt submitted that the reliefs as prayed for in the present petition have already been granted by virtue of the Emergency Award and recourse to Section 9 for enforcement of Emergency Award (which is an interim order) was not available.

10. Mr Vashist, Senior counsel appearing for the petitioners countered the contentions advanced by Mr Dutt. He submitted that reading the proviso to Section 2(2) of the Amendment Act in the manner as suggested by Mr Dutt would render the said proviso absolutely redundant. He contended that the very purpose for which Section 2(2) was amended was to confer the jurisdiction on Indian courts in respect of Sections 9 and 27 of the Act, even if the seat of arbitration is outside India. He earnestly contended that in the expression "subject to an agreement to the contrary", the word "agreement" would mean something more than the choice of law and seat of arbitration. He further submitted that the decision in Bhatia International (supra) was no longer good law for agreements entered into after 06.09.2012 as it was over-ruled prospectively by the constitution bench of the Supreme Court in Bharat Aluminium (supra). He also submitted that mere choosing SIAC Rules for arbitration does not in any way indicate that Part I has been impliedly excluded by the parties.

11. Mr Vashist stated that the present petition is not an enforcement proceeding per se and has been filed to prevent the respondents from frustrating the rights of the petitioners.

12. Mr Vashist also countered the submission on behalf of the respondents that the Amendment Act would not be applicable to arbitral proceedings commenced before commencement of the Amendment Act on the following grounds : (i) the expression " to arbitral proceedings " as used in Section 26 of the Amendment Act would not apply to proceedings before a court; and (ii) Petition was filed under the Ordinance and on the day it was filed, there was no provision in the ordinance excluding the applicability of the amendments to arbitral proceedings commenced prior to 23.10.2015 and by virtue of Section 27(2) of the Act, all acts done under the Ordinance were saved.

Reasoning and Conclusion

13. In the aforesaid context as to the maintainability of the present petition, the following questions arise for consideration:-

> (i)Whether the provisions of the Amendment Act are applicable to the present proceedings? and
>
> (ii) If the answer to the aforesaid question is in the affirmative whether Section 9 of the Act is applicable by virtue of the proviso introduced in Section 2(2) of the Act by Section 2 (II) of the Amendment Act?

14. The controversy involved in the first question centres around the interpretation of Section 26 of the Amendment Act, which is set out below:-

> 26. Act not to apply to pending arbitral proceedings. - Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.

15. As is plainly evident from the language of the aforesaid section, it is in two parts. The first is couched in negative form; the opening words expressly provide that the Amendment Act shall not apply to arbitral proceedings commenced in accordance with section 21 of the Act, before the commencement of the Act unless the parties agree otherwise. The second limb is in the affirmative; that is, the Act would apply in relation to arbitral proceedings commenced on or after the date of commencement of the Amendment Act.

16. In my view the aforesaid two limbs are not exhaustive. This is so because the first limb - which is in the negative form - only refers to proceedings commenced in accordance with Section 21 of the Act prior to the commencement of the Amendment Act (23.10.2015). Section 21 is in Part I of the Act and, indisputably, applies only to arbitral proceedings in India. There is no reference to arbitral proceedings that have commenced other than under Part-I of the Act. Thus, clearly, the first limb of Section 26 of the Amendment Act would not cover arbitral proceedings commenced outside India - arbitral proceedings to which Part I of the Act does not apply. In the context of those arbitral proceedings clearly the provisions of Part II of the Act as amended by the Amendment Act would be applicable and nothing in Section 26 of the Amendment Act bars the applicability of the Amendment Act to those proceedings.

17. If the arbitral proceedings that have commenced under Section 21 of the Act prior to 23.10.2015 and those that are commenced after 23.10.2015 do not exhaust the entire statutory space to which the Amendment Act is applicable, then plainly the provisions of Section 26 as to the applicability of the Act are not exhaustive. In other words, Section 26 is silent as to the applicability of the Amendment Act to proceedings which are not expressly indicated under Section 26 of the Act.

18. The second aspect to be kept in mind is the meaning of the expression "arbitral proceedings". Section 21 of the Act provides for commencement of arbitral proceedings and reads as under:

> 21.Commencement of arbitral proceedings.--Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

19. Section 32 of the Act contains provisions regarding termination of proceedings. The said section is set out below:-

> 32. Termination of proceedings.--

> (1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).
>
> (2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where--
>
> (a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute,
>
> (b) the parties agree on the termination of the proceedings, or
>
> (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.
>
> (3) Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.

20. A conjoint reading of Section 21 and 32 of the Act also indicates the scope of the expression "arbitral proceedings". Any proceedings initiated in the Court outside the course of the arbitral proceedings can by no stretch be considered to fall within the scope of arbitral proceedings. Thus, a petition to set aside the arbitral award under Section 34 or for that matter a petition under Section 9 to seek interim measures of protection after the arbitral award has been passed would clearly be proceedings, which by no stretch can be considered as arbitral proceedings.

21. Bearing the aforesaid in mind, it would be noticed that the first limb of Section 26 of the Act only bars its applicability to arbitral proceedings. The use of the word to' instead in relation to', as is used for the second limb of Section 26, is material. The use of the word to' clearly restricts the import of the first limb of Section 26.

22. The distinction between the expression to' and in relation to' was highlighted by the Supreme Court in Thyssen Stahlunion Gmbh v. Steel Authority of India Ltd: (1999) 9 SCC 334 in the context of Section 85(2) of the Act. Section 85 of the Act is the repeal and savings clause. By virtue of Section 85 (1) of the Act, the Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961 were repealed. However, by virtue of Section 85 (2)(a) of the Act, the provisions of the aforesaid enactments were expressly made applicable "in relation to" arbitral proceedings, which had commenced before the Act coming into force. In that context the Supreme Court, inter alia, held as under:-

> The provisions of the old Act (Arbitration Act, 1940) shall apply in relation to arbitral proceedings which have commenced before the coming into force of the new Act (the Arbitration and Conciliation Act, 1996).

> The phrase in relation to arbitral proceedings cannot be given a narrow meaning to mean only pendency of the arbitration proceedings before the arbitrator. It would cover not only proceedings pending before the arbitrator but would also cover the proceedings before the court and any proceedings which are required to be taken under the old Act for the award becoming a decree under Section 17 thereof and also appeal arising thereunder. *** The expression in relation to is of the widest import as held by various decisions of this Court in Doypack Systems (P) Ltd., Mansukhlal Dhanraj Jain, Dhanrajamal Gobindram and Navin Chemicals Mfg. This expression in relation to has to be given full effect to, particularly when read in conjunction with the words the provisions of the old Act. That would mean that the old Act will apply to the whole gambit of arbitration culminating in the enforcement of the award. If it was not so, only the word "to" could have sufficed and when the legislature has used the expression "in relation to", a proper meaning has to be given. This expression does not admit of restrictive meaning. The first limb of Section 85 (2)(a) is not a limited saving clause. It saves not only the proceedings pending at the time of commencement of the new Act but also the provisions of the old Act for enforcement of the award under that Act. [emphasis supplied]

23. As noticed above, while in the first limb, the word used is to arbitral proceedings and in the second limb, the expression used is in relation to arbitral proceedings. Thus, if the aforesaid expressions are interpreted in the manner as indicated by the Supreme Court in Thyssen Stahlunion Gmbh (supra), the first limb of Section 26 of the Amendment Act would have to be read in a restrictive manner. In other words, the Amendment Act would not apply to arbitral proceedings commenced under Part-I of the Act before 23.10.2015. There is no controversy regarding the second limb of Section 26; undisputedly, it has a much wider sweep and covers all proceedings, which are connected with the arbitral proceedings - whether commenced under Part-I or otherwise - including proceedings under Sections 8, 9, 14, 34 and 37 of the Act.

24. Mr Dutt's contention that the use of the word "to" and the expression "in relation to" is not of much significance and the intention of the legislature was clear that the provisions of the Amendment Act should not be applied to any proceedings in relation to arbitral proceedings commenced before 23.10.2015, is unpersuasive. It is well settled that if the legislature uses different words in respect of the same subject matter, it must be understood that they were not used to convey the same meaning. In The Member, Board of Revenue v. Arthur Paul Benthall: AIR 1956 SC 35 a Constitution Bench of the Supreme Court observed that "When two words of different import are used in a statute in two consecutive provisions, it would be difficult to maintain that they are used in the same sense". In D.L.F. Qutab Enclave Complex Educational Charitable Trust v. State of Haryana and Ors.: (2003) 5 SCC 622, the Supreme Court held that "When different terminologies are used by the legislature it must be presumed that the same had been done consciously with a view to convey different meanings."

25. To summarise, Section 26 of the Amendment Act is silent as to, (i) arbitral proceedings commenced before 23.10.2015 to which Part-I of the Act does not apply; (ii) proceedings in courts in relation to arbitral proceedings commenced before 23.10.2015 to which part-I of the Act applies;

and (iii) proceedings in courts in relation to arbitral proceedings commenced before 23.10.2015 to which Part-I does not apply.

26. The next aspect to be examined is whether the Amendment Act would apply to proceedings before the court. As discussed earlier, Section 26 of the Amendment Act is silent as to the applicability of the Amendment Act to proceedings (other than arbitral proceedings commenced before 23.10.2015) which are commenced before or after 23.10.2015 but are in relation to or connected with arbitral proceedings commenced before 23.10.2015.

