IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 63

Civil Appeal No 175 of 2017

Between

Marty Limited

… *Appellant*

And

Hualon Corporation (Malaysia) Sdn Bhd (receiver and manager appointed)

… *Respondent*

In the matter of Originating Summons No 501 of 2016

Between

Marty Limited

… *Appellant*

And

Hualon Corporation (Malaysia) Sdn Bhd (receiver and manager appointed)

… *Respondent*

JUDGMENT

[Arbitration] — [Arbitral tribunal] — [Jurisdiction]

[Arbitration] — [Agreement] — [Repudiation]

[Arbitration] — [Agreement] — [Waiver]

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Marty Ltd
v
Hualon Corp (Malaysia) Sdn Bhd (receiver and manager appointed)

[2018] SGCA 63

Court of Appeal — Civil Appeal No 175 of 2017
Sundaresh Menon CJ, Judith Prakash JA and Tay Yong Kwang JA
6 July 2018

10 October 2018 Judgment reserved.

Judith Prakash JA (delivering the judgment of the court):

Introduction

1 This appeal examines the circumstances in which a party to an arbitration agreement who commences court proceedings may be held to have lost its right to refer the same disputes to arbitration and the legal basis which would justify such a holding.

2 The parties before us are parties to an on-going arbitration. The appellant challenged the jurisdiction of the arbitrator on the basis that the respondent had, by its actions in a foreign court, waived its right to submit its disputes with the appellant to arbitration in Singapore or had repudiated the arbitration agreement. Having lost its jurisdictional challenge before the arbitral tribunal, the appellant filed an application pursuant to s 10(3) of the International Arbitration Act

(Cap 143A, 2002 Rev Ed), challenging the tribunal's decision. The High Court Judge ("the Judge") agreed with the tribunal and dismissed the application with costs.

3 Before us the appellant appeals against the Judge's decision on the following grounds:

(a) the respondent could not approbate and reprobate by relying on the arbitration clause in the underlying contract while challenging the validity of the underlying contract as a whole for lack of authority;

(b) the respondent had, by commencing and maintaining court proceedings in the British Virgin Islands ("BVI"), waived its right to arbitrate or committed a repudiatory breach of the arbitration clause, and the appellant had accepted this repudiation; or

(c) in the alternative, the dispute did not fall within the scope of the arbitration clause for various reasons including that the appellant was not even in existence when some of the disputed share transfers took place, that disputes relating to the share transfers in 1999 could not be covered by the arbitration clause which was only adopted in 2008, and that the dispute that related to the appellant's shareholding could not fall within the ambit of the constitution of the company which was adopted to deal with its operations and internal governance.

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Background facts

The parties

4 Hualon Corporation (Malaysia) Sdn Bhd, a Malaysian company that was incorporated in 1989, is the respondent in this appeal. It was put into receivership in November 2006. Prior thereto its directors were two brothers, namely, Mr Oung Da Ming and Mr Oung Yu-Ming (collectively "the Oung brothers"). The Oung brothers were substantial shareholders in the respondent. They were also shareholders in three related companies: Hualon Chemical and Textile Co Ltd ("Hualon Chemical"), Hualon Corporation Taiwan which itself was a substantial shareholder in the respondent, and E-Hsin International Corporation ("E-Hsin").

5 In 1993, the respondent incorporated a company in Vietnam known as Hualon Corporation Vietnam as its wholly-owned subsidiary ("the Vietnam Subsidiary"). The Vietnam Subsidiary was governed by its company charter issued on 30 December 1993. Mr Oung Da Ming was its chairman.

6 In June 1999, the Vietnam Subsidiary issued shares to Hualon Chemical and E-Hsin ("the 1999 transfers") and, as a result, was no longer wholly owned by the respondent. The Oung brothers, as the then-directors of the respondent, procured the 1999 transfers.

7 Starting in late 1999 the respondent experienced financial difficulties and was thereafter forced to seek help from its creditors through a scheme of arrangement. Its financial position did not improve substantially, however, and this led the creditors to appoint Mr Duar Tuan Kiat ("the Receiver") as receiver and manager of the respondent on 30 November 2006. From then onwards,

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the respondent acted under the direction of the Receiver and the powers of the directors were displaced.

8 In the meantime, the appellant, Marty Ltd, had entered the scene in August 2006 as a company incorporated in the BVI by the Oung brothers. The Oung brothers are and were at all material times the only shareholders of the appellant.

Events occurring after the appellant's incorporation

9 In March 2007, Hualon Chemical subscribed for further shares in the Vietnam Subsidiary and E-Hsin transferred its shares in the Vietnam Subsidiary to the appellant ("the 2007 transfers"). The allegation is that the 2007 transfers were procured by the Oung brothers.

10 In February 2008, the Vietnam Subsidiary was re-registered for the purpose of obtaining an investment certificate from the relevant authorities. As part of the re-registration process, the Vietnam Subsidiary's company charter was revised and updated ("the Revised Charter"). The Revised Charter contains a number of articles which are relevant to the issues between the parties but we need only mention two:

(a) Article 7, which sets out the "Capital Contribution" of the shareholders of the Vietnam Subsidiary. It states that the shares of the Vietnam Subsidiary are held by the respondent (47.69%), the appellant (41.21%) and Hualon Chemical (11.1%). These proportions were a direct result of the shares that the appellant and Hualon Chemical had acquired through the 1999 and 2007 transfers; and

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(b) Article 22, the arbitration clause which provides that disputes between members of the company should first be resolved through negotiation and conciliation and if this cannot be done "the disputes shall be submitted by any Party for final settlement to Singapore International Arbitration Centre ("SIAC") in accordance with the Rules of laws of SIAC. The award of the arbitrators is final and binding".

11 In August 2008, Hualon Chemical transferred all of its shares in the Vietnam Subsidiary to the appellant and another BVI company, Cubic Holdings Limited, a company whose ownership remains unknown ("the 2008 transfers"). The respondent's position is that the 2008 transfers were also procured by the Oung brothers. After the 2008 transfers, the shareholders of the Vietnam Subsidiary were the appellant (now holding 99.7% of the shares), Cubic Holdings Limited (holding 0.11% thereof) and the respondent (whose shareholding was reduced to only 0.19%). The 1999, 2007 and 2008 share transfers (collectively the "Share Transfers") and the parties' capital contributions as recorded in Art 7 of the Revised Charter formed the basis of the dispute between the parties. The respondent's position is that the Share Transfers were invalid and that its ownership of the Vietnam Subsidiary has been unlawfully diluted to almost nothing.

Events leading to the disputes and the litigation

Due diligence conducted on the Vietnam Subsidiary

12 In February 2009, the Receiver commissioned Indochine Counsel, a law firm in Vietnam, to undertake a "limited due diligence/check" on the Vietnam Subsidiary. Indochine Counsel's proposed scope of services, which was approved and accepted by the Receiver, included obtaining the corporate

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records of the Vietnam Subsidiary.

13 On 1 July 2009, Indochine Counsel sent its report dated 19 June 2009 (the "Due Diligence Report") to the Receiver. In the section titled "Our Advice", Indochine Counsel set out its advice on the consequences and legal redress under the laws of Vietnam in respect of the transfer of capital from the respondent to the appellant. It took the view that the respondent's representative (*ie*, Mr Oung Da Ming) was not authorised to act or had acted *ultra vires* in respect of the Share Transfers. Specifically, Indochine Counsel stated that if the respondent could prove that its representative had taken a "fabricated act" in respect of the Share Transfers, it could "bring [the] matter to the authorized court/arbitration against such unauthorized representative in order to request the court to consider and judge invalidity of such fabricated capital assignment transaction". Attached to the Due Diligence Report was a copy of the English translation of the Revised Charter. Thus, from July 2009 onwards, if not earlier, the Receiver and his advisers had access to the Revised Charter.

