IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC(I) 11

Originating Summons No 3 of 2019

Between

(1) BXY
(2) BYA
(3) BYB

… *Plaintiffs*

And

(1) BXX
(2) BXZ
(3) BYC

… *Defendants*

JUDGMENT

[Arbitration] — [Conduct of arbitration] — [Preliminary issues]

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BXY and others
v
BXX and others

[2019] SGHC(I) 11

Singapore International Commercial Court — Originating Summons No 3 of 2019
Roger Giles IJ
24 June 2019; 27 June 2019

19 July 2019 Judgment reserved.

Roger Giles IJ:

1 The plaintiffs are respondents in an arbitration. They applied to the Tribunal for an order that the first defendant, a claimant in the arbitration together with the other defendants, be struck out as a party, on the ground that it had assigned all its rights in the agreement containing the arbitration clause to the second defendant and so was not a proper party to the arbitration. The Tribunal dismissed the application.

2 This is an application for a decision of the High Court, pursuant to s 10(3) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA") and/or Article 16(3) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"), asking that the ruling "be reversed". The application was brought in the Singapore High Court, and was transferred to the Singapore International Commercial Court in its jurisdiction

to hear proceedings relating to international commercial arbitration (see s 18D(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed)) ("the SCJA").

3 For the reasons which follow, the application should be dismissed. The first defendant is a proper party to the arbitration and the Tribunal has jurisdiction to hear and determine its claims; and in any event, the application was brought out of time.

Background

4 The plaintiffs, Thai and Cambodian nationals, owned through a company and/or managed a business in Cambodia. In 2015 it was agreed that the business would be acquired by the first defendant, an Australian company. The transaction was structured as a transfer of the business to a new company incorporated by the second and third plaintiffs; and then a transfer of the shares in the new company to the second defendant, a wholly owned subsidiary of the first defendant, as the first defendant's nominee.

5 The parties to the share sale agreement ("the SSA") were the second and third plaintiffs as vendors and the first defendant as purchaser: the second defendant was not a party. The SSA contained a choice of law clause (cl 12) in favour of the laws of Singapore, and an arbitration clause (cl 11) providing for settlement of disputes by arbitration in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC").

6 In 2018, the first and second defendants commenced arbitration proceedings against the second and third plaintiffs, alleging breaches of non-compete and non-solicitation provisions in the SSA and associated other wrongs. The proceedings were consolidated with another arbitration

commenced by the new company, now the third defendant, against the first and second plaintiffs, alleging breaches of a management agreement entered into concurrently with the SSA. The consolidation explains the joinder of the first plaintiff and the third defendant in the present application, although the jurisdictional question does not concern them. As did counsel, I will refer globally to the plaintiffs and the defendants.

The challenge to jurisdiction before the Tribunal

7 In their Statement of Defence and Counterclaim, the plaintiffs asserted that the first defendant was not a proper party to the arbitration because it had vested "all its rights, title and interest in, under and/or pursuant to the SSA" in the second defendant, and was therefore no longer a party to the arbitration agreement in the SSA; nor was it a party to the management agreement.[1] This was duly denied by the defendants in their Reply.

8 By letter dated 7 December 2018, the plaintiffs applied to the Tribunal for an order that the first defendant "be struck out as a party to the Arbitration" because "all [its] rights and obligations under [the SSA] have been assigned to [the second defendant]". Submissions in support of the application were included in the letter.

9 The Tribunal gave directions for responsive submissions, which were provided by letters dated 21 December 2018 from the defendants and 4 January 2019 from the plaintiffs in reply.

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[1] Statement of Defence and Counterclaim (Amendment No. 1) of the respondents in SIAC ARB032/18/PLN at paras 21–25.

10 On 8 January 2019, the Tribunal issued its decision as Directions (2), dismissing the application.

This Application

11 Article 16 of the Model Law relevantly provides that an arbitral tribunal may rule on its own jurisdiction (Article 16(1)), that a plea that the tribunal does not have jurisdiction shall be submitted not later than the submission of the statement of defence (Article 16(2)), and:

> (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.