27. The Amendment Act must be held applicable from the date it came into force. The Act as it stands in the statute book stands amended with effect from 23.10.2015. The applicability of the Amendment Act to arbitral proceedings that have commenced prior to that date has expressly been excluded and, therefore, to that extent the Amendment Act would not be applicable. However for proceedings other than those expressly excluded, the Amendment Act would be applicable from the date it came into force.

28. Mr Dutt had, during the course of his arguments, also mentioned that applying the amended provisions of the Amendment Act in relation to pending proceedings would imply that the provisions were being applied retrospectively. He did not pursue this line of argument, but in my view, it must be addressed for the sake of completeness.

29. It is important to clarify that applying the Amendment Act from 23.10.2015 does not indicate that the Amendment Act is being applied retrospectively in the true sense because the Amendment Act replaced the Arbitration and Conciliation (Amendment) Ordinance, 2015; by virtue of Section 27(1) of the Amendment Act, the said ordinance was repealed and by virtue of Section 27(2), all acts done under the Act as amended by the Ordinance were deemed to be done under the Act as amended by the Amendment Act.

30. The issue to be considered is whether the Amendment Act should be interpreted as not applicable to court proceedings for the reason that the same would make the Amendment Act a retrospective legislation? The well accepted principle of interpretation is that all statutes affecting substantive rights should be interpreted as being applicably prospectively unless indicated otherwise either expressly or by necessary implication. There is a general presumption that unless the statute expressly indicates, it would not be applied retrospectively to impair a vested right or impose a fresh burden based on past transaction/events. However, procedural laws are presumed to apply retrospectively; this is so because as explained by the Supreme Court in Anant Gopal Sheorey v. State of Bombay: AIR 1958 SC 915, "no person has any right in any course of procedure". In Amireddi Raja Gopala Rao v. Amireddi Sitharamamma and Ors: (1965) 3 SCR 122, the Supreme Court had observed that "It is a well-recognised rule that a statute should be interpreted, if possible, so as to respect vested rights." These principles have to be kept in mind while addressing the above issue.

31. The Act embodies the Indian Law as applicable to arbitrations. The nature of arbitration law is essentially procedural but it also includes provisions with regard to matters that cannot be classified

as mere procedural matters. This would include the question as to whether the disputes are arbitrable; the question as to jurisdiction; the scope of challenge to the awards; and, to some extent even the supportive and supervisory roles of Courts in relation to arbitrations. Thus, the Amending Act does to certain extent affect the substantive rights of parties. The question thus arises is: whether in view of the such effect, the applicability of the Amendment Act to proceedings instituted in courts in relation to arbitral proceedings instituted prior to 23.10.2015, should be interpreted to be excluded?

32. It is also well settled that an amending enactment is not retrospective merely because it also applies to persons to whom the pre-amended Act applies. In Punjab University v. Subhash Chander and Anr.: 1984 (3) SCC 603, the Supreme Court set aside the decision of the Full Bench of the Punjab and Haryana High Court, whereby it was held that the amendment to the rules to award lower grace marks would not be applicable to students who had been admitted to the course prior to the amendment. In Bishan Naraian Mishra vs State of U.P: 1965 (1) SCR the Supreme Court held that the amendment in the rules reducing the age of superannuation from 58 years to 55 years could not be considered as retrospective and would apply to all employees altering the age of superannuation after the amendment notwithstanding that the age of superannuation was higher when they had joined the employment. The Court held that merely because a legislation applies to past acts does not make the law retrospective. In The Queen v. The Inhabitants of St. Mary, Whitechapel: (1848) 12 QBD 120 the court observed that a statute "is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing". This principle was cited with approval by the Supreme Court in Rao Shiv Bahadur Singh and Anr. v. State of Vindhya Pradesh: AIR 1953 SC 394.

33. Most enactments would invariably affect some existing rights however they cannot be considered as a retrospective legislation only for that reason.

34. It is also necessary to bear in mind that the rights of the parties for resolution of disputes were crystallised when they agreed for resolution of the disputes by arbitration and not when the arbitration agreement was invoked. Thus, in any view, even if it is assumed that the Amendment Act has a retroactive effect, simply interpreting Section 26 of the Amendment Act to exclude its applicability to proceedings in relation to arbitral proceedings would not address the issue of interpreting the enactment in a manner so as to avoid its retroactive effect, if any.

35. Thus, in my view, a more appropriate approach would be to consider the nature of arbitration law and effect of the Amendment Act as a whole. Essentially, the provisions of an arbitration law can be classified into four broad categories. The first being the provisions which relate to matters which define the scope of arbitrations; this includes provisions defining the matters that are arbitrable; the scope of arbitration agreements, etc. Such provisions define the entire scope of arbitration and the legal policy of the Alternate Dispute Resolution Mechanism. The second category of provisions relate to the conduct of arbitrations. These provisions essentially provide for the manner in which arbitration shall be conducted. The provisions under chapter V of the Act clearly fall within this category. The parties are free to derogate from most of such provisions and agree to a separate set of rules for conduct of arbitrations. The parties are also free to adopt the rules of any institutional

arbitration such as International Chambers of Commerce (ICC), London Court of International Arbitration (LCIA), Delhi International Arbitration Centre (DIAC) etc. The third category of provisions relate to the interface between the courts and the arbitration process. The Act contains provisions in aid of arbitral proceedings such as role of courts in appointment of arbitrators, assistance in taking evidence, etc. This category would also include provisions relating to exercise of supervisory role by courts including setting aside of awards. One facet of this category would also be enforcement of awards by courts.

36. As discussed earlier, insofar as the rules pertaining to conduct of arbitral proceedings are concerned, the legislature in its wisdom has specifically provided that the Amendment Act would not apply to arbitral proceedings that were commenced prior to 23.10.2015. The applicability of the provisions of the Amendment Act that relate to the supportive and supervisory role of courts, may be considered in the context of the reasons that led to enactment of such provisions.

37. The Consultation Paper (hereafter 'the consultation paper') on the proposed amendments to the Act placed in public domain in April, 2010 by the Government of India, indicated the reasons for amending the Act as under:

> As we know that main purpose of the 1996 Act is to encourage an ADR method for resolving disputes speedy and without much interference of the Courts. In fact Section 5 of the Act provides, Notwithstanding anything contained in any other law for the time being in force, in matters covered by this Part (i.e. Part I), no judicial authority shall intervene except where so provided in this Part. However, with the passage of time, some difficulties in its applicability of the Act have been noticed. The Supreme Court and High Courts have interpreted many provisions of the Act and while doing so they have also realized some lacunas in the Act which leads to conflicting views. Further, in some cases, courts have interpreted the provisions of the Act in such a way which defeats the main object of such a legislation. Therefore, it becomes necessary to remove the difficulties and lacunas in the Act so that ADR method may become more popular and object of enacting Arbitration law may be achieved.

38. The amendments introduced by the Amendment Act are based on 246th Report of the Law Commission of India. A plain reading of the said report clearly indicates that most of the amendments are occasioned by the decisions rendered by the courts (mainly the Supreme Court of India). In some cases, the courts had pointed out certain anomalies while in the other cases, the courts had interpreted the law, which the Government felt was different from India's legal policy relating to arbitration. Thus, several amendments have also been introduced to overcome the decisions rendered by the courts.

39. The amendment to Section 2(2) of the Act has been introduced principally to strengthen the view of the Supreme Court in Bharat Aluminium (supra) in respect of lex arbitri being the law that is applicable at the seat of arbitration; at the same time also enable courts to pass interim orders. The amendment is also to overcome the view in Bhatia International (supra). The object of the said

amendment is clearly to enable a party to take recourse to the courts to assist the arbitral process being conducted overseas.

40. Significant amendments have been introduced to Section 11 of the Act principally to restrict the judicial intervention at pre-arbitral stage in conformity with Section 8 and 45 of the Act and further to promote institutional arbitrations. Section 11A and IVth Schedule to the Act have been introduced in respect of the arbitral fees. The issue as to excessive arbitral fees had been flagged by the Supreme Court in Union of India v Singh Builders Syndicate: (2009) 4 SCC 523; and notice of this was taken by the Law Commission. The amendments to Section 12 have been made and Vth Schedule has been introduced to ensure the neutrality of the arbitrators as this issue had been highlighted in several decisions rendered by the Supreme Court. Substantial amendments have been brought in Section 17 of the Act to enable arbitral tribunals to pass orders which can be effectively enforced. The Supreme Court in Sundaram Finance Ltd v. NEPC India Ltd: (1999) 2 SCC 479 had pointed out that the orders passed by the arbitral tribunal cannot be enforced as orders of the Court and, therefore, the parties have to resort to Section 9 of the Act. The Commission also noted that in Sri Krishan v. Anand: 2009 3 Arb LR 447 (Del) this Court had attempted to find suitable legislative basis for enforcing the orders by reading Section 27(5) of the Act in a manner so as to hold a person violating interim orders, guilty of contempt. The Commission felt that the solution provided in Sri Krishan (supra) was not a complete solution and, therefore, amendments were required to give teeth to the orders of the arbitral tribunal.