Litigation in the BVI courts

14 From 2009 to 2014, the Receiver investigated the matters that were raised in the Due Diligence Report, including by taking steps to locate the individuals involved and to scrutinise the Share Transfers. On 22 July 2014, when he considered enough material had been gathered, the Receiver commenced proceedings in the BVI courts on behalf of the respondent against the appellant and the Oung brothers ("the BVI Action"). In the statement of claim it filed in the BVI Action on the same day, the respondent alleged that it had been wrongfully deprived of its shareholding in the Vietnam Subsidiary. According to the statement of claim, the Oung brothers had breached their

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statutory and fiduciary duties and the appellant had dishonestly assisted the Oung brothers and knowingly received shares in the Vietnam Subsidiary to which it was not entitled and was thereby unjustly enriched. The respondent then applied for and obtained leave to serve the cause papers on the Oung brothers out of jurisdiction and also obtained an injunction restraining the appellant from disposing of its interest in the Vietnam Subsidiary ("the Interim Injunction").

15 The appellant received the cause papers on 13 October 2014 and filed its Acknowledgment of Service on 4 November 2014. On the relevant form, the appellant checked the "YES" box in response to the question as to whether it intended to defend the claim. However, no defence was ever filed.

16 Subsequently, the appellant and the Oung brothers filed separate challenges against the BVI court's jurisdiction on the ground of *forum non conveniens*. The appellant stated in its application (filed on 18 December 2014) that the BVI was not the natural or appropriate forum to hear the respondent's claim and that Malaysia or alternatively Vietnam would be the appropriate and convenient forum to hear the claim. The appellant amended its jurisdictional challenge on 26 January 2015 to include an application to discharge the Interim Injunction. The jurisdictional challenge was heard on 9 February 2015.

17 On 2 February 2015, before the jurisdictional challenge was heard, the respondent applied for leave to discontinue the BVI Action against the Oung brothers. Leave was granted on 9 February 2015. Thereafter, the BVI Action was only against the appellant.

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18 On 10 February 2015, the BVI court dismissed the appellant's jurisdictional challenge. In its decision, the BVI court explained that the appellant needed to show that some other jurisdiction was clearly or distinctly the appropriate forum, and doubted that this could be done as the appellant had put forward *two* different jurisdictions as alternative candidates. The BVI court held that it did not need to resolve this conundrum because in any event, the appellant had adduced no evidence to show that the respondent was entitled to commence proceedings against the appellant in either Malaysia or Vietnam as of right, nor had the appellant submitted to the courts of either jurisdiction.

Arbitration clause discovered and arbitration commenced

19 The Receiver takes the position that it was only at the end of February 2015, after the jurisdictional challenge had concluded and some seven months after the institution of the BVI Action, that he discovered the existence of Art 22, the arbitration clause. Two affidavits were filed in support of this position. The first affidavit was made by the Receiver who explained that he was not aware of the existence of Art 22 until it was brought to his attention by his lawyers towards the end of February 2015. This was corroborated by a second affidavit made by the respondent's counsel in the BVI proceedings ("the BVI counsel"), who took a similar position. She said that during February 2015, in the course of reviewing the documents filed by the appellant, "it came to the attention of the [respondent's] lawyers that the [Revised Charter] … contained an arbitration clause. This clause had not previously been noticed by any of the law firms instructed in this matter". However, we note that no affidavit was filed by the lawyers who *had* noticed Art 22, explaining how or why they had failed to spot Art 22 before the commencement of the BVI Action and the circumstances in which Art 22 was eventually spotted. The respondent

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also did not tender in evidence any correspondence between the parties that could have shed light on these issues. Further, in July 2014, the same BVI counsel had filed an affidavit in support of the injunction application which exhibited an English translation of the Revised Charter containing all the articles of the same including Art 22.

20 On 6 March 2015, the appellant filed a fresh application to discharge the Interim Injunction. The appellant argued, *inter alia*, that the Interim Injunction should be discharged because there was no serious issue to be tried.

21 On 10 March 2015, the respondent filed its Notice of Arbitration with the SIAC and the arbitration, known as SIAC Arbitration No 48 of 2015, was subsequently deemed to have commenced on 12 March 2015. In its Notice of Arbitration, the respondent took the same position as it did in the BVI court: that the Oung brothers breached their fiduciary duties by procuring the dilution of the respondent's shareholding in the Vietnam Subsidiary, and that the appellant was liable as knowing recipient or dishonest assistant or was unjustly enriched. Significantly, the respondent stated in its Notice of Arbitration that its case was "based on [the Revised Charter] adopted on 4 February 2008, at the direction of the Oung Brothers, as a foundation for their subsequent fraudulent dilution of the [respondent's] shareholding". The respondent took the position that the Revised Charter and the associated share transfers were invalid and sought, *inter alia*, a re-transfer of the shareholding in the Vietnam Subsidiary to the respondent.

22 The next day, 13 March 2015, the respondent wrote to the appellant, stating that although it challenged the validity of the Revised Charter as a whole, it accepted the existence and validity of Art 22, the arbitration clause, and would

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be seeking to rely on it. In the same letter, the respondent proposed that the BVI proceedings be stayed pending the outcome of the arbitration. The respondent took no concrete steps in this regard until 20 April 2015.

Further steps taken in the BVI proceedings

23 On 26 March 2015, the appellant applied to the BVI court for summary judgment in its favour or to strike out the BVI Action. The appellant submitted that the Receiver had no authority to institute the BVI Action and that there was no evidence of the Share Transfers. The appellant later amended its application to introduce a time-bar defence and to introduce further details of that defence.

24 In response, on 31 March 2015, the respondent asked to inspect certain documents that were referred to in the affidavit filed in support of the appellant's summary judgment application. The respondent's request was refused by the appellant on 17 April 2015.

25 On 20 April 2015, after the respondent's inspection request was refused and more than one month after the respondent initially filed its Notice of Arbitration, the respondent applied to the BVI court to stay the BVI Action in favour of arbitration. The application was heard by the BVI court on 18 May 2015. Judgment was reserved.

26 During this time, the arbitration proceedings were running in parallel. On 19 June 2015, the tribunal was constituted with a sole arbitrator. The appellant thereafter challenged the jurisdiction of the tribunal. In September and October 2015, the parties tendered their submissions on jurisdiction to the tribunal.

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27 On 28 October 2015, the respondent applied to the BVI court to extend the Interim Injunction. The terms of the application were that the Interim Injunction be continued (*ie*, in favour of litigation), or alternatively, that a fresh injunction should be granted against the appellant on the same terms pending the determination of the arbitration proceedings. Counsel for the respondent, Ms Yogarajah, confirmed during the hearing before us that the respondent's primary application had been for the Interim Injunction to be continued in support of litigation and the application for a fresh injunction in support of arbitration was an alternative prayer. The BVI court heard the appellant's application to discharge the Interim Injunction (see [20] above) and the respondent's application to extend the Interim Injunction on 3 November 2015. On 20 November 2015, the BVI court granted the appellant's application and discharged the Interim Injunction. The respondent appealed against this order on 11 December 2015 and the appellant filed a cross-appeal on 5 January 2016 in respect of some of the findings made by the BVI court.

28 In the meantime, the appellant applied to the BVI court in November 2015 for security for costs to be provided by the respondent in respect of the litigation. The BVI court granted the appellant's application on 20 January 2016 and ordered the respondent to pay security for costs into court within 21 days. The respondent did not pay in time and the BVI Action was struck out on 22 March 2016. It should be noted that no decision was ever made in respect of the respondent's appeal against the decision to discharge the Interim Injunction because the respondent's claim was struck out.