12 The IAA provides in s 3(1):

> **3.**—(1) Subject to this Act, the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore.

13 Chapter VIII is not presently relevant. Pursuant to s 8(1) of the IAA, the High Court in Singapore is taken to be the court specified in Article 6 for the purposes of Article 16(3).

14 Section 10 of the IAA relevantly provides:

> **10.**—(1) This section shall have effect notwithstanding Article 16(3) of the Model Law.
>
> (2) An arbitral tribunal may rule on a plea that it has no jurisdiction at any stage of the arbitral proceedings.
>
> (3) If the arbitral tribunal rules —
>
> (*a*) on a plea as a preliminary question that it has jurisdiction; or

> (*b*) on a plea at any stage of the arbitral proceedings that it has no jurisdiction,
>
> any party may, within 30 days after having received notice of that ruling, apply to the High Court to decide the matter.
>
> (4) An appeal from the decision of the High Court made under Article 16(3) of the Model Law or this section shall lie to the Court of Appeal only with the leave of the High Court.
>
> (5) There shall be no appeal against a refusal for grant of leave of the High Court.
>
> …

15 Although the application to the Tribunal was described as an application to strike out rather than a plea that the Tribunal did not have jurisdiction, it was not in dispute that a jurisdictional challenge was raised by the plaintiffs in conformity with Article 16(2) of the Model Law, and was ruled on as a preliminary question within Article 16(3) and s 10(3) of the IAA.

16 The plaintiffs applied to the High Court by an Originating Summons filed on 22 February 2019. A prayer that the arbitration be stayed until its final determination was not pursued. The substantive prayer was that:

> The Tribunal's ruling in [Directions (2)] … that [the first defendant] is a proper party to the Arbitration and therefore that the Tribunal has jurisdiction to hear [the first defendant's] claims in the Arbitration, be reversed[.]

17 The Originating Summons was filed more than 30 days after Directions (2) was issued, and the 30 days in Article 16(3) and s 10(3) was therefore in question. The plaintiffs also sought a declaration that the Originating Summons had been filed within the time prescribed under Article 16(3) and/or s 10(3) for appeal [*sic*] against the Tribunal's ruling on jurisdiction, or, alternatively, an extension of time and/or leave to file the Originating Summons out of time.

18 It was common ground that I should decide the present application *de novo*: see *BCY v BCZ* [2017] 3 SLR 357 at [36] and *BNA v BNB and another* [2019] SGHC 142 at [10] (the latter case having been decided after the hearing of this application).

The Issues

19 The issues in the application were:

(a) procedurally, whether the application was brought within the 30 days stated in Article 16(3) and s 10(3); and if not:

(i) whether there was power to extend the time; and

(ii) if so, whether the time should be extended; and

(b) substantively, whether the Tribunal had jurisdiction to hear and determine the first defendant's claims.

20 As earlier indicated, my decision of the procedural issues is adverse to the plaintiffs. In case I am incorrect, and there being provision for an appeal by leave (s 10(4) of the IAA), I consider that I should nonetheless decide the substantive issue. I will do so first.

Does the Tribunal have jurisdiction?

21 The SSA was preceded by an agreement dated 23 January 2015 and a supplementary agreement dated 22 May 2015. Amendments then led to a Deed of 18 June 2015, giving effect to the SSA as a Restated Share Sale Agreement.

22 The SSA recited that the vendors (the second and third plaintiffs) agreed to sell and the purchaser (the first defendant) agreed to purchase the shares in

the new company, for the consideration and on the terms and subject to the conditions therein. The operative clause, cl 3.1(a), was in like terms:

> 3.1 Sale and Purchase
>
> (a) Subject to the terms and conditions of this Agreement, each of the Vendors shall sell as beneficial owner, or shall cause the Shareholders to sell as beneficial owner and the Purchaser shall purchase the Sale Shares free from all Encumbrances and together with all rights and benefits now and hereafter attaching thereto.