41. The Act has also brought about significant changes in Section 34 of the Act. The amendments made to Section 34 of the Act are intended to bring the aforesaid Section in line with the decision regarding the scope of the public policy' as explained by the Supreme Court in Renu Sagar Power Company Ltd v. General Electric Company: AIR 1994 SC 860. Explanation 2 to Section 34(2)(b) (ii) was suggested by the Law Commission after the 246th Report had been submitted. This was to overcome the decision of the Supreme Court in Oil and Natural Gas Corporation Ltd v. Western Geco International Ltd.: (2014) 9 SCC 263 and to curtail the interference of courts on the Wednesbury principle. In that case the Supreme Court had inter alia held that an award which was unreasonable on the anvil of Wednesbury principle could be set aside as being contrary to public policy of India.

42. Section 36 of the Act has been amended in view of the observations made by the Supreme Court in National Aluminium Co Limited v. M/s Press Steel & Fabrications Pvt Ltd and Anr: 2004 (1) SCC 540 wherein the Supreme Court had criticized the provision of automatic suspension of execution of the award on filing of a petition under Section 34 of the Act.

43. It is thus, seen that most of the amendments introduced in the Act were either clarificatory or to address certain anomalies in the Act or to remove difficulties.

44. The essential purpose of the Act is to provide the legal framework for an Alternate Dispute Resolution (ADR) mechanism. And, as stated above, the Amendment Act has been enacted for removing the difficulties and the lacunae in the Act. The entire purpose of the Amendment Act is to improve the efficacy of the ADR. Whilst it is understandable that the arbitral proceedings that have

already commenced, should be continued in accordance with the procedure as adopted; it is difficult to understand the rationale as to why the supportive and supervisory role of Courts in regard to those proceedings be not provided as per the Amendment Act. If the contention as advanced by the respondents is accepted, it would mean that the courts would adopt different approach in lending their aid to proceedings and enforcement of awards depending upon when the arbitral proceedings commenced.

45. As an illustration, let us consider a case where two sets of parties enter into similar contracts prior to 23.10.2015. Disputes relating to one agreement arises before 23.10.2015 and one of the parties invokes the arbitration clause. In the other case, disputes arise after 23.10.2015 and the arbitral proceedings commence thereafter. Arbitral awards in respect of disputes between both the sets of parties are made on the same date - after 23.10.2015. By virtue of the amendment to Section 36 of the Act, the stay of an arbitral award is no longer automatic after the period for setting aside the award under Section 34 of the Act has expired and unless the Court hearing an application under Section 34 of the Act grants a stay, the arbitral award is liable to be enforced. If the contention of the respondent is accepted then the Court would have to view the awards rendered in the light of when the arbitral proceedings were commenced. While in the case of former, the arbitral award would be automatically stayed on any party filing an application under Section 34 of the Act but that would not be the case in respect of the latter notwithstanding that the arbitral awards were rendered on the same date. This, in my view, can clearly not be the intention of the legislature.

46. The amendment for effective enforcement of the award would also principally be a procedural matter. The Supreme Court in Narhari Shivram Shet Narvekar v. Pannalal Umediram: (1976) 3 SCC 203, held that a decree passed by an Indian Court against a foreigner which was non- executable in Goa (which was not a part of India) at the time when it was passed, became executable once Goa became a part of India and the Code of Civil Procedure was extended to Goa. The Supreme Court further observed:-

> It seems to us that the right of the judgment- debtor to pay up the decree passed against him cannot be said to be a vested right, nor can be question of executability of the decree be regarded as a substantive vested right of the judgment-debtor. A fortiorari the execution proceedings being purely a matter of procedure it is well settled that any change in law which is made during the pendency of the cause would be deemed to be retro-active in operation and the Appellate Court is bound to take notice of the change in law

47. In Kuwait Minister of Public v. Sir Frederick Snow & Partners: (1984) 1 All ER 733 (HL), the Court held that an arbitral award would be executable in United Kingdom if the foreign State was a party to the New York Convention, notwithstanding that such State was not a party to the convention when the award was made. Therefore, lifting the stay of enforcement on an award would essentially be an alteration in the procedure.

48. The amendments to Section 36 of the Act, although affects the rights of parties, cannot be read as being retrospective law and, therefore, interpreted as inapplicable for enforcement of awards

rendered in relation to the arbitral proceedings commenced before 23.10.2015. The amendments introduced to Section 34 of the Act are also substantive, however, it is seen that the same have been introduced to bring the defence of public policy within the scope of that defence, as explained by the Supreme Court in Renu Sagar (supra). The suggestion that changes introduced in Section 34 of the Act are substantial therefore affect the vested rights of the parties, is also inconsiderable. The extent of impairment to extant rights is an essential measure to evaluate whether the law should be interpreted in a manner so as to exclude from its scope the extant rights.

49. The fundamental premise of arbitration is that the parties have agreed to accept the decision of an arbitral tribunal as final and binding. Any amendment to restrict judicial intervention essentially enforces the aforesaid ethos; thus, it cannot be considered to be divesting any part of its vested right to any significant extent so as to read Section 34 of the Act to be inapplicable in respect of the awards rendered pursuant to arbitral proceedings initiated prior to 23.10.2015.

50. In Secretary of State for Social Security and Another v. Tunnicliffe: (1991) 2 All ER 712, the Court of Appeal observed as under:

> In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree-- the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.

51. The aforesaid view was approved by the House of Lords in L'Office Cherifien des Phosphates and another v. Yamashita-Shinnihon Steamship Co Ltd: (1994) 1 All ER 20. In that case, the Court was concerned with the applicability of Section 13A of the Arbitration Act of 1950. The said provision came into force on 01.01.1992 and enabled the arbitrators to dismiss the claim if any of the following conditions were satisfied: "(a) that there has been inordinate and inexcusable delay on the part of the claimant in pursuing the claim; and (b) that the delay - (i) will give rise to a substantial risk that it is not possible to have a fair resolution of the issues in that claim; or (ii) has caused, or is likely to cause or to have caused, serious prejudice to the respondent." In that case, the disputes between the parties were referred to arbitration in 1985 and after filing of the claims and statement of defence, the arbitration had not proceeded further. After the introduction of Section 13A in the Arbitration Act 1950, the respondents filed for dismissal of the case and the arbitrators accepted the application and dismissed the case. In the aforesaid context, the claimants argued that the arbitrator could not take into account the delay that had occurred prior to insertion of Section 13A as the said provision could not have any retrospective operation. The Court rejected the aforesaid contention. The following passage from the concurring opinion of Lord Mustill is instructive:-

> If there were any doubt about this the loud and prolonged chorus of complaints about the disconformity between practices in arbitration and in the High Court, and the increasing impatience for something to be done about it, show quite clearly that s 13A was intended to bite in full from the outset. If the position were otherwise it would

> follow that, although Parliament has accepted the advice of all those who had urged that this objectionable system should be brought to an end, and has grasped the nettle and provided a remedy, it has reconciled itself to the continuation of arbitral proceedings already irrevocably stamped with a risk of injustice. I find it impossible to accept that Parliament can have intended any such thing, and with due respect to those who have suggested otherwise I find the meaning of s 13A sufficiently clear to persuade me that in the interests of reform Parliament was willing to tolerate the very qualified kind of hardship implied in giving the legislation a partially retrospective effect.

52. The view that a statutory provision can be applied retrospectively on the doctrine of fairness was accepted by the Supreme Court in Vijay v. State of Maharashtra: 2006 (6) SCC 289. In that case, the Court was concerned with the applicability of provisions of Bombay Village Panchayats Act, 1958 which enacted that no person, who has been elected as Councillor of Zila Parishad or as member of the Panchayat Samiti shall be a member of Panchyat or continue as such. The Supreme Court rejected the contention that the said provision would not be applicable to the existing members. The relevant observations of the court are quoted below:-

> "It is now well-settled that when a literal reading of the provision giving retrospective effect does not produce absurdity or anomaly, the same would not be construed to be only prospective. The negation is not a rigid rule and varies with the intention and purport of the legislature, but to apply it in such a case is a doctrine of fairness. When a law is enacted for the benefit of the community as a whole, even in the absence of a provision, the statute may be held to be retrospective in nature. The appellant does not and cannot question the competence of the legislature in this behalf."

53. Thus, even in cases where there is no provision that the new law is to be applied retrospectively, the Courts would nonetheless apply the same if it is fair to do so and if it furthers the intention of the legislature.

54. The question whether Section 26 of the Amendment Act should be interpreted in a manner so as to exclude its applicability to Court proceedings in relation to the arbitral proceedings that have commenced before 23.10.2015 would also have to be viewed on the basis whether it could be fair to do so and whether it would further the object of the legislation.

55. The stated object of Arbitration Act has always been to provide for a speedy resolution of disputes and provide an efficacious ADR mechanism. The Act was enacted in 1996 to consolidate laws relating to Domestic Arbitrations, International Commercial Arbitrations and enforcement of Foreign Awards. After its enactment, it was felt that the Act had certain lacunae which needed to be addressed. In the year 2001, the Law Commission of India undertook a comprehensive review and recommended several Amendments in its 176th Report to the Government of India. The Government of India decided to accept most of the recommendations and accordingly, the Arbitration and Conciliation (Amendment) Bill, 2003 was introduced in the Rajya Sabha on 22.12.2003. Thereafter, in July, 2004, the Government constituted a Committee under the

Chairmanship of Justice Dr B.P. Saraf to undertake the study of implications of the recommendations of the Law Commission relating to Arbitration and Conciliation (Amendment) Bill, 2003. The Bill was thereafter referred to the Departmental Standing Committee on Personnel, Public Grievances, Law and Justice. The said Committee after taking evidence of eminent advocates, representatives of Trade and Industry and other stake holders submitted a report on 04.08.2005. The Committee also recommended that the Bill of 2003 may be withdrawn to bring a fresh legislation. The said Bill of 2003 was thereafter withdrawn for further examination. In 2010, the Government of India issued the Consultation Paper inviting suggestions from public and other stakeholders.