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The arbitration proceedings are challenged before the High Court

29 On 19 April 2016, the tribunal held that it had jurisdiction over the dispute. The appellant challenged that decision in the High Court by filing Originating Summons No 501 of 2016 on 19 May 2016. The appellant argued that the respondent could not take the position that Mr Oung Da Ming had no authority to enter into the Revised Charter while simultaneously relying on Art 22, the arbitration clause contained within the Revised Charter. The appellant also submitted that because of the unique nature of the respondent's challenge, the dispute between the parties did not fall within the scope of Art 22. The appellant further argued that the respondent's conduct in commencing the BVI proceedings and taking steps in the litigation even after the arbitration was commenced meant that it had waived its right to arbitrate, repudiated the arbitration agreement or was estopped from relying on the arbitration clause.

The decision below

30 The Judge dismissed the appellant's challenge and held that the tribunal had jurisdiction. The reasons for the Judge's decision are published as *BMO v BMP* [2017] SGHC 127 ("the Judgment"). First, the Judge considered the appellant's contention that the respondent could not rely on Art 22 while challenging the Revised Charter as a whole. The Judge agreed with the appellant but held that this issue was no longer live since the respondent's counsel had indicated during the hearing that the respondent would no longer contest the Revised Charter's validity in the arbitration (Judgment at [44]).

31 Second, the Judge rejected the appellant's submission that the dispute fell outside the scope of Art 22. The Judge characterised the dispute between the parties as one that pertained to the transfer of shares in a joint venture

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company, the Vietnam Subsidiary. She held that the dispute arose from the Revised Charter since that document, as the Vietnam Subsidiary's constitution, was part of the joint venture documentation. The Judge also noted that although two of the three Share Transfers occurred before the Revised Charter was entered into and concerned third parties who were not bound by the arbitration clause, this was not enough to displace the presumption that the parties wanted all disputes between them to be determined at a single forum (Judgment at [49]–[50] and [53]–[55]).

32 Third, the Judge rejected the appellant's contention that the respondent had waived its right to arbitrate. The Judge held that a party in the respondent's position could never waive its right to arbitrate. The respondent was the party in breach of the arbitration clause and in that sense the wrong-doer, whereas only an innocent party could waive its rights by election. In any event, the respondent did not waive its right to arbitration on the facts, because it did not have actual knowledge of Art 22 at the material time (Judgment at [74], [85] and [88]).

33 Fourth, the Judge did not agree with the appellant that the respondent had committed a repudiatory breach of the arbitration clause which the appellant had accepted. The Judge accepted that the respondent had breached the arbitration agreement by commencing the BVI Action, but held that this was not a repudiatory breach. The respondent had only commenced litigation because it was not aware of Art 22, and thus did not possess the necessary repudiatory intent (Judgment at [101]–[108]). In any event, the appellant did not accept the breach because it failed to take any steps in the BVI Action. Instead, the appellant had only challenged the BVI court's jurisdiction on the ground of

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forum non conveniens (Judgment at [115]–[117]).

34 Finally, the Judge held that the respondent was not estopped from relying on Art 22. As she did in relation to waiver, the Judge held that promissory estoppel could never apply to the respondent, the party in breach of the arbitration clause. In any event, the respondent's conduct was too equivocal to found an estoppel, and the appellant had not relied on the respondent's conduct to its detriment (Judgment at [124]–[127]).

Parties' cases

35 On appeal, the appellant advances all the arguments that it made in the court below except for the argument on estoppel.

36 First, the appellant argues that the respondent cannot "approbate and reprobate", in that it cannot rely on Art 22 while disavowing the Revised Charter as a whole. The respondent accepts that it cannot do both but submits that its concessions during the two hearings before the Judge means that this issue is no longer live. The appellant disagrees, contending that the concessions were equivocal. The appellant refers to a letter that its counsel sent to the respondent's counsel after the hearing, seeking to confirm that the respondent would withdraw its objections to the Revised Charter in the arbitration and would amend its Notice of Arbitration accordingly. However, the respondent's counsel replied stating that this was a matter to be handled by the respondent's counsel in the arbitration instead.

37 Second, the appellant submits that even if the respondent's concession was unequivocal, this concession is fatal to the issue of whether the dispute falls

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within the scope of Art 22. According to the appellant, the respondent's entire argument in its Notice of Arbitration was premised on the Revised Charter, and therefore there would be no dispute to be referred to arbitration if the concession were accepted. The appellant also puts forward the point that the appropriate dispute resolution clause cannot be Art 22, because the Revised Charter only concerns the Vietnam Subsidiary's internal operations.

38 Third, on the issue of waiver, the appellant submits that there is no reason in principle or authority why waiver by election should only be available to the innocent party. Rather, the doctrine should be applicable whenever any party is faced with choosing between two inconsistent courses of action. In this case, the respondent faced two inconsistent courses of action when it had the choice of whether to arbitrate or litigate the dispute. In relation to the doctrine of waiver by election, the appellant submits that either actual or constructive knowledge of the existence of the arbitration clause would be sufficient and that in this case the respondent possessed both. On actual knowledge, the appellant argues that the knowledge of either Mr Oung Da Ming or the Receiver could be attributed to the respondent. In any event, the respondent had constructive knowledge of Art 22 because the Revised Charter was registered with the Vietnamese authorities as the constitution of the Vietnam Subsidiary and this registration gave notice to the entire world. Further, since the respondent was in actual possession of the Revised Charter and was advised by at least five sets of lawyers on how it could be deployed in the BVI Action, the respondent must be held to have had constructive knowledge of the contents of the Revised Charter.

39 Finally, the appellant submits that the respondent committed a repudiatory breach of the arbitration clause when it pursued litigation in the

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BVI courts for many months without reserving its right to arbitrate. In the BVI Action the respondent also contested the validity of the Revised Charter, which contained the arbitration clause. This would have indicated to a reasonable person in the appellant's shoes that the respondent had abandoned its right to arbitrate. The appellant contends that it accepted this breach by participating in the BVI Action; its jurisdictional challenge on the ground of *forum non conveniens* was not fatal to a finding of acceptance, since the appellant had indicated that the more appropriate forum was either Malaysia or Vietnam, and did not endorse arbitration.

40 The respondent's arguments in response to the appellant's submissions on the four issues largely mirror the findings made by the Judge.

Issues

41 Based on the submissions, there are four issues before the court:

(a) whether the respondent's concession in the court below suffices to remove the inconsistency in its position, with the result that it can rely on the arbitration clause;

(b) whether the respondent committed a repudiatory breach of the arbitration clause and, if so, whether the appellant had accepted such repudiation;

(c) whether the respondent as the party in breach of the arbitration clause had the capacity to waive its right to arbitrate and, if so, whether it did so on the facts; and

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(d) whether the dispute falls within the scope of the arbitration clause.

42 Although the Judge addressed the issue of scope as a preliminary point before turning to the issues of waiver and repudiation, it is more germane in our view to address the issue of scope last. The first three issues concern the common point of whether the respondent can even rely on the arbitration clause in the first place, while the issue of scope operates on the basis that the respondent can rely on the arbitration clause, but asks whether the present dispute falls within the clause.

Issue 1: Whether the respondent's concession is sufficient to remove the inconsistency in its position

43 The Judge held, and the parties accept, that the respondent cannot rely on the arbitration clause while challenging the validity of the Revised Charter as a whole for lack of authority. Briefly, we consider that this position is correctly taken. Although the principle of separability generally insulates an arbitration clause from challenges to the underlying contract, it cannot shield the arbitration clause from a challenge that affects the underlying contract as a whole. One such example is an allegation that the entire contract was entered into without authority, because this amounts to saying that each and every clause within the contract, including the arbitration clause, was entered into without authority.