23 The transfer of the shares to the second defendant was not expressly directed in the SSA, but was reflected in the conditions precedent in cl 2.1.

24 One condition precedent (cl 2.1(n)) was that the purchaser had obtained from the vendors undated share transfer documents completed for submission to the Cambodian Ministry of Commerce ("the Ministry") applying for, *inter alia*, "the registration of the transfer of the Sale Shares to [the second defendant]" and "the listing of [the second defendant] as the owners [*sic*] of the Sale Shares to satisfy the minimum number of shareholders and the ratio of shareholding as required by laws of Cambodia".

25 The other condition precedent (cl 2.1(o)) was:

> (o) the letter of designation where the Purchaser shall have irrevocably agreed, confirmed and declared [the second defendant] will be the registered owner of the Sale Share [*sic*], having been duly accepted by the Vendors[.]

26 To the same effect, cl 5.2 included that on completion, the vendors would ensure that there was provided to the new company, *inter alia*, a letter from the Ministry approving and/or confirming the registration of the transfer of the shares to the second defendant and its listing as owner of the shares satisfying the shareholding requirements.

27 Some days before completion, which took place on 1 July 2015, the first defendant provided a letter of designation dated 22 June 2015.

28 The letter was addressed to the second and third plaintiffs. It began by referring to the SSA "wherein you agreed to sell or cause to be sold to us the entire issued and paid up share capital of [the new company]", and then read:

> We do hereby irrevocably agree, confirm and declare as follows:-
>
> 1. We hereby nominate our wholly owned subsidiary, [the second defendant] to be the registered owner of the Sale Shares and vest unto [the second defendant] all of our rights, title and interest in, under and/or pursuant to [the SSA].
>
> 2. We further irrevocably request and authorize you to transfer all the Sale Shares to [the second defendant].
>
> In consideration of you executing or causing to be executed the transfer in respect of the Sale Shares to [the second defendant], we hereby irrevocably and unequivocally agree to indemnify you and keep you indemnified against all claims, demands, actions, losses and damages, costs and expenses whatsoever and howsoever that may be suffered or incurred by you, as a result of or in relation to our nomination pursuant to paragraph 1 above.
>
> The provisions of clause 9 (*Confidentiality*), clause 10 (*Miscellaneous*), clause 11 (*Dispute Resolution*) and clause 12 (*Governing Law and Jurisdiction*) of [the SSA] shall apply to this letter as if set out in full in this letter and as if any reference in those provisions to "this Agreement" included a reference to this letter.
>
> This letter shall be governed by, and construed in accordance with, the laws of Singapore.
>
> [emphasis added in underline]

29 The letter of designation bore two endorsements. One was by the second and third plaintiffs, that they "hereby acknowledge and agree to the terms of this letter and confirm that we shall execute or cause to be executed the transfer of the Sale Shares in favour of [the second defendant] pursuant to the terms of [the SSA] and this letter". The other was by the second defendant, that it

"acknowledge and accept the nomination by [the first defendant] pursuant to the terms of this letter, acknowledge and agree to the terms of this letter and confirm that we shall execute or cause to be executed the transfer of the Sale Shares to us pursuant to the terms of [the SSA] and this letter".

30 The plaintiffs' argument for assignment rested on the underlined words in the letter of designation, "and vest unto [the second defendant] all of our rights, title and interest in, under and/or pursuant to [the SSA]" ("the words of vesting"). They submitted that cl 2.1(o) of the SSA would have been satisfied by the preceding nomination of the subsidiary to be the registered owner of the shares and authority to transfer the shares to it; but the words of vesting went further, and must be given effect. Their effect, it was submitted, was an assignment to the subsidiary, being an assignment of more than rights to the shares and expressly of the rights, *etc*, under the SSA. The plaintiffs submitted that this constituted an absolute assignment in writing, through their endorsement made with notice to the second and third plaintiffs as vendors and so effective pursuant to s 4(8) of the Civil Law Act (Cap 43, 1999 Rev Ed). As a result, they said, the first defendant could not enforce any benefit under the SSA.