56. Thereafter, the Ministry of Law and Justice asked the Law Commission of India to undertake a study of the proposed amendments. The Law Commission of India submitted its report on 05.08.2014 and proposed several amendments to the Act. The Amended Act is essentially based on the said proposals. Most of the amendments also address the issues that were sought to be addressed by the 2003 Bill. Thus, it is clear that there has been a long standing demand for amending the Act to make it more effective. The amendments for restricting Judicial Review and for removing the provision for an automatic stay of execution of the awards have been on the anvil since several years. The Government of India caused the President to promulgate the Arbitration and Conciliation (Amendment) Ordinance, 2015 [No.9 of 2015], which was published in the Gazette of India on 23.10.2015 and it came into effect immediately. The fact that Government caused the Ordinance to be issued under Article 123 (1) of the Constitution of India - which is issued where the President is satisfied that circumstances exist which make it necessary for him to take immediate action - without waiting for the Parliament Session to commence clearly indicates that the Government was of the view that it was necessary to immediately implement the proposed amendments. In the circumstances, it is difficult to accept that the intention of the Legislature was not to apply the said provisions in respect of proceedings instituted before the courts after 23.10.2015 either under Section 34 or under Section 36 of the Act.

57. It is also relevant to note that it is not the respondents' contention that the applicability of the Amendment Act depends on the date when the parties entered into the Arbitration Agreement; thus, no vested right can be claimed by the parties in respect to the pre-amended Act.

58. It is also relevant to mention that as far as enforceability of foreign awards is concerned, any proceedings for enforcement of a foreign award after 23.10.2015 would, undisputedly, be in terms of the Act as amended. It is not disputed that in the facts of the present case, any award that is passed by the Arbitral Tribunal in Singapore would be enforceable as a foreign award in accordance with the provisions of Part-II of the Act as amended by virtue of the Amendment Act. In this view, it is also difficult to reconcile the position that for the purposes of section 9 of the Act, the provisions of the Amendment Act be ignored but the arbitral award that may follow would be enforced according to the Amended Act.

59. As mentioned hereinbefore, there is no indication in Section 26 of the Amendment Act that it would not be applicable to the proceedings instituted in courts after the Amendment Act came into force. As stated earlier, the Amendment Act is based on the amendments as provided by the Law

Commission in its 246th Report. In the said report, the Law Commission had proposed that a new section-Section 85A-be inserted in the Act, which reads as under:-

> Transitory provisions .--(1) Unless otherwise provided in the Arbitration and Conciliation (Amending) Act, 2014, the provisions of the instant Act (as amended) shall be prospective in operation and shall apply only to fresh arbitrations and fresh applications, except in the following situations -
>
> (a) the provisions of section 6-A shall apply to all pending proceedings and Arbitrations.
>
> Explanation: It is clarified that where the issue of costs has already been decided by the court/tribunal, the same shall not be opened to that extent.
>
> (b) the provisions of section 16 sub-section (7) shall apply to all pending proceedings and arbitrations, except where the issue has been decided by the court/tribunal.
>
> (c) the provisions of second proviso to section 24 shall apply to all pending arbitrations.
>
> (2) For the purposes of the instant section,--
>
> (a) "fresh arbitrations" mean arbitrations where there has been no request for appointment of arbitral tribunal; or application for appointment of arbitral tribunal; or appointment of the arbitral tribunal, prior to the date of enforcement of the Arbitration and Conciliation (Amending) Act, 2014.
>
> (b) "fresh applications" mean applications to a court or arbitral tribunal made subsequent to the date of enforcement of the Arbitration and Conciliation (Amending) Act, 2014.
>
> [NOTE: This amendment is to clarify the scope of operation of each of the proposed amendments with respect to pending arbitrations/proceedings.] It is clear from the above that the proposal was to apply the Amendment Act, not only to all applications filed before a court/ arbitral tribunal after the Amendment Act came into force, but it was also proposed that certain provisions be applied retrospectively to proceedings before the arbitral tribunal. The proposal with regard to retrospective application to pending proceedings was not accepted, therefore, Section 26 expressly provides that nothing in the Amendment Act would apply to pending arbitral proceedings. The proposal that the Amendment Act shall apply only to fresh arbitrations was accepted as is plainly evident from the language of the latter part of Section 26 of the Amendment Act. No specific provision was enacted with regard to the applicability of the amendment to fresh applications. However, it was enacted that the Amendment Act would come into force from 23.10.2015 and therefore would be plainly applicable

> to the proceedings instituted after the said date. The Parliament had specified the date on which the Amendment Act came into force and unless enacted otherwise, it would be applicable to all proceedings instituted after the specified date. There is no reason to hold that the Amendment Act would not apply to the applications filed in Courts. For the reasons stated herein before the Amendment Act would also apply to pending proceedings before courts.

60. The view that Section 26 of the Amendment Act does not apply to proceedings before courts is also supported by the decision of a Division Bench of the Calcutta High Court in Sri. Tufan Chatterjee v. Sri Rangan Dhar: 2016 SCC online Cal 483. Although, I have some reservation as to the manner in which the esteemed Court has interpreted Section 9(3) of the Act, I respectfully concur with the following conclusion:-

> A careful reading of the provisions of the 1996 Act, and in particular Sections 21 and 32 thereof, makes it amply clear that the expression arbitral proceedings' in Section 26 of the Amendment Act of 2015 cannot be construed to include proceedings in a Court under the provisions of the 1996 Act, and definitely not any proceedings under Section 9 of the 1996 Act, instituted in a Court before a request for reference of disputes to arbitration is made.
>
> Arbitral proceedings can be said to commence, when a request for reference to arbitration is received by the respondent and/or the authority competent under the arbitration agreement, upon notice to the respondent. The arbitral proceedings, which so commence, terminate with a final award as provided in Section 32(1) of the 1996 Act or with an order under Section 32(2) of the 1996 Act Proceedings in Court under the 1996 Act whether initiated before, during or after the termination of the arbitral proceedings, would not attract Section 26 of the Amendment Act of 2015.

61. In New Tirupur Area Development Corporation v. Hindustan Construction Company Limited (A.No. 7674 of 2016 in O.P. No.931 of 2015), the Madras High Court has held that the Amendment Act shall apply to petitions pending under Section 34 of the Act. The Bombay High Court in a recent decision in M/s Rendezvous Sports World v. The Board of Control for Cricket in India [Chamber Summons No.1530 of 2015 in Execution Application (L) No.2481 of 2015 decided on 14.06.2016] has also accepted the view that Section 36 of the Act as amended shall apply to proceedings pending before Courts.

62. In view of the aforesaid, Section 2(2) of the Act as amended would be clearly applicable in the facts of the present case. The said Sub-section as amended reads as under:-

> (2) This Part shall apply where the place of arbitration is in India:
>
> Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India,

> and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.

63. The principal question to be addressed is whether by virtue of the proviso introduced in Section 2(2) of the Act, recourse to Section 9 of the Act is available in relation to the arbitral proceedings in question.

64. At this stage, it is necessary to refer to the Dispute Resolution Clause, which reads as under:-

> "15 Governing Law and Dispute Resolution 15.1 This Agreement shall be governed by and construed in accordance with the laws of Singapore.
>
> 15.2 Any dispute, controversy, claims or disagreement of any kind whatsoever between or among the Parties in connection with or arising out of this Agreement or the breach, termination or invalidity thereof shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules) for the time being in force, which rules are deemed to be incorporated by reference in this clause. This Agreement and the rights and obligations of the Parties shall remain in full force and effect pending the award in such arbitration proceedings which award, if appropriate, shall determine whether and when any termination shall become effective.
>
> 15.3 The Arbitral Tribunal shall consist of one arbitrator to be appointed by the Chairman of SIAC.
>
> 15.4 Language of Arbitration. The language of the arbitration shall be in English.
>
> 15.5 Survival: The provisions contained in this Clause 15 shall survive the termination of this Agreement."

65. Clause 15.1 of the agreement expressly indicates that the agreement would be governed by and construed in accordance with the law of Singapore. Thus, clearly, the substantive law as applicable to the contract between the parties is the law as applicable in Singapore. The seat of arbitration is also Singapore and therefore the law as applicable to the arbitral proceedings, lex arbitri, is also the law as applicable in Singapore. The legal principle that the law as applicable to arbitral proceedings would be the law as applicable where the seat of arbitration is situated has been authoritatively settled by a Constitution Bench of the Supreme Court in Bharat Aluminium (supra).

66. The Supreme Court in Bhatia International (supra) had considered the question whether Part I of the Act would be applicable to International arbitrations and had held as under:-

> In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by parties would prevail. Any

> provision, in Part I, which is contrary to or excluded by that law or rules will not apply.