44 This issue therefore turns on whether the respondent maintains its challenge to the validity of the Revised Charter as a whole based on the lack of authority of Mr Oung Da Ming to adopt it on behalf of the respondent, as stated in its Notice of Arbitration. Although Ms Yogarajah's position during the

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High Court hearings on 6 and 13 February 2017 and in her correspondence with the appellant's counsel on 8 and 10 February 2017, may not have been clear enough, she clarified the respondent's position in no uncertain terms during the hearing before us: she stated that the respondent would not be challenging the validity of the Revised Charter either in the present proceedings or in the arbitration, in that the respondent accepted that Mr Oung Da Ming had acted with authority. Counsel for the appellant, Mr Philip Jeyaretnam SC, accepted before us that this clarification was sufficient for the appellant's purposes.

45 In our view, this resolves the inconsistency in the respondent's previous positions. Accordingly, we no longer need to deal with this ground of appeal. However, we note that the respondent's concession on this issue has a significant impact on its position in relation to the remaining issues. We turn now to address those issues.

Issue 2: Whether the respondent committed a repudiatory breach of the arbitration clause that the appellant accepted

46 We now turn to address the parties' submissions on the issue of breach. We are dealing with this issue before considering waiver, unlike the Judge, because it is based on the contract between the parties and the contractual relationship between them must be the first port of call in considering their rights and obligations and how their conduct affected the same. Only if contractual principles have no application would we then need to consider the applicability of other doctrines like waiver.

47 The Judge held that the respondent did not commit a repudiatory breach and, in any event, the appellant did not accept any such repudiation.

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48 The Judge accepted that commencing the BVI Action was a breach of the arbitration agreement, but noted that this would only be a repudiatory breach if repudiatory intent could be shown. The Judge held that repudiatory intent would not be lightly inferred, especially if there was a satisfactory explanation for the breaching party's conduct. From the Judgment it seems that the Judge accepted the respondent's explanation that it commenced litigation because it was unaware of its obligation to arbitrate. Even though the respondent did not discontinue the BVI Action after it commenced arbitration, the Judge considered that the respondent's conduct remained consistent with its decision to arbitrate the dispute, because the steps that it took in court were in support of the arbitration.

49 In any event, the Judge held that the appellant did not accept any repudiatory breach. The Judge considered that the appellant's participation in the BVI Action did not amount to a "step in the proceedings" and thus, the appellant did not accept the purported repudiation.

50 On appeal, the appellant submits that the respondent repudiated the arbitration clause when it commenced the BVI Action and stated in its statement of claim that on appointment of the Receiver the Oung brothers ceased to have authority to act on behalf of the respondent, which would have included entering into the Revised Charter that contained the arbitration clause. This repudiatory breach was then accepted by the appellant when it challenged the jurisdiction of the BVI court on the ground of *forum non conveniens* on 18 December 2014.

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Repudiation

51 Like any other contract, an arbitration agreement can be repudiated, giving the innocent party the right to accept the breach and bring the agreement to an end. In the context of arbitration agreements, one relevant factor to determine whether the breaching party has repudiatory intent is whether it has an explanation for commencing litigation other than its rejection of the arbitration agreement. If the breaching party can provide a satisfactory explanation, then, as the Judge explained, the court would be slow to infer repudiatory intent.

52 We would emphasise, however, that whether an agreement has been repudiated is an *objective* inquiry. A repudiatory breach consists of the "manifested intentions" of the breaching party, which a reasonable man in the position of the innocent party would take to indicate that the breaching party no longer intended to perform its contractual obligations (see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") at para 17.012). To that extent, any explanation given by the breaching party for commencing litigation is only relevant if it is manifested in the breaching party's conduct such that it would be apparent to a reasonable person in the position of the innocent party. Put another way, the breaching party cannot justify what would otherwise have been repudiatory conduct using an explanation that only it knew about and the innocent party would not have been able to infer.

53 In the present case, the Judge held, and Mr Jeyaretnam SC, counsel for the appellant, accepted, that the act of issuing court proceedings does not *per se* constitute a repudiatory breach of the arbitration agreement. Instead,

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Mr Jeyaretnam SC argued that the respondent had breached the arbitration clause in a repudiatory fashion because it had commenced the BVI Action and also maintained the BVI Action for some ten months without reserving its right to arbitration or otherwise limiting its claim in the BVI Action to ancillary matters.

54 We pause to observe that although Mr Jeyaretnam SC was content to accept that the commencement of the BVI Action alone was not sufficient to amount to repudiation and put his case on the basis that the respondent had commenced and maintained the BVI Action without qualification, it is strongly arguable that the commencement of court proceedings is itself a *prima facie* repudiation of the arbitration agreement. This is because parties who enter into a contract containing an arbitration clause can reasonably expect that disputes arising out of the underlying contract would be resolved by arbitration and indeed have a contractual obligation to do so. Thus, where court proceedings are commenced without an accompanying explanation or qualification and the relief sought will resolve the dispute on the merits, the defending party in the court proceedings is entitled to take the view that the party who commenced those proceedings ("the claimant") no longer intends to abide by the arbitration clause. It would, however, still be open to the claimant to displace this *prima facie* conclusion by furnishing an explanation for commencement of the court proceedings, either on the face of the proceedings themselves or by reference to events and correspondence occurring before the proceedings started which showed objectively that it had no repudiatory intent in doing so. But in the absence of any explanation or qualification, the commencement of court proceedings in the face of an arbitration clause is, in our view, sufficient to constitute a *prima facie* repudiation of the arbitration agreement.

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55 We find support for this proposition in the English case of *Sadruddin Hashwani v Nurdin Jivraj* [2015] EWHC 998 (Comm). There, the parties' joint venture agreement contained an arbitration clause which referred disputes under the agreement to a panel of three arbitrators. Some nine years after the joint venture agreement and after disputes between them had arisen, the parties entered into a separate agreement under which the same disputes would be sent to a sole arbitrator. Subsequently, the claimant sought to invoke the arbitration clause under the joint venture agreement. He denied that the arbitration under the separate agreement was an arbitration at all and instead said that it was a non-binding conciliation. After disputing the appointment of arbitrators under the joint venture agreement's arbitration clause to the Supreme Court, the claimant instituted another claim seeking to replace the sole arbitrator under the separate agreement, as the previous sole arbitrator had died. The court held that by actively relying on the arbitration clause in the joint venture agreement, the claimant had repudiated the arbitration clause in the separate agreement. While this case concerned the effect of arbitration proceedings, and not court proceedings, on an arbitration clause, we consider that the principle underlying the court's decision applies equally to both situations. Where a party has two methods of dispute resolution open to him, his reliance on one to resolve a dispute on the merits signifies that he does not intend to rely on the other to resolve the same dispute.

56 We note that there are a number of authorities that have expressed the contrary view, namely, that the commencement of court proceedings *per se* is insufficient to amount to the repudiation of an arbitration agreement. Many of these authorities, however, provide limited support for this proposition because it was agreed between the parties that this was the correct legal position and the

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cases did not turn on applying this rule. Thus, the various courts had no occasion to examine the merits of this proposition (see *BEA Hotels NV v Bellway LLC* [2007] EWHC 1363 (Comm) ("*BEA Hotels*") at [13]; *National Navigation Co v Endesa Generacion SA* [2009] EWHC 196 (Comm) at [113]–[114]).