31 Some clarification is appropriate. At times the submissions spoke of enforcement of the non-compete, non-solicitation and like obligations in the SSA. Thus it was said that, having assigned away the benefit of those obligations, the first defendant was not a proper party to claims to enforce them. That, however, does not deny the Tribunal's jurisdiction; the Tribunal could still have jurisdiction to determine that the claims should fail because the first defendant was not entitled to enforce the obligations. What matters in this application is the arbitration clause, and the plaintiffs should be understood as contending that, because the first defendant had assigned away the benefit of

the arbitration clause, it was not entitled to submit its claims to arbitration and the Tribunal had no jurisdiction to determine them – even to determine that they should fail because the first defendant was not entitled to enforce the obligations.

32 The defendants did not submit that the arbitration clause survived, as between the first defendant and the second and third plaintiffs, despite an assignment of rights, *etc*, under the SSA to the second defendant. They submitted that, on their proper interpretation, the words of vesting in the letter of designation were a vesting in the subsidiary, as the first defendant's nominee, of the first defendant's right, title and interest in the shares acquired by it under the SSA, but no more. The SSA and all its rights, *etc*, including the right to invoke the arbitration clause, remained in favour of the first defendant.

33 It may be that the question of the scope and effect of the letter of designation is itself arbitrable: see the penultimate paragraph of the letter (at [28] above). If so, neither side took the point.

34 In my view, the defendants' submission should be accepted. The words of vesting are readily open to be understood, and should be understood, as if they read "and vest unto [the second defendant] all of our rights, title and interest in the Sale Shares in, under and pursuant to [the SSA]".

35 The SSA provides for the sale of the shares by the vendors to the purchaser; although the shares are to be transferred to the second defendant, the first defendant and it alone has the rights and bears the obligation under the SSA. This is repeated in the letter of designation, referring to the agreement to sell the shares "to us", that is, the first defendant. The purpose of the letter of designation was to nominate the second defendant as transferee of the shares,

and nothing in the SSA required or contemplated assignment of the first defendant's rights as purchaser under the SSA to its subsidiary.

36 The first defendant necessarily retained rights as purchaser after 22 June 2015, and on any view remained subject to obligations as purchaser. The plaintiffs accepted that there had not been a novation, and that the first defendant's obligations could not be and had not been assigned. It would not make sense for the first defendant to purport to assign its rights away while remaining subject to its obligations.

37 Thus, after 22 June 2015 and until completion, the first defendant was obliged (for example) to use its best endeavours to ensure fulfilment of the conditions precedent (cl 2.2), and was under the fundamental obligation of paying for the shares. After completion, it remained obliged to the second and third plaintiffs to do its part in fulfilling a number of conditions subsequent (cl 6 – for example, applying for certain permits and fulfilling a financier's conditions to enable release to the second and third plaintiffs of purchase money held in escrow). After 22 June 2015 the first defendant as purchaser remained entitled to performance by the second and third plaintiffs of their obligations, including using their best endeavours to ensure fulfilment of the conditions precedent and other matters reciprocal to payment for the shares (for example, provision of documents necessary for assessing stamp duty on the transfer of the shares (cl 5.2(f) and provision of a letter confirming no change in circumstances and currency of representations and warranties as at completion (cl 5.2(n)). The first defendant could terminate the SSA if documents required on completion were not provided or the vendors' obligations on completion were not fulfilled (cl 5.4). These rights, on which continuance of the transaction to completion could turn, had to remain in the first defendant.

38 Consistently with this, the endorsement of the second and third plaintiffs on the letter of designation, while stating agreement to its terms, then referred only to transfer of the shares to the first defendant. Similarly, while the endorsement of the second defendant also stated agreement with the terms of the letter of designation, it did no more than acknowledge and accept its nomination and refer to the transfer of the shares: it did not acknowledge or accept an assignment of the first defendant's rights, *etc*, under the SSA.