67. Thus, prior to decision in Bharat Aluminium (supra) the position of law was that unless the parties had agreed to the contrary, the provisions of Part I of the Act would be applicable. The decision in Bhatia International (supra) was overruled by the Constitution Bench in Bharat Aluminium (supra) and the law declared was that Part I of the Act would have no application in cases where the seat of arbitration is outside India. However, the Constitution Bench of the Supreme Court had expressly held that the said decision would be applied prospectively and only in respect of agreements that were entered into and after the date of that decision. The Supreme Court held as under:-

> With utmost respect, we are unable to agree with the conclusions recorded in the judgments of this Court in Bhatia International (supra) and Venture Global Engineering (supra). In our opinion, the provision contained in Section 2(2) of the Arbitration Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India. Similarly, no suit for interim injunction simplicitor would be maintainable in India, on the basis of an international commercial arbitration with a seat outside India.
>
> xxxx xxxx xxxx xxxx The judgment in Bhatia International (supra) was rendered by this Court on 13-3-2002. Since then, the aforesaid judgment has been followed by all the High Courts as well as by this Court on numerous occasions. In fact, the judgment in Venture Global Engineering (supra) has been rendered on 10-01-2008 in terms of the ratio of the decision in Bhatia International (supra). Thus, in order to do complete justice, we hereby order, that the law now declared by this Court shall apply prospectively, to all the arbitration agreements executed hereafter.

68. Plainly, this position stands amended by enactment of Section 2(II) of the Amendment Act by virtue of which Section 2(2) of the Act stands amended by introduction of a proviso that expressly provides that provisions of Section 9, 27 & 37(1)(a) and 37 (3) of the Act would also apply to international commercial arbitrations even if the place of arbitration is outside India and the arbitral award is enforceable under the provisions of Part II of Act.

69. As is apparent from the plain language of the proviso, it is subject to an agreement to the contrary. In other words the proviso is applicable only if there is no agreement to the contrary; that is, there is no agreement, which excludes the applicability of sections 9, 27, 37(1)(a) and 37(3) of the Act.

70. It is relevant to note that the Law Commission in its 246 th report had proposed the following amendments to Section 2(2) of the Act:

"(vi) In sub-section (2), add the word "only" after the words "shall apply" and delete the word "place" and insert the word "seat" in its place.

[NOTE: This amendment ensures that an Indian Court can only exercise jurisdiction under Part I where the seat of the arbitration is in India. To this extent, it over-rules Bhatia International v. Bulk Trading S.A. and Anr (2002) 4 SCC 105 Anr., (2002) 4 SCC 105, and re-enforces the "seat centricity" principle of Bharat Aluminium Company and Ors. etc. v. Kaiser Aluminium Technical Service, Inc and Ors. etc., (2012) 9 SCC 552] Also insert the following proviso "Provided that, subject to an express agreement to the contrary, the provisions of sections 9, 27, 37 (1)(a) and 37(3) shall also apply to international commercial arbitration even if the seat of arbitration is outside India, if an award made, or that which might be made, in such place would be enforceable and recognized under Part II of this Act.

[NOTE: This proviso ensures that an Indian Court can exercise jurisdiction with respect to these provisions even where the seat of the arbitration is outside India.]"

71. The aforesaid proposal was not accepted in toto; the word "only" in the opening sentence of sub section (2) and the word express" in the first line of the proviso as proposed by the Law commission were omitted. Thus, it is not necessary that the parties exclude the applicability of Section 9 of the Act by an express agreement and so long as an agreement to exclude Section 9 and 27 of the Act can be inferred by implication, the provisions of Sections 9, 27, 37(1)(a) and 37(3) would stand excluded. This in effect reverts the position of law as it was prior to the decision in case of Bharat Aluminium (supra) in so far as the applicability of sections 9, 27, 37(1)(a) and 37(3) of the Act is concerned. In other words, although provisions of Part -I - except Sections 9, 27, 37(1)(a) and 37(3) of the Act

- would not apply to arbitrations held outside India, Sections 9, 27, 37(1)(a) and 37(3) of the Act would apply unless the parties have contracted to the contrary.

72. The controversy as to whether parties have contracted out of Part I of the Act has been considered in several decisions. In Venture Global Engineering v. Satyam Computer Services Ltd. and Another: (2008) 4 SCC 190, the Supreme Court considered the question whether a petition under Section 34 of the Act was maintainable in respect of a foreign award. Following its earlier decisions in Bhatia International (supra), the Supreme Court had reiterated that provisions of Part I of the Act would be applicable unless the same was expressly or impliedly excluded by the parties. In that case, the Shareholder's Agreement between the parties therein included the following clauses:-

"11.05 (a) xxxx xxxx xxxx xxxx

(b) This Agreement shall be construed in accordance with and governed by the laws of the State of Michigan, United States, without regard to the conflicts of law rules of such jurisdiction. Disputes between the parties that cannot be resolved via negotiations shall be submitted for final, binding arbitration to the London Court of Arbitration.

(c) Notwithstanding anything to the contrary in this agreement, the Shareholders shall at all times act in accordance with the Companies Act and other applicable Acts/Rules being in force, in India at any time."

73. In the aforesaid context, the Court, inter alia, held that the non obstante clause - clause (c) as quoted above - would override the entirety of the contract including clause (b) which deals with the settlement of disputes by arbitration. The Court rejected the contention that the afore- quoted clause (c) could not be construed to mean that Indian law was the substantive law of contract or the Indian law would not govern the Disputes Resolution clause - clause (b) quoted above. The Court concluded the Part-I of the Act could not be held to be excluded by the parties.

74. In M/s. Indtel Technical Services Pvt. Ltd. v. W.S. Atkins Rail Ltd.: (2008) 10 SCC 308, the Supreme Court considered the application under Section 11 of the Act and was concerned with an agreement which included the clause that read as under:-

> "CLAUSE 13 - SETTLEMENT OF DISPUTES 13.1. This Agreement, its construction, validity and performance shall be governed by and constructed in accordance with the laws of England and Wales."

And, in context of the aforesaid clause, the Court held that:

> "it is no doubt true that it is fairly well-settled that when an arbitration agreement is silent as to the law and procedure to be followed in implementing the arbitration agreement, the law governing the said agreement would ordinarily be the same as the law governing the contract itself. The decisions cited by Mr. Tripathi and the views of the jurists referred to in the NTPC case support such a proposition. What, however, distinguishes the various decisions and views of the authorities in this case is the fact that in the Bhatia International case this Court laid down the proposition that notwithstanding the provisions of Section 2(2) of the Arbitration and Conciliation Act, 1996, indicating that Part-I of the said Act would apply where the place of arbitration is in India, even in respect of International Commercial agreements, which are to be governed by laws of another country, the parties would be entitled to invoke the provisions of Part-I of the aforesaid Act and consequently the application made under Section 11 thereof would be maintainable."

75. The decisions in Bhatia International (supra) and M/S. Indtel Technical Services Pvt. Ltd. (supra) were followed by the Supreme Court in a later decision in Citation Infowares Limited v. Equinox Corporation: (2009) 7 SCC 220.

76. In Dozco India (P) Ltd. v. Doosan Infracore Co. Ltd.: (2011) 6 SCC 179, the Supreme Court rejected a petition under Section 11(6) of the Act as the Court interpreted the agreement between the parties to exclude Part-I of the Act. In that case, the relevant clauses of the agreement between the parties read as under:-

> "Article 22. Governing Laws - 22.1 : This agreement shall be governed by and construed in accordance with the laws of The Republic of Korea.
>
> Article 23. Arbitration - 23.1 : All disputes arising in connection with this Agreement shall be finally settled by arbitration in Seoul, Korea (or such other place as the parties may agree in writing), pursuant to the rules of agreement then in force of the International Chamber of Commerce."

In the aforesaid context, the Supreme Court held as under:-

> "In the backdrop of these conflicting claims, the question boils down to as to what is the true interpretation of Article
>
> 23. This Article 23 will have to be read in the backdrop of Article 22 and more particularly, Article 22.1. It is clear from the language of Article 22.1 that the whole Agreement would be governed by and construed in accordance with the laws of The Republic of Korea.
>
> xxxx xxxx xxxx xxxx If we see the language of Article 23.1 in the light of the Article 22.1, it is clear that the parties had agreed that the disputes arising out of the Agreement between them would be finally settled by the arbitration in Seoul, Korea. Not only that, but the rules of arbitration to be made applicable were the Rules of International Chamber of Commerce. This gives the prima facie impression that the seat of arbitration was only in Seoul, South Korea."

77. In Videocon Industries (supra), the Supreme Court considered the controversy as to the applicability of the Part-I of the Act in the context of the following clauses of the agreement:-

> "33.1 Indian Law to Govern Subject to the provisions of Article 34.12, this Contract shall be governed and interpreted in accordance with the laws of India.
>
> 33.2 Laws of India Not to be Contravened - Subject to Article 17.1 nothing in this Contract shall entitle the Contractor to exercise the rights, privileges and powers conferred upon it by this Contract in a manner which will contravene the laws of India.
>
> xxxx xxxx xxxx xxxx 34.12. Venue and Law of Arbitration Agreement The venue of sole expert, conciliation or arbitration proceedings pursuant to this Article, unless the Parties otherwise agree, shall be Kuala Lumpur, Malaysia, and shall be conducted in the English language. Insofar as practicable, the Parties shall continue to implement the terms of this Contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute. Notwithstanding the provisions of Article 33.1, the arbitration agreement contained in this Article 34 shall be governed by the laws of England."