57 The remaining authorities that expressly state this proposition can be traced back to the English case of *Rederi Kommanditselskaabet Merc-Scandia IV v Couniniotis SA (The "Mercanaut")* [1980] 2 Lloyd's Rep 183. There, the charterers of a ship commenced arbitration proceedings against the ship owners but were unsure of whether arbitration or litigation was the right course of action, given that the booking note contained an arbitration clause while the bill of lading contained a jurisdiction clause. This was of concern to the charterers since the limitation period for commencing court proceedings was about to expire. So when the owners refused the charterers' request for a time extension, the charterers had no choice but to commence court proceedings immediately. Counsel for the owners argued that by commencing proceedings in the Danish court, the charterers had repudiated the arbitration agreement. Lloyd J expressly rejected this argument, finding that because it was clear that the charterers only started court proceedings because the owners refused to grant a time extension, a reasonable person in the owners' position would not have thought that the charterers, by commencing court proceedings, had intended to repudiate the arbitration agreement (at 185). In our view, that finding was sufficient to displace any *prima facie* assumption that might have arisen from the commencement of court proceedings in breach of the arbitration agreement and it was not necessary for Lloyd J to go further and state that commencement of proceedings on their own could never be evidence of a repudiatory intent.

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58 In our view, the reasoning in *The Mercanaut* is, with respect, thin. The critical passage in that judgment is as follows (at 185):

> Mr Hirst, who appeared for the owners, submits that *by commencing proceedings in the Danish Court the charterers repudiated the arbitration agreement*, and that the owners accepted the charterers' repudiation by serving their defence and counterclaim in the Danish proceedings. …
>
> *I regret that I cannot accept that argument. The party to a contract does not repudiate it unless he evinces an intention not to be bound.* An arbitration agreement is no different in that respect from any other contract.
>
> …
>
> Mr Hirst conceded that to issue a protective writ would not by itself be a repudiation of the arbitration agreement. But it could, he said, amount to a repudiation if the party issuing the writ did not make his position clear. …
>
> I cannot agree with that submission. *It must be remembered that repudiation is something which is not lightly to be inferred. Where repudiation is inferred from conduct, the conduct must be clear and unequivocal.* The conduct in the present case falls far short of repudiation. …
>
> [emphasis added]

59 It can be seen from the foregoing passage that counsel for the owners had argued that the commencement of court proceedings in itself was repudiatory because the charterers, who issued the writ, did not make their position as to the arbitration clear when issuing the writ. Lloyd J rejected this argument on the basis that a party can only be found to have repudiated a contract if he evinces an intention not to be bound and that this intention should not be inferred from conduct that is anything short of unequivocal. Implicit in Lloyd J's reasoning is that issuing court proceedings is equivocal as to that party's attitude towards the arbitration clause, and thus such intention cannot be inferred.

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60 With respect, we doubt whether Lloyd J's approach is correct for the reasons stated at [54] above. In particular, we emphasise that a party to a contract that contains an arbitration clause is entitled to expect that disputes arising out of the said contract be arbitrated. Thus, if court proceedings rather than arbitration proceedings are commenced by the claimant in order to resolve such disputes, it is expected that the claimant would either furnish an explanation for doing so or qualify the scope of the court proceedings or the relief sought. The failure to do so naturally leads to the inference that the claimant no longer intends to be bound by the arbitration agreement.

61 *The Mercanaut* is cited in a number of legal texts as the basis for the proposition that the commencement of court proceedings *per se* is not repudiatory. For instance, it is stated in *Chitty on Contracts* vol 2 (H G Beale QC gen ed) (Sweet & Maxwell, 32nd Ed, 2015) ("*Chitty*") that the "resort to legal proceedings of itself [does not] constitute a repudiation of the arbitration agreement" (at para 32–051). Similarly, David St John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration* (Sweet & Maxwell, 24th Ed, 2015), which was referred to by the Judge (at [93]), states that a party "may repudiate the arbitration agreement by commencement of proceedings in court in breach of its terms, but such breach will only be repudiatory if done in circumstances that show the party in question no longer intends to be bound by the agreement to arbitrate" (at para 2–137).

62 These texts have in turn been cited in subsequent cases for the same proposition.

(a) In *Al Thani v Steven Steel Company Incorporated and Another* (28 June 1996) (Queen's Bench Division, Commercial Court, UK)

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("*Al Thani*"), the defendant and the claimant's company attempted to resolve a dispute relating to the supply of steel using London arbitration. When the tribunal asked for submissions on the issue of whether the claimant should be found personally liable, the defendant, in addition to making those arguments before the tribunal, also commenced court proceedings in Texas. The defendant, however, made clear that the court proceedings were not to be taken as a denial of the tribunal's jurisdiction, and explained that it had commenced court proceedings as it was unsure as to whether any arbitral award obtained against the claimant personally would be enforceable. In considering the issue of whether the defendant had repudiated the arbitration agreement, the court cited the above passage in *Chitty* with approval. It held that on the facts there was no repudiation since the defendant had a good reason for starting court proceedings, had communicated this reason to the claimant, and in any event had expressly reserved its position.

(b) *Al Thani* was cited in *AAY and others v AAZ* [2011] 1 SLR 1093, which was also referred to by the Judge (at [92]). There, Chan Seng Onn J approved both *Al Thani* and the passage cited from *Chitty* as representing the correct legal position (at [90]). In that case, however, the repudiatory act alleged was not the commencement of court proceedings, but rather a breach of confidentiality in respect of the arbitration.

63 The texts and cases that we have just referred to provide direct support for the proposition that the commencement of court proceedings *per se* is not repudiatory. Their conclusions are, however, premised on the reasoning in *The Mercanaut*. For the reasons that we gave at [54] and [60] above, we doubt

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that their approach is correct and are not inclined to adopt it.

64 We also note that there are a number of cases which appear to *indirectly* support the proposition established in *The Mercanaut* in the sense that they have been cited in academic works (such as *Chitty* and *Russell on Arbitration*) or other judicial decisions as examples of cases in which the proposition has been applied, even though none of these cases explicitly states that this is the applicable rule (see *eg*, *Lloyd and Others v Wright* [1983] 1 QB 1065 at 1071 ("*Lloyd v Wright*"); *World Pride Shipping Ltd v Daiichi Chuo Kisen Kaisha (The "Golden Anne")* [1984] 2 Lloyd's Rep 489 at 495; *Dubai Islamic Bank PJSC v PSI Energy Holding Company BSC* [2011] EWHC 1019 (Comm) ("*Dubai Islamic Bank*") at [61]; *Costain Limited v Tarmac Holdings Limited* [2017] EWHC 319 (TCC) at [96]; *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 at [96]).

65 In this second set of cases, however, the various courts did not expressly state whether the commencement of court proceedings in itself was a repudiatory breach, and in determining the question of repudiation, also considered not only the commencement of court proceedings but also additional facts relating to the parties' conduct. This makes it impossible to ascertain whether the various courts viewed the commencement of court proceedings as (i) an equivocal fact that did not by itself amount to repudiation and thus other facts were needed to determine whether there was repudiation, which supports the proposition in *The Mercanaut*; or (ii) a *prima facie* repudiatory breach which was then buttressed further or rebutted depending on the other facts available, which detracts from the proposition. Thus, we consider that these cases are of limited assistance when it comes to the question of deciding whether, as a matter

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of principle, the commencement of court proceedings *per se* amounts to a *prima facie* repudiation of an arbitration agreement.