39 It may be accepted that the words of vesting were unnecessary for nomination of the second defendant as transferee of the shares, but they are quite explicable as reinforcement of that nomination and its effect. Clause 3.1 (set out at [22] above) refers to sale of the shares "together with all rights and benefits now and hereafter attaching thereto". By the nomination, the first defendant vested in the second defendant the title to, and its rights and interest in, the shares which it was entitled to receive as purchaser under the SSA. The subject of the vesting was the shares, not the SSA.

40 The plaintiffs' submissions included reference to cl 10.5(b) of the SSA. Clause 10.5(a) provided that the SSA would bind the parties' "successors and permitted assigns", and by cl 10.5(b):

> (b) Agreement May Be Assigned
>
> The Vendors agree that the benefit of any provision of this Agreement may be enforced by the beneficial owner for the time being of the Sale Shares. However, this Agreement cannot be assigned by the Purchaser to any third party unless:
>
> (i) the third party is a wholly owned subsidiary of the Purchaser;
>
> (ii) the third party is the Financier; or
>
> (iii) a prior written consent of the Vendors is given.

41 In the plaintiffs' submission, that the SSA could be assigned to a wholly owned subsidiary of the first defendant, or could be assigned with their consent, gave some support to understanding the words of vesting as an assignment.

42 On one view, the provision is against the plaintiffs because it purports to allow the second defendant, if beneficial owner, to enforce the benefit of the provisions of the SSA, so assignment was not necessary. Even if the ability to assign the SSA is accepted, however, I do not think cl 10.5 is of particular assistance in deciding whether the words of vesting were an assignment. That the SSA could be assigned says nothing about whether it was assigned.

43 The defendants sought some support from the second and third plaintiffs' subsequent offer of a business opportunity to the first defendant, in accordance with a right of first offer in cl 6.4 of the SSA; this, they said, was inconsistent with an assignment. The plaintiffs ventured in response that the second defendant was a claimant in the arbitration together with the first defendant, as if entitled to enforce the SSA, which was consistent with an assignment. The regard which may properly be had to the parties' subsequent conduct was not explored. It need not be. Not enough is known of the circumstances of the second and third plaintiffs' offer to make the conduct significant, and the joinder of the second defendant in the arbitration is best seen as a lawyerly covering of all bases.

Was the Application brought in time?

44 The answer turns on a finding of fact. Directions (2) was issued on 8 January 2019, but its receipt by the plaintiffs was contested. The plaintiffs said that they did not receive notice of Directions (2) until 8 or 9 February 2019. The defendants said that the plaintiffs received notice of Directions (2) on 8 January

2019, at the time it was issued by the Tribunal; or alternatively, on 15 January 2019 through words spoken at a procedural teleconference.

45 The time stipulation of 30 days after "having received notice of" the Tribunal's ruling is found in both Article 16(3) and s 10(3). The time stipulation is repeated in O 69A r 2(3) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"), relevantly providing that an application to appeal against the ruling of the arbitral tribunal under s 10(3) or Article 16(3) "shall be made within 30 days from the date of receipt by the applicant … of the arbitral tribunal's decision or ruling".

Notice on 8 January 2019

46 The parties referred to Article 3(1)(*a*) of the Model Law and Rule 2 of the SIAC Rules. By the former, a written communication is deemed to have been received if it is delivered to the addressee's mailing address and on the day it is delivered. By the latter:

> 2.1 For the purposes of these Rules, any notice, communication or proposal shall be in writing. Any such notice, communication or proposal may be delivered by hand, registered post or courier service, or transmitted by any form of electronic communication (including electronic mail and facsimile), or delivered by any other appropriate means that provides a record of its delivery. Any notice, communication or proposal shall be deemed to have been received if it is delivered: (i) to the addressee personally or to its authorised representative; (ii) to the addressee's habitual residence, place of business or designated address; (iii) to any address agreed by the parties; (iv) according to the practice of the parties in prior dealings; or (v) if, after reasonable efforts, none of these can be found, then at the addressee's last-known residence or place of business.