And, the Supreme Court held as under:-

> "In the present case also, the parties had agreed that notwithstanding Article 33.1, the arbitration agreement contained in Article 34 shall be governed by laws of England. This necessarily implies that the parties had agreed to exclude the provisions of Part I of the Act. As a corollary to the above conclusion, we hold that the Delhi High Court did not have the jurisdiction to entertain the petition filed by the respondents under Section 9 of the Act and the mere fact that the appellant had earlier filed similar petitions was not sufficient to clothe that High Court with the jurisdiction to entertain the petition filed by the respondents."

78. A similar view was also expressed by the Supreme Court in Reliance Industries Limited and Anr v. Union of India: (2014) 7 SCC 603 and Union of India v. Reliance Industries Limited and Others: (2015) 10 SCC 213. In those cases the parties had, inter alia, agreed as under:-

> "33.12 The venue of conciliation or arbitration proceedings pursuant to this Article, unless the Parties otherwise agree, shall be London, England and shall be conducted in the English Language. The arbitration agreement contained in this Article 33 shall be governed by the laws of England. Insofar as practicable, the Parties shall continue to implement the terms of this Contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute."

79. In Harmony Innovation Shipping Ltd. (supra), the Supreme Court was concerned with interpretation of a clause that read as under:

> 5. If any dispute or difference should arise under this charter, general average/arbitration in London to apply, one to be appointed by each of the parties hereto, the third by the two so chosen, and their decision or that of any two of them, shall be final and binding, and this agreement may, for enforcing the same, be made a rule of Court. Said three parties to be commercial men who are the members of the London Arbitrators Association. This contract is to be governed and construed according to English Law. For disputes where total amount claim by either party does not exceed USD $ 50,000 the arbitration should be conducted in accordance with small claims procedure of the London Maritime Arbitration Association.

80. The Supreme Court after noticing various earlier decisions held as under:

> 50. Thus, interpreting the clause in question on the bedrock of the aforesaid principles it is vivid that the intended effect is to have the seat of arbitration at London. The commercial background, the context of the contract and the circumstances of the parties and in the background in which the contract was entered into, irresistibly lead in that direction. We are not impressed by the submission that by such interpretation it will put the Respondent in an advantageous position. Therefore, we think it would be appropriate to interpret the clause that it is a proper

> clause or substantial clause and not a curial or a procedural one by which the arbitration proceedings are to be conducted and hence, we are disposed to think that the seat of arbitration will be at London.

81. Mr Dutt, learned counsel had earnestly contended that in view of the decisions of the Supreme Court in Videocon Industries (supra) Harmony Innovation Shipping Ltd. (supra) and Reliance Industries (supra) it was clear that the parties had implicitly agreed to exclude Section 9 of the Act to the arbitral proceedings , because they had agreed that the agreement would be construed and considered in accordance with law in Singapore.

82. I am unable to accept the aforesaid contention mainly for the reason that the controversy considered by the Supreme Court in Dozco Industries Pvt Ltd, Videocon Industries, Reliance Industries v. Union of India, Union of India v. Reliance Industries and Harmony Innovation Shipping Ltd. (supra) was materially different from the question involved in the present case. In those cases, the question before the Supreme Court was as to which law was applicable to the arbitral proceedings - which was the lex arbitri. An agreement that the proper law of arbitration (lex arbitri) of a country other than India would govern the arbitration agreement would necessarily exclude the Act as lex arbitri and consequently Part I of the Act.

83. In Reliance Industries cases (supra), the parties had expressly agreed that the arbitration agreement shall be governed by the laws of England. So was the case in Videocon Industries (supra). Undisputedly, if the parties had agreed that the proper law applicable to the arbitration would be that of a foreign country it would necessarily mean that the Act would not be the proper law governing the arbitration. The two are mutually exclusive.

84. In the present case, there is no dispute as to the law governing the arbitration. Clause 15.1 of the Agreement expressly provides that the laws as applicable in Singapore will apply to the entire contract. Further the seat of the arbitration is also in Singapore. The petitioners had also applied under Section 12 (6) of the International Arbitration Act, (IAA) - the law as applicable to the International Arbitration in Singapore - for the judgment in terms of the order passed by the Arbitral tribunal. In paragraph 41 of the petition filed before the Singapore High Court, the petitioner has stated as under:-

> 41. It is undisputed that the IAA applies to SIAC 179 as Singapore is the seat of the arbitration (as confirmed by the Emergency Arbitrator in paragraph 10 of the Emergency Award [TAB 1]). The Plaintiffs understand that this Honourable Court has supervisory and/or curial jurisdiction over SIAC 179 and Section 12(6) of the IAA specifically provides that all orders or directions made or given by an arbitral tribunal in the course of an arbitration shall, by leave of the High Court or a Judge thereof, be enforceable in the same manner as if they were orders made by a court. Accordingly, I believe that Singapore is an appropriate forum for the filing of this action for enforcement of the Emergency Award.

85. Thus, the question that needs to be addressed is: whether an agreement between the parties that a foreign law would be applicable to the arbitration, implicitly excludes the applicability of Section 9 of the Act?

86. As noted earlier, the very purpose of amending Section 2 (2) of the Act was to enable a party to approach the courts in India for interim relief in respect of the arbitral proceedings held or to be held outside India. The need for this amendment was highlighted by the Law Commission of India, in its 176th Report in the following words:-

> Section 2(2) states that Part - I of the Act applies to arbitration in India. That would mean that in the case of arbitration between Indian nationals and also where one party is not an Indian national, and where the place of the arbitration is in India, Part I of the Act will apply. While the UNCITRAL Model Law permits certain Articles like 8, 9, 35 and 36 to apply to arbitrations outside the Country, there is an omission in this behalf in the 1996 Act. Consequently, for example in the absence of availability of Section 9 in the case of an arbitration outside India, the Indian party is unable to obtain interim measures from Indian Courts, before arbitration starts outside India. The absence of an express provision as stated above has led to conflicting judgments in the Delhi and Calcutta High Courts. It is proposed to allow Section 9 to the invoked whenever arbitration is outside India. Similarly, the provisions of Section 8, 27, 35 and 36 are proposed to be made available whenever arbitration is outside India. Almost all countries which have adopted the Model Law allow views of these provisions to arbitrations outside the country. The proposed clause (a) of Section 2(2) states that Part - I of the Act applies to domestic arbitration in India and the proposed clause (b) states that Sections 8, 9, 27, 35 and 36 will be available for international arbitrations outside India. In its 176th report the Law Commission had proposed that Section 2 (2) of the Act be amended to read as under:-
>
> (2) (a) Save as otherwise provided in clause (b), this Part shall apply where the place of arbitration is in India.
>
> (b) Sections 8, 9 and 27 of this Part shall apply to international arbitration (whether commercial or not) where the place of arbitration is outside India or where such place is not specified in the arbitration agreement..
>
> 87. The Consultation Paper placed by the Government of India in public domain also highlighted the need for amending Section 2 of the Act to enable the parties to approach the Courts in India for interim relief under Section 9 of the Act in the following words:-
>
> (xvii) It may be stated that it is the broad principle in International Commercial arbitration that a law of the country where it is held, namely, the Seat or forum or laws arbitri of the arbitration, governs the arbitration. However, if all the provisions of Part I are not made applicable to International Commercial arbitration where the

seat of arbitration is not in India, some practical problems are arising. There may be cases where the properties and assets of a party to arbitration may be in India. Section 9 of the Act which falls in Part I provide for interim measures by the Court. As per Section 9, a party may, apply to a court for certain interim measures of protection including for preservation, interim custody or sale of goods, securing the amount in disputes, detention, preservation or inspection of any property, interim injunction etc. If provision of Section 9 is not made applicable to International Commercial arbitration where seat of arbitration is not in India, a party may be out of remedy if the assets and property are in India. In cases of international arbitration where the seat of arbitration is outside India, a serious controversy has arisen in the Indian Courts. These are cases where interim measures could not be granted by Indian courts under Section 9 to an Indian national before commencement of arbitration (or after the award) against property of a foreign party. By the time the Indian party takes steps to move the courts in the country in which the seat of arbitration is located, the property may have been removed or transferred.

88. The Law Commission of India in its 246th Report also proposed amendments to Section 2 (2) of the Act (as quoted herein before) as it felt that the same were necessary. The reasons for such amendments were explained, as under:-

(i) Where the assets of a party are located in India, and there is a likelihood that that party will dissipate its assets in the near future, the other party will lack an efficacious remedy if the seat of the arbitration is abroad. The latter party will have two possible remedies, but neither will be efficacious. First, the latter party can obtain an interim order from a foreign Court or the arbitral tribunal itself and file a civil suit to enforce the right created by the interim order. The interim order would not be enforceable directly by filing an execution petition as it would not qualify as a "judgment" or "decree" for the purposes of sections 13 and 44A of the Code of Civil Procedure (which provide a mechanism for enforcing foreign judgments). Secondly, in the event that the former party does not adhere to the terms of the foreign Order, the latter party can initiate proceedings for contempt in the foreign Court and enforce the judgment of the foreign Court under sections 13 and 44A of the Code of Civil Procedure. Neither of these remedies is likely to provide a practical remedy to the party seeking to enforce the interim relief obtained by it.

That being the case, it is a distinct possibility that a foreign party would obtain an arbitral award in its favour only to realize that the entity against which it has to enforce the award has been stripped of its assets and has been converted into a shell company.

(ii) While the decision in BALCO was made prospective to ensure that hotly negotiated bargains are not overturned overnight, it results in a situation where Courts, despite knowing that the decision in Bhatia is no longer good law, are forced to apply it whenever they are faced with a case arising from an arbitration agreement

executed pre- BALCO.