66 For the foregoing reasons, we consider it strongly arguable that the commencement of court proceedings *per se* by a party who is subject to an arbitration agreement is *prima facie* repudiatory of such party's obligations under that agreement. Applying this approach to the present case, the respondent was bound to arbitrate all disputes arising from the Revised Charter by virtue of Art 22 of the same. Thus, when such a dispute arose, a reasonable person in the appellant's position would have expected the respondent to either commence arbitration proceedings, or commence court proceedings but at the same time make clear its position in relation to the arbitration. For instance, the respondent could have stated that it acknowledged the obligation to arbitrate but took the view that the dispute did not fall within the scope of Art 22, or that it only commenced court proceedings for ancillary relief in support of arbitration. The respondent did not do so but instead, in the BVI Action, sought substantive relief that would have resolved the dispute. Faced with the BVI Action, a reasonable person in the appellant's position would have concluded that the respondent no longer intended to abide by Art 22 of the Revised Charter.

67 However, because Mr Jeyaretnam SC did not put his case on the basis that the commencement of the BVI Action alone was repudiatory, we do not decide the case on this basis. Instead, we apply the approach taken by the Judge.

68 In our judgment, the respondent evinced repudiatory intent when it started the BVI Action and contended in its statement of claim that once the Receiver was appointed, "the powers and authority of the Oung Brothers to act

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on behalf of and bind the [respondent] as its directors ceased". To a reasonable person in the appellant's position, it would appear that the respondent had disavowed all documents and transactions that the Oung brothers entered into after the Receiver's appointment, including the Revised Charter and the arbitration clause therein. It was then for the respondent to furnish a satisfactory explanation as to why it took this course of action and why its actions could not be seen, objectively, as repudiatory.

69 The English case of *Downing v Al Tameer Establishment and another* [2002] 2 All ER (Comm) 545 is an illustration of how disavowal of a contract impacts an arbitration clause in the same. There, the claimant invented a process to separate crude oil from water and entered into a contract with the defendant for the latter to exploit the technology. The claimant later alleged that the defendant wrongfully failed to perform the contract and invited the defendant to appoint arbitrators to resolve the dispute pursuant to the arbitration clause within the contract. The defendant denied that any contractual relationship existed. The claimant then commenced court proceedings in Saudi Arabia on the basis that the defendant had repudiated the arbitration agreement. The Court of Appeal affirmed the lower court's decision that the defendant had repudiated the arbitration agreement because it had expressly denied any contractual relationship with the claimant and said that it had no intention of dealing with the claimant further (at [26]). Thus where a party to the arbitration agreement disavows the entire contract that contains the arbitration clause, it can be inferred that the intention was also to disavow the arbitration agreement specifically.

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70 Turning back to the present case, the respondent contended that it had indeed furnished an explanation for commencing the BVI Action and for wording its statement of claim as it had: it did not have actual knowledge of Art 22. In our view, this explanation is not satisfactory. First, as we noted at [19] above, it is a mere assertion that is not substantiated by affidavit evidence from the lawyers involved or evidence of the circumstances surrounding the discovery of Art 22. Second, even if we were to accept this explanation at face value, the alleged lack of knowledge was something that only the respondent was aware of. This ignorance was not manifested in the respondent's actions until much later. It would have been impossible for a reasonable person in the position of the appellant to have known that the respondent had commenced litigation only because it was ignorant of the arbitration clause. Thus, we are unable to accept the respondent's contention that, on an objective basis, it had no repudiatory intent because it had no actual knowledge of Art 22.

71 Our finding on this issue accords with the decided cases. We mention just three examples. In *BEA Hotels* (*supra* at [56]), the defendant commenced arbitration proceedings against the claimant in 2003 and then started court proceedings against the claimant and other parties in 2006. The claimant argued that the tribunal had no jurisdiction because the defendant repudiated the arbitration agreement by starting court proceedings. The court rejected this argument because the defendant made clear in its statement of claim that it was "expressly and specifically … disavow[ing] any claim of [the defendant] against [the claimant] which falls within the arbitration agreement" (at [23]). Because of this qualification, a reasonable person in the claimant's position would not have concluded that the defendant was abandoning its right to arbitrate.

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72 *BEA Hotels* was applied in the context of the repudiation of a jurisdiction clause in *Dubai Islamic Bank* (*supra* at [64]). In that case, the claimant had commenced court proceedings in Bahrain and carried on the same for 16 months in breach of an exclusive jurisdiction clause before it eventually commenced court proceedings in England. The English court held that there was no repudiatory breach of the exclusive jurisdiction agreement. The claimant's stated explanation for starting court proceedings in Bahrain and not taking steps to start proceedings in England was that it had to concentrate on identifying the location of certain assets and recovering them. The court accepted this explanation as satisfactory because it had been manifested in the claimant's conduct. The claimant had restricted the claim in Bahrain to the profit sum due to it and had not claimed the principal sum and had expressly referred in its claim to the right to bring separate proceedings in respect of the debt due (at [60]). The court concluded that because of this, a reasonable person in the defendant's shoes would have contemplated that other proceedings might be brought at a later stage (at [60]).

73 A similar conclusion was reached in *Lloyd v Wright* (*supra* at [64]). There, certain disputes between the parties, who were partners in a firm of solicitors, were referred to arbitration. The plaintiffs then issued a writ in the English court claiming substantially the same relief. Subsequently, the arbitrator consolidated the various arbitrations and made orders for discovery and inspection. On the question of whether the plaintiffs had repudiated the arbitration agreement, the court held that there was no repudiation because both parties had by their conduct made clear that they were accepting that the arbitration was still alive even after the writ was issued, for instance by accepting that the arbitrator could make procedural directions for the hearing,

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including fixing further hearing dates (at 1071B–C). Thus, it was *objectively* clear that the arbitration had not been abandoned.

74 In all three cases, the reason for the apparently repudiatory conduct on the part of the breaching party was communicated (directly or indirectly) to the innocent party and therefore a reasonable person in the innocent party's position would not have been able to conclude that the breaching party had intended to repudiate its contractual obligations. In contrast, in the present case, the reason for the respondent's conduct was a purely subjective one, *ie*, its own ignorance, and was not communicated to the appellant. Thus there would have been no basis for a reasonable person in the appellant's position to conclude that despite starting the BVI Action and in effect disavowing the contract that contained the arbitration clause, the respondent did not intend to abandon its right to arbitrate.

75 Although, as we explained above, it is not necessary for our decision, we are also satisfied that the respondent possessed actual knowledge of Art 22. While we agree with the Judge that it is necessary to point to the actual knowledge of an identified person in order to attribute that knowledge to the respondent, with respect we disagree with the Judge's finding that there was no person who had actual knowledge of Art 22 that could be attributed to the respondent. The Judge held that neither the BVI counsel nor the Receiver had the requisite actual knowledge that could be attributed to the respondent (Judgment at [88]–[89]). By reason of the developments before us it is not necessary for us to inquire into the knowledge of the BVI counsel or the Receiver. This is because the respondent's concession in relation to Issue 1 means the actual knowledge of Mr Oung Da Ming can be attributed to the respondent.

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76 It will be recalled that the respondent had withdrawn the challenge it had made to the validity of the Revised Charter on the basis that Mr Oung Da Ming was not authorised to sign it (see [44] above). In other words, the respondent now accepts that Mr Oung Da Ming was authorised to sign the Revised Charter on its behalf. Because of this acceptance, any knowledge on the part of Mr Oung Da Ming can be taken to be the knowledge of the respondent. Mr Oung Da Ming clearly had knowledge of the terms of the Revised Charter since he had signed off on a board resolution of the Vietnam Subsidiary on 20 December 2007, expressly approving the contents of the Revised Charter. Accordingly, the respondent also had actual knowledge of the terms of the Revised Charter, including Art 22.