47 The parties' submissions were in terms of notice through deemed receipt because of delivery of Directions (2). It was not suggested that notice of Directions (2) was received in some other manner.

48 As next described, any delivery of Directions (2) was by email. It may be that the correct approach is not that of deemed receipt involving delivery of an email, and in particular it may be that an email is not a written communication delivered to a mailing address, or that Rule 2.1 distinguishes between delivery by hand, *etc*, and transmittal by electronic communication. I do not take this further, because I do not think it matters in this case whether it is asked whether Directions (2) was received, or whether it was delivered and so deemed to have been received. In what follows, I will refer only to receipt.

49 Directions (2) was an attachment to an email sent by the Tribunal on 8 January 2019 ("the Directions (2) email"). The plaintiffs did not dispute that the Directions (2) email was sent. They said that it was not received.

50 The Directions (2) email was one of many emails passing between the parties and the Tribunal. Directions given by the Tribunal in June 2018 included that correspondence between the parties and the Tribunal "shall normally be sent by e-mail, and copied to [AB], who acts as the Tribunal Secretary in this case".

51 A number of emails were in evidence. Emails from the plaintiffs to the Tribunal were copied to the defendants and emails from the defendants to the Tribunal were copied to the plaintiffs. Emails from the Tribunal were sent to the plaintiffs and the defendants. Many emails were also copied to a number of other persons at SIAC. These references to copying or sending to the plaintiffs and the defendants must be amplified. The parties did not stint in legal

representation. The plaintiffs engaged a firm PF. The defendants engaged a firm DF1, which engaged another firm DF2 as counsel. Within each firm the parties had teams of lawyers. The emails were sent to the email addresses of all members of the teams.

52 In accordance with this practice, the plaintiffs' letter of 7 December 2018 applying for the order striking out the first defendant as a party was copied to the addresses of two lawyers at DL1 and three lawyers at DL2. The Tribunal's first directions were given by an email of 11 December 2018 sent to the addresses of three lawyers at PF, two lawyers at DF1 and three lawyers at DF2, and copied to two persons at SIAC. One of the lawyers at DF2 emailed the Tribunal on the same day, copied to all the addresses of the other lawyers and SIAC persons, asking for adjustment of the timetable, and the Tribunal responded by an email of 12 December 2018 to the addresses of the same lawyers and persons with a modified timetable. The defendants' submissions of 21 December 2018 and the plaintiffs' submissions in reply of 4 January 2019 were copied to the addresses of the same lawyers and persons.

53 Then came the Directions (2) email on 8 January 2019, relevantly reading:

> Please find attached the Tribunal's Directions (2), dated 8 January 2019, which rules on the Respondents' Application for Striking Out …

54 A question of receipt of the Directions (2) email then arose.

55 On 8 February 2019, the plaintiffs emailed the Tribunal concerning certain preliminary issues, and in the email further asked that the striking-out application be decided before any exchange of requests to produce or steps thereafter in the arbitration. The Tribunal's response on the same day included,

"the Respondents are to note that the Striking Out Application has already been disposed of by the Tribunal in Directions (2) dated 8 January 2019".

56 Later on 8 February 2019, one of the plaintiffs' lawyers, CD, replied with an apology "for being unaware of this". He also stated:

> We have checked our records, and appear to have not received any notification of Directions No. 2 by way of email, only becoming aware of this a short while ago by reviewing the [D]ropbox folder. We once again apologise for our oversight, and humbly and respectfully request that any future directions or orders from the Tribunal also be circulated by email.

57 The Directions (2) email and these emails were sent or copied to the parties' lawyers and SIAC persons in the usual way. I interpolate that a Dropbox folder had been created, into which the Tribunal and the parties loaded documents and communications. It was not suggested that notice of Directions (2) had thereby been earlier received by the plaintiffs.