89. It is also necessary to reiterate that amendment to Section 2 (2) of the Act was made on the basis of the United Nations Commission on International Trade Law (UNCITRAL) Model Law as adopted on 21.06.1985 and as amended on 07.07.2006. Article 1.2 of UNCITRAL Model Law reads as under:-

"Article 1. Scope of Application (1) xxxx xxxx xxxx xxxx (2) The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State. (Article 1(2) has been amended by the Commission at its thirty-ninth session, in 2006)

90. The Article 9, 17H, 17I and 17J, of the Model Law are relevant and are set out below:-

"Article 9. Arbitration agreement and interim measures by court It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

```
xxxx                xxxx       xxxx              xxxx
Article 17 H. Recognition and enforcement
(1)     An interim measure issued by an arbitral tribunal shall be
```

recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Article 17 I. Grounds for refusing recognition or enforcement (1) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

(i) Such refusal is warranted on the grounds set forth in article 36(1)(a)(i), (ii), (iii) or (iv); or

(ii)The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii)The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

(i)The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) Any of the grounds set forth in article 36(1)(b)(i) or

(ii), apply to the recognition and enforcement of the interim measure.

(iii)Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

Article 17 J. Court-ordered interim measures A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

91. The Article 17-J of the Model Law specifically provides that the Court shall have the same powers for issuing interim measures in relation to the arbitral proceedings irrespective of the seat of such arbitral proceedings. In terms of the UNCITRAL Model Law, arbitral proceedings are governed by the law as applicable at the seat of the arbitration;

nonetheless, it would be open for the Courts to issue interim orders even in respect of the arbitral proceedings that are held outside the State. The object of amending Section 2(2) of the Act is inter alia to incorporate such provision in the Act.

92. The contention that the parties have impliedly agreed to exclude Section 9 of the Act, has to be considered in the above backdrop.

93. It is seen that the parties had expressly agreed that the arbitration shall be governed by the SIAC Rules. It is relevant to note that Rule 26.3 of the SIAC Rules, expressly provides that:-

> "26.3 A request for interim relief made by a party to a judicial authority prior to the constitution of the Tribunal, or in exceptional circumstances thereafter, is not incompatible with these Rules. [Rule 30.3 of SIAC Rules, 2016 is similarly worded to Rule 26.3 quoted above.]

94. This is pari materia to Article 9 of the Model Rules. The SIAC Rules must be read as a part of the agreement between the parties and the only conclusion that can be drawn is that the parties had expressly agreed that seeking an interim order from the Courts would not be incompatible with the arbitral proceedings .

95. The SIAC Rules are clearly in conformity with the UNCITRAL Model Law and permit the parties to approach the Court for interim relief. As pointed out earlier, UNCITRAL Model Law expressly provides for courts to grant interim orders in aid to proceedings held outside the State. And, the proviso to Section 2 (2) of the Act also enables a party to have recourse to Section 9 of the Act notwithstanding that the seat of arbitration is outside India. Thus, the inescapable conclusion is that since the parties had agreed that the arbitration be conducted as per SIAC Rules, they had impliedly agreed that it would not be incompatible for them to approach the Courts for interim relief. This would also include the Courts other than Singapore. It is relevant to mention that IAA is based on UNCITRAL Model Law and SIAC Rules are also complimentary to IAA/UNCITRAL Model law.

96. In the circumstances, the contention that the parties by agreeing that the proper law applicable to arbitration would be the law in Singapore have excluded the applicability of Section 9 of the Act.

97. The only question that now remains to be considered is whether the petitioner can approach this Court for an interim relief considering that it has already approached the Arbitral Tribunal in Singapore and thereafter, also obtained a judgment in terms of the interim order from the Singapore High Court.

98. It is relevant to mention that Article 17H of the UNCITRAL Model Law contains express provisions for enforcement of interim measures. However the Act does not contain any provision pari materia to Article 17H for enforcement of interim orders granted by an Arbitral Tribunal outside the India. Section 17 of the Act is clearly not applicable in respect of arbitral proceedings held outside India.

99. In the circumstances, the emergency award passed by the Arbitral Tribunal cannot be enforced under the Act and the only method for enforcing the same would be for the petitioner to file a suit.

100. However, in my view, a party seeking interim measures cannot be precluded from doing so only for the reason that it had obtained a similar order from an arbitral tribunal. Needless to state that the question whether the interim orders should be granted under section 9 of the Act or not would have to be considered by the Courts independent of the orders passed by the arbitral tribunal.

Recourse to Section 9 of the Act is not available for the purpose of enforcing the orders of the arbitral tribunal; but that does not mean that the Court cannot independently apply its mind and grant interim relief in cases where it is warranted.

101. It is relevant to note that the provisions under Article 17 I (2) of the Model Law, the court enforcing an interim order passed by an Arbitral Tribunal in prescribed form undertakes a review of the substance of interim measure the Model Law. To that extent, a Court while examining a similar relief under Section 9 of the Act would be unfettered by the findings or the view of the Arbitral Tribunal.

102. The decisions of this Court in Sri Krishan (supra) and Indiabulls Financial Services Ltd. & Ors. v. Jubilee Plots and Housing Private Ltd.: 2009 SCC OnLine Del 2458 referred to by Mr Dutt have no applicability in the facts of this case. In those cases, it was held that a person disobeying the orders passed under Section 17 of the Act would be guilty of contempt as provided under Section 27 (5) of the Act. Clearly, a person guilty of not following the interim orders of the arbitral tribunal in Singapore cannot be proceeded for the contempt under Section 27 of the Act, as contended by Mr Dutt.

103. In the circumstances, I am of the view that the present petition is maintainable and accordingly, it is to be considered on its merits.

VIBHU BAKHRU, J OCTOBER 07, 2016 RK/pkv

New York State Bar Association
International Section

2018 Regional Meeting
Seoul, Republic of Korea
April 23-24

Recognition and Enforcement of International Arbitration Awards

Co-Chairs:

Oliver J. Armas

Hogan Lovells, New York

June (Junghye) Yeum

Clyde & Co., Singapore

Recognition and Enforcement of International Arbitration Awards

Speakers:

Jessica Fei

Herbert Smith Freehills LLP, Beijing

Alex Yanos

Alston & Bird, New York

Topics

Recognition and Enforcement of International Arbitration Awards

- USA (including NY) [Alex Yanos and Oliver Armas]
- China [Jessica Fei]
- Southeast Asia and India [June Yeum]

Recognition and Enforcement of International Arbitration Awards

USA

USA

- Recognition and Enforcement of International Arbitration Award
  - Legal Framework in the U.S.
    - 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NY Convention)
      - Federal Arbitration Act (FAA)
  - Under the NY Convention, recognition may be refused
    - Party incapacity or arbitration agreement is invalid
    - Insufficient notice to party against whom award is invoked
    - Award is outside the scope of the arbitration agreement
    - Composition of arbitral tribunal or procedure not compliant with arbitration agreement or laws of the seat
    - Award not yet binding on parties
    - Dispute was not arbitrable
    - Recognition would be against public policy

USA (CONT'D)

- Court must have jurisdiction
  - FAA confers subject matter jurisdiction on US federal courts
  - Court also needs personal jurisdiction over the debtor or its property
    - Implication of *Daimler* decision on Corporate Entities
      - *Sonera Holding v. Cukurova Holding*
  - Application of Forum *Non Conveniens* Doctrine
- Enforcement of Awards in Investor-State Disputes
  - Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)
    - Final ICSID award is meant to be treated as a final judgment of a domestic court
    - Which is the recognition process and law that applies?
      - Law of the forum where application is made?
      - Reference to the federal sovereign immunity law (FSIA)?

USA (CONT'D)

- Vacating an International Arbitration Award
  - What law applies: NY Convention, FAA or State law?
  - Grounds for vacatur under the FAA:
    - Award was procured by corruption, fraud or undue means
    - Evident partiality or corruption in the arbitrators
    - Arbitrators guilty of misconduct in refusing to postpone the hearing or refusing to hear "pertinent and material" evidence or other misbehavior prejudicing the rights of a party
    - Arbitrators exceeded their powers

China

Enforcement of International Arbitration Awards and Issues re Belt and Road Disputes
A China perspective

Enforcement of Foreign Arbitral Awards In China

- China acceded to the New York Convention in 1987 (subject to reciprocity reservation and commercial reservation)
- Limited grounds for non-enforcement of foreign arbitral awards
- “Public policy” ground has been rarely used to refuse enforcement
- “Prior reporting system” for any non-enforcement decisions of foreign arbitral awards

Enforcement of Foreign Arbitral Awards In China

Reasons for non-enforcement	Number of cases
• No arbitration agreement or Invalid arbitration agreement	5
• Expiry of statute of limitations	4
• Notices of proceedings not served upon the losing party	1
• The reappointment of arbitrator was not in conformity with the agreed arbitration rules	1
• No available assets for enforcement located in China	1
Total	12
	(year 2000-2007)

(*Source: Presentation of Mr. Wang E-xiang, Vice President of China's Supreme Court, at the Seminar in Celebration of the 50th Anniversary of the New York Convention on June 6, 2008, titled "Several Issues in the Implementation of New York Convention in China".*)