77 As a response to this approach, the respondent submits that it is necessary for the appellant to go one step further and show, positively, that Mr Oung Da Ming had actual knowledge of the arbitration clause, for instance by pointing to a statement made by Mr Oung Da Ming to that effect. We do not accept this submission because to do so would severely undermine the efficacy of arbitration agreements. If the respondent is right, then each time a party enters into a contract containing an arbitration agreement, it would have to inquire into whether the agent or officer who signed the agreement on behalf of the counterparty had actual knowledge of the arbitration clause and obtain a statement from that person to that effect, or risk stymying future arbitration proceedings because of an assertion by the counterparty that despite being bound by the underlying contract, it did not have knowledge of the arbitration clause specifically. This would place too onerous a burden on contracting parties seeking to arbitrate their disputes and would run counter to our courts' approach towards arbitration (see Sundaresh Menon (ed), *Arbitration in*

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Singapore: A Practical Guide (Sweet & Maxwell, 2014) at para 2.002). It would also be completely contradictory to the well-established doctrine that a party who signs a document is deemed to know the contents of the same. In our view, a party who is bound by the underlying contract must also be taken to have actual knowledge of the contents of the same including any arbitration clause contained therein.

78 While we do not need to come to a conclusion on the point, we have some doubt regarding the Judge's finding that neither the BVI Counsel nor the Receiver had knowledge of Art 22. We consider it highly peculiar that despite the respondent exhibiting the English translation of the Revised Charter to the affidavit in support of the Interim Injunction, the respondent is now saying that it did not at that time have knowledge of Art 22 of the Revised Charter. The respondent's sole explanation is that its lawyers had failed to notice Art 22 in the course of its preparations. However, there was no explanation on affidavit by either the lawyer who had missed the clause or the lawyer who eventually spotted it. Instead, the respondent has only provided affidavits from the Receiver and the BVI counsel in which they stated that they had failed to notice the clause. But, as we noted at [19] above, this is unsatisfactory since neither the Receiver nor the BVI counsel was, ostensibly at least, the person involved in the initial mistake or the eventual discovery of the clause. It would also be recalled that the Revised Charter was furnished to the Receiver as an attachment to the Due Diligence Report in July 2009. This was some *five* years before the start of the BVI Action. The Due Diligence Report itself is full of references to the articles of the Revised Charter and went so far as to mention at para 6.2 the possibility of bringing an action against the "unauthorized representative" (meaning the Oung brothers) to "the authorized court/arbitration". It is indeed

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difficult to accept that during the five years in question none of the members of the Receiver's staff or his lawyers had sight of Art 22. There was no other evidence, such as e-mail correspondence between the respondent and its lawyers, that could shed light on why the clause was overlooked or the circumstances in which it was eventually discovered. It seems to us that it would not be unreasonable to impute knowledge of Art 22 to the Indochine Counsel who wrote the Due Diligence Report, the BVI Counsel and the respondent's other lawyers involved in the preparation of the BVI Action and therefore to the Receiver and the respondent.

79 In our judgment, the respondent has not done enough to displace the *prima facie* position that it should be taken to have actual knowledge of the clause by virtue of being bound by the Revised Charter. We also agree with the appellant that Mr Oung Da Ming had actual knowledge of Art 22 that could be attributed to the respondent.

80 For these reasons, we are persuaded that the respondent repudiated the arbitration agreement when it commenced the BVI Action *and* took an unequivocal position in its statement of claim as to the Oung brothers' lack of authority to bind it without reserving its right to arbitrate, although, as we have explained above, we think that the commencement of the court proceedings alone could have constituted a *prima facie* repudiatory breach. Its conduct in simultaneously applying for the Interim Injunction to support the BVI Action, considered objectively, was a clear indication as to why it considered litigation rather than arbitration to be worth pursuing. This is not the end of the matter, however, because for the repudiation to be operative the appellant must still show that it accepted the same. We turn to this next.

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Acceptance

81 The relevant legal principles are not in dispute. The innocent party, in this case the appellant, may elect to accept the repudiation and bring the contract to an end, or it may choose to reject the repudiation and affirm the contract. The decision to accept the repudiation is irrevocable; consequently, an innocent party is only taken to have accepted the repudiation if its words or actions clearly and unequivocally demonstrate this (*The Law of Contract in Singapore* at para 17.223). These principles apply equally to arbitration agreements which, in relation to repudiation, are no different from other species of contract.

82 In this case, the Judge concluded that the appellant's conduct did not amount to a "step in the proceedings" and therefore did not demonstrate "an unequivocal acceptance of any purported repudiation". With respect, we do not agree that an unequivocal acceptance must necessarily come in the form of a step in the proceedings. Although taking a step in the proceedings would clearly evince an unequivocal acceptance of the repudiation, the converse is not always true. For instance, if the innocent party had sent a clearly-worded letter to the breaching party noting that the latter had repudiated the arbitration agreement and purporting to accept the breach, this would be enough to communicate the innocent party's acceptance, even if no steps in the proceedings had been taken.

83 Furthermore, the authorities cited by the Judge in support of this proposition, including this Court's decision in *Carona Holdings Pte Ltd and others v Go Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460, specifically concerned s 6(1) of the Arbitration Act (Cap 10, 2002 Rev Ed). That provision provides

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that the party to an arbitration agreement who wishes to apply for a stay of court proceedings in favour of arbitration may only do so "at any time after appearance and before delivering any pleading or taking any other step in the proceedings". Thus, the authorities cited were only concerned with interpreting the specific phrase "any other step in the proceedings" contained in the legislation. In our view, the more pertinent inquiry in this case is whether the appellant's conduct – whether or not it constituted a step in the proceedings – clearly and unequivocally communicated its acceptance of the repudiation to the respondent.

84 Turning to the facts, the appellant contends that it accepted the repudiation when it challenged the BVI court's jurisdiction on the ground of *forum non conveniens*. In that challenge, the appellant had submitted that the appropriate forum would be either Malaysia or Vietnam. According to the appellant, this submission communicated its acceptance of the repudiation because it made clear that litigation, and not arbitration, was the appropriate dispute resolution mechanism.

85 We are unable to accept this submission because the appellant's jurisdictional challenge was not, in our view, sufficiently unequivocal. First, we consider that a *forum non conveniens* application is, in general, too equivocal to constitute acceptance of a repudiation of an arbitration agreement. Since the breach lies in the commencement of litigation, the acceptance of the breach must lie in accepting the court's jurisdiction and engaging it on the merits. However, the very nature of a jurisdictional challenge based on *forum non conveniens* is the opposite: the applicant disputes rather than accepts the chosen court's jurisdiction to hear the case.

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86 Second, we do not agree with the appellant that notwithstanding the nature of a *forum non conveniens* application in general, the appellant had in this case indicated that it accepted the breach by stating that the more appropriate forum was either Malaysia or Vietnam. As we see it, the appellant had simply stated that Malaysia and Vietnam were possible fora without committing to submit to the jurisdiction of either court. The result was that even if the BVI court had declined jurisdiction and the respondent had initiated proceedings in Malaysia or Vietnam, the appellant would still have been free to contest jurisdiction in the chosen forum on the basis of the arbitration agreement.

87 If the appellant had submitted to the jurisdiction of the courts of Malaysia or Vietnam, or had given an undertaking that it would submit to jurisdiction, such action might very well have constituted an unequivocal acceptance of the repudiation. The act of submission or the giving of an undertaking to submit to jurisdiction would have made clear that the appellant was serious about engaging the court process (albeit of another forum), instead of arbitration, to resolve the dispute. For instance, in *Rappo, Tania v Accent Delight International Ltd and another and another appeal* [2017] 2 SLR 265, this court held that the written undertakings provided by each of the appellants would have provided the Swiss courts with a firm footing on which to assume jurisdiction, even though the Swiss courts did not appear to have jurisdiction based solely on the relevant legislation (at [96]). While that case concerned a substantive *forum non conveniens* application, a written undertaking here would have been equally effective to demonstrate that the appellant had, in no uncertain terms, accepted that the respondent had abandoned arbitration and was itself content to proceed solely with litigation.