58 The Tribunal replied to CD on 9 February 2019, sending Directions (2) "which was circulated to parties on 8 January 2019". This email also was copied to the other lawyers and SIAC persons.

59 Apart from what CD said in the email of 8 February 2019, the plaintiffs led the following evidence concerning receipt of the Directions (2) email.

60 The third plaintiff gave evidence that, following the Tribunal's email of 9 February 2019:

> [PF] thereafter carried out internal checks and discovered that none of its lawyers had received the Tribunal's said email on 9 January 2019, or at all.

61 Another of the plaintiffs' lawyers, EF, gave evidence that upon being informed by the Tribunal's email of 9 February 2019:

> … [PF] carried out internal checks and discovered that neither me nor any of my colleagues had received the Tribunal's said email of 9 January 2019.

62 These deponents mistakenly referred to "the Tribunal's said email of 9 January 2019", EF's evidence curiously perpetuating the mistake when the error in the third plaintiff's affidavit had been pointed out by the defendants. There was no evidence from CD of his checking of the records, apparently on 8 February 2019 and prior to the checking to which the third plaintiff and EF referred, or from the third addressee in the plaintiffs' team of lawyers.

63 Counsel for the plaintiffs accepted that, application within the 30 days being in issue, it was for the plaintiffs to satisfy the Court that notice of Directions (2) had not been received by the Directions (2) email. The plaintiffs relied on the apparent unawareness in CD's email of 8 February 2019 concerning the decision of preliminary questions; on CD's email later that day stating that "we" had checked the records and "appear to have not received" a notifying email; and on the evidence of the third plaintiff and EF. They described non-receipt of the Directions (2) email as an anomaly, and said that:

> … in the limited context of electronic communications, it is difficult to point to reasons behind glitches … [and the Court should not] prejudice the would-be recipient of a notice due to technical or other errors beyond their control. …

64 There was no evidence or suggestion of non-receipt of any of the many other emails to which I have referred. As the defendants submitted, the history of successful emailing, including the emails concerning the application to strike out the first defendant as a party, called for explanation of a failure in the one email of 8 January 2019 to which Directions (2) was attached. That is all the more so when the Directions (2) email responded in a chain to the plaintiffs' email of 4 January 2019 providing their submissions in reply. The Directions

(2) email had been duly received by the defendants' lawyers (they told their client of the dismissal), and the plaintiffs called no evidence that the Directions (2) email had not been received by AB or the SIAC persons.

65 There was no evidence to explain a failure in the electronic transmission to the plaintiffs' lawyers alone, for example a slip in the addressing in the email, or explaining how a glitch could occur and prevent receipt of the one email by the addressees at PF. The suggestion of a glitch was not assisted by more direct evidence of non-receipt. The third plaintiff cannot be taken to have had knowledge beyond what he was told by the plaintiffs' lawyers. Of the plaintiffs' lawyers to whom the Directions (2) email was addressed, only EF gave evidence; in particular, CD did not give evidence backing up what he had said in his email of 8 February 2019. EF's evidence was of checking by the firm, not herself – it was not forthright evidence that she did not receive the email as addressee. And the checking to which EF referred was not amplified – not what was done, and not whether it (or any subsequent investigation) revealed a glitch in the firm's email reception as a whole or, perhaps remarkably, in receipt of the Directions (2) email alone.

66 The assertions of checking, without direct evidence of non-receipt from the lawyers in the plaintiff's team to whom the email was addressed, and of non-receipt without evidence explaining how the "anomaly" (the plaintiffs' word) could have occurred, are not persuasive. CD may not have been conscious of Directions (2) at the time of his first email of 8 February 2019 concerning the preliminary issues, but receipt of the Directions (2) email is a different matter. On the evidence before me, I am not satisfied that the Directions (2) email was not received, and find that it was received on 8 January 2019. It follows that the plaintiffs' application was not brought within time.

Notice on 15 January 2019

67 For completeness, I go to the defendants' alternative argument.

68 A procedural