Enforcement of Foreign Arbitral Awards In China

Reasons for non-enforcement	Number of cases
• No arbitration agreement or Invalid arbitration agreement	4
• Notices of proceedings not served upon the losing party	2
• The appointment / reappointment of arbitrator was not in conformity with the agreed arbitration rules	4
• The debtor does no longer exist	1
• Against public policy	2
Total	**13** (year 2008 – 2016)

(*There are no official figures for situation after 2007. According to our search in publicly available information shows, between 2008 and 2016, there were thirteen or more foreign arbitral awards which were refused recognition and enforcement by the Chinese courts.*)

The Belt and Road Initiative

- Since 2013, B&R is China's strategic and economic policy to create a 21st century Silk Road
- Structured along 6 overland corridors and 1 maritime route
  - China-Mongolia-Russia Economic Corridor
  - China-Central Asia- West Asia Economic Corridor
  - New Eurasia Land Bridge Economic Corridor
  - China-Pakistan Economic Corridor
  - Bangladesh-China-India-Myanmar Economic Corridor
  - China-Indochina Peninsula Economic Corridor
  - Maritime Route
- US$900 billion committed by China Development Bank

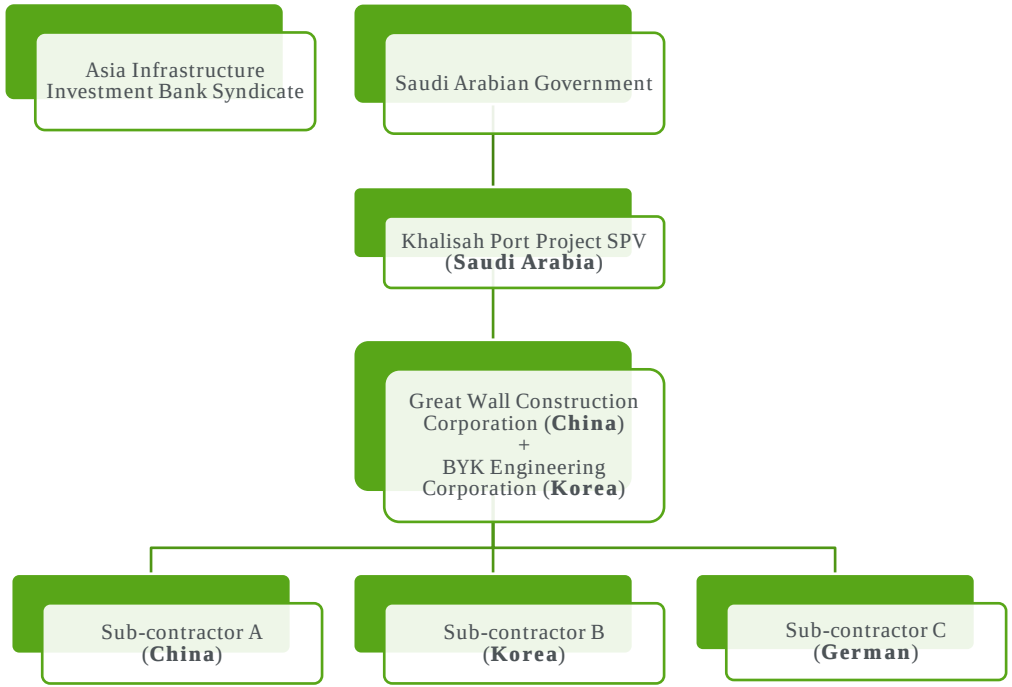
1/3 of the world's GDP

65% of the world's population

all goods and services the world

60+ countries

The Belt and Road Initiative: An Example



B&R Disputes Resolution: Litigation

- Is litigation an option?
  - Probably want to avoid local Saudi Arabian court litigation
  - A role to play for international commercial courts (e.g. DIFC courts and Singapore International Commercial Court)?
  - Chinese Supreme People's Court's announced intention to establish Chinese International Commercial Courts at Beijing, Shenzhen and Xi'an for B&R disputes, although details remain unknown
  - Enforcement?

B&R Disputes Resolution: Arbitration

- What are the options for international arbitration?
  - Commercial arbitration:
    - ICC/LCIA arbitration seated in Dubai
    - SIAC arbitration seated in Singapore
    - HKIAC arbitration seated in Hong Kong
    - CIETAC arbitration seated in Hong Kong / Beijing
  - Investment treaty arbitration:
    - ICSID arbitration
    - SIAC arbitration (SIAC Investment Arbitration Rules 2017)
    - CIETAC arbitration (CIETAC Investment Arbitration Rules 2017)

B&R Disputes Resolution: Arbitration (CONT'D)

- Arbitration is the mechanism of choice for B&R disputes
  - Ease of cross-border enforcement of arbitral awards
    - Most OBOR countries are signatories to New York Convention
    - Limited exceptions (Ethiopia, Iraq, Macedonia, Maldives, Moldova, Palestine, Timor-Leste, Turkmenistan, Yemen)
  - Flexibility - applicable law, seat, tribunal members, language
  - Very limited appeal against arbitral awards
  - Private and confidential
  - Commercial arbitration:
    - Commercial party v commercial party
  - Investment treaty arbitration:
    - Investor v host state

B&R Disputes Resolution: Mediation

- Mediation will likely become more popular for B&R disputes
  - Tradition of Chinese companies preferring mediation/conciliation
  - Flexibility
  - Informality and business relationship preservation qualities
  - Confidentiality
  - Time and cost saving potential
  - Enforcement?
  - Mediated settlement agreement enforceable as a contract

B&R Disputes Resolution: Wrap-up

- Positive developments at various jurisdictions including China, Singapore and Hong Kong for resolving B&R disputes
- To be assessed on a case-by-case basis
- Rise of national court system and/or mediation?
- Combining processes e.g. mediation followed by arbitration?
- A universal disputes escalation clause for B&R contracts?

Southeast Asia and India

Award Enforcement Jurisprudence in Southeast Asia

Operating Enforcement Framework

- Most Asian countries are parties to NYC
  - E.g. Singapore, Malaysia, Indonesia, India, China, Philippines, Thailand, Japan, Myanmar
- While signatories on paper, countries diverge in how faithful they are to NYC (and Model Law) when incorporating same into their arbitration legislation
- Singapore: adopts both NYC and Model Law. Grounds for setting aside and non-enforcement are exactly the same as Model Law and NYC

India Legislation v Model Law

Area of difference	Model Law 1985	IACA
Setting aside of award	Award can be set aside if, among others, it is “in conflict with the public policy” of the country. (Art 34) Public policy is undefined.	Defines public policy as: - fraud/ corruption - "contravention with the fundamental policy of Indian law" - "conflict with the most basic notions of morality or justice" Additional setting aside grounds for arbitrations involving only Indian parties - award can be set aside for “patent illegality appearing on the face of the award”

Indonesia: non-Model Law jurisdiction

- Indonesia is not a Model Law jurisdiction
- Arbitration legislation = Law No 30 of 1999 dated 12 Aug 1999
- Arbitration law has its own grounds for setting aside award:
  - award being based on forged documents
  - opposing party concealing important documents and
  - award being obtained through fraud
- Default language of arbitration is Indonesian
- Documents-only arbitration by default, unless parties agree otherwise

Interim Relief for Securing Award in Southeast Asia

Singapore

- Types of interim relief: freezing of assets; interim injunctions. Attachment orders?
- Court-ordered interim relief available if tribunal "has no power or is unable for the time being to act effectively". See, Section 12A(6), Singapore International Arbitration Act
- Security for costs is only available from the arbitral tribunal
- Interim relief ordered by Emergency Arbitrator is enforceable in Singapore

Indonesia

- Viability of interim relief in Indonesia is very limited
- No court-ordered interim relief
  - Court not allowed to interfere once dispute is referred to arbitration: Article 3, 11, Indo Arbitration Law.
- Arbitral tribunal is permitted to grant interim relief
  - Including attachment orders or sale of perishable goods
  - But there is no effective means to enforce such orders if they are not complied with

India

- Court-ordered interim relief
  - After tribunal is constituted, court will not entertain interim relief unless circumstances exist which "may not render [tribunal-ordered relief] efficacious"
- Interim relief from tribunal
  - Can be directly enforced as if it were an order of court
- Interim relief from Emergency Arbitrator
  - Not directly enforceable per se (*Raffles Design* case)
  - But, court could take notice of the Emergency Arbitrator's findings when granting interim relief (*Avitel* case)

CLYDE&CO

NYSBA –Regional Session: Recognition and Enforcement of International Arbitral Awards

June Junghye Yeum, Partner, Clyde & Co
Singapore / New York

Outline

1. Award Enforcement Jurisprudence in Southeast Asia

2. Interim Relief for Securing Award in Southeast Asia

Award Enforcement Jurisprudence in Southeast Asia

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  - E.g. Singapore, Malaysia, Indonesia, India, China, Philippines, Thailand, Japan, Myanmar.

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  - Including attachment orders or sale of perishable goods
  - But there is no effective means to enforce such orders if they are not complied with.

India

- **Court-ordered interim relief**
  - After tribunal is constituted, court will not entertain interim relief unless circumstances exist which "may not render [tribunal-ordered relief] efficacious".

- **Interim relief from tribunal**
  - Can be directly enforced as if it were an order of court

- **Interim relief from Emergency Arbitrator**
  - Not directly enforceable *per se (Raffles Design* case*)*
  - But, court could take notice of the Emergency Arbitrator's findings when granting interim relief *(Avitel* case*)*

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Global Arbitration Firms (GAR 100, 2015)