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88 For these reasons, we are unable to accept the appellant's contention that it had accepted the respondent's repudiation by challenging the BVI court's jurisdiction on 18 December 2014.

89 That does not dispose of the issue, however, as we take the view that the appellant had accepted the repudiation by its summary judgment application in the BVI Action on 26 March 2015 (see [23] above) which it served on the respondent. In that application, the relief sought was summary judgment in favour of the appellant and in the alternative, for the respondent's claim and statement of claim to be struck out. Unlike the *forum non conveniens* application, the summary judgment application clearly engaged the jurisdiction of the BVI court because it requested the BVI court to determine the claim on the merits. By this application, the appellant had unequivocally indicated to the respondent that it was willing to accept the latter's invitation to litigate rather than arbitrate the merits of the claim.

90 We note that the summary judgment application was filed some two weeks after the filing of the Notice of Arbitration on 10 March 2015 and the deemed commencement date of the arbitration (12 March 2015). Because of this, the Judge did not consider whether the summary judgment application could constitute acceptance. The Judge took the view that any act of acceptance must have taken place before the Notice of Arbitration was issued because past that point, the respondent no longer evinced any repudiatory intent that could be accepted.

91 With respect, we take a different view. Once a repudiatory breach has been committed, it persists and is capable of acceptance until the breaching party resumes performance of the contract and thus ends any continuing right

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in the innocent party to accept the repudiation (*Chitty on Contracts* vol 1 (H G Beale gen ed) (Sweet & Maxwell, 32nd Ed, 2015) at para 24–002). In this case, the act of breach was the initiation of the BVI Action on the basis of the unequivocal position taken in the statement of claim. Thereafter, the respondent could only resume performance of the agreement to arbitrate by discontinuing the BVI Action or, at the very least, filing an application to stay the proceedings. In this case, the Notice of Arbitration was not accompanied by any such application. The stay application was only filed on 20 April 2015 (see [25] above), by which time the repudiation had already been accepted.

92 It also does not assist the respondent that it had written to the appellant on 13 March 2015 "propos[ing] that the proceedings in the BVI be stayed pending the outcome of the arbitration" (see [22] above). This was a mere proposal and no steps were taken to carry out the proposal until more than a month later. Indeed, we note that the respondent *needed* the court proceedings to remain in place because its Interim Injunction was, at that point, still issued in support of the BVI Action. It was only on 28 October 2015, some seven months later, that the respondent sought a fresh injunction, on the same terms as the Interim Injunction, in support of the arbitration (see [27] above). Thus, it cannot be said that the respondent had resumed performance of the arbitration agreement simply by issuing a Notice of Arbitration and intimating that it intended to eventually stay the court proceedings. Instead, the respondent's conduct, taken as a whole, demonstrated that at least up to 26 March 2015, when the appellant filed the summary judgment application, it had wanted to keep the court proceedings afoot because it was reliant on them to keep the Interim Injunction in place. Accordingly, we hold, contrary to the decision below, that there was a repudiatory breach of the arbitration clause by the respondent and

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that the breach was accepted by the appellant.

Issue 3: Whether the respondent waived its right to arbitrate

93 On the issue of waiver, the Judge held that a party in the respondent's position could never waive its right to arbitrate. In the Judge's view, waiver by election could only be asserted when there was "an element of *choice* and only as a *response* (typically in relation to contractual breach)" [emphasis in original] (Judgment at [74]). On the facts of the case before her, the party in breach was the respondent who had not been put to election since the choice of whether to insist on arbitration lay with the appellant who in that respect was the innocent party (*ie*, in so far as it had not itself breached Art 22). In any event, the Judge held that even if waiver by election was possible, the respondent did not waive its right to arbitrate because it did not possess actual knowledge of Art 22 and therefore had not been presented with any choice.

94 On appeal, the appellant submits that there is nothing in principle or authority that permits only the innocent party to waive a legal right. The appellant further submits that the requirements of waiver by election, including knowledge, are met by the actions of the respondent.

95 While we agree with the Judge that waiver by election *typically* involves a response by the "waiving" party to the other party's breach of contract, this need not always be the case. A waiver by election can operate so long as a state of affairs arises in which a party becomes entitled to exercise a right, whether because the terms of a contract give it that right or the right arises by operation of the general law (see *The Law of Contract in Singapore* at para 18.089). Such a right need not always be exercisable upon breach. For instance, the right to

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assert litigation privilege, which is provided by the general law, can be waived even though its exercise is not premised on any breach. A similar situation arises where the contract itself gives one party a right that can be exercised upon the occurrence of a specific event, even though that event does not involve a breach of contract. Thus, we doubt that it is entirely accurate to say that waiver by election only applies to the "innocent party", since there may well be no breaching or innocent party in these situations.

96 Where, however, a party to an arbitration agreement breaches that agreement by starting court proceedings instead of arbitration in respect of a dispute covered by the agreement, the waiver analysis may not be applicable since one has to look to the agreement itself to discern the effect or potential effect of the breach. If, as would generally be the case, the breach operates as a repudiation and that repudiation has been accepted, as here, then considerations of waiver become wholly academic. It is only if the breach does not amount to a repudiation or the repudiation is not accepted that waiver may become relevant (and in that case only if the other party does not apply for the action to be stayed and the enforcement of the agreement to arbitrate, which would be the usual reaction of the objecting party). In that situation, the issue would be whether indeed the contract breaker had two rights to choose between such that he could waive one of them (*ie*, the element of choice remarked on by the Judge). It may be thought that by entering into the arbitration agreement, the contract breaker had given up his right to go to court and acquired a right cum obligation to arbitrate in its place. So he was not faced with a choice between two *rights*; rather his choice was between complying with his contractual obligations and breaking them. It is not necessary for us to embark on a discussion of this rather thorny issue in view of our finding on repudiation and we therefore leave it open

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to be decided at some future time when the appropriate facts present themselves. In passing we note that many of the cases cited to us have considered both waiver and repudiation and appear to take the view that both doctrines are potentially applicable when a party commences court proceedings in breach of an arbitration clause albeit without consideration of the thorny issue to which we have referred.

Issue 4: Whether the dispute falls within the scope of the arbitration clause

97 Our finding on the issue of repudiation means that the arbitration proceedings cannot go on by reason of want of jurisdiction. The issue of the scope of Art 22 was raised by the appellant as an alternative argument as to why the arbitral tribunal did not have jurisdiction over the dispute. In view of this Court's decision, that argument is now moot and need not be dealt with.

Conclusion

98 To summarise, we have found that the respondent had committed a repudiatory breach of the arbitration clause which was accepted by the appellant. It follows that the arbitral tribunal does not have jurisdiction over the arbitration proceedings known as SIAC Arbitration No 48 of 2015. The appeal is allowed and the orders below, including the costs order, made by the Judge are set aside.

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99 The parties shall make their submissions on costs, here and below, limited to 10 pages each within 14 days of this Judgment.

Sundaresh Menon	Judith Prakash	Tay Yong Kwang
Chief Justice	Judge of Appeal	Judge of Appeal

Philip Jeyaretnam SC, Paras Manohar Lalwani, Chua Weilin and Tan Ting Wei (Dentons Rodyk & Davidson LLP) for the appellant;
Yogarajah Yoga Sharmini, Subashini d/o Narayanasamy and Kannan s/o Balakrishnan (Haridass Ho & Partners) for the respondent.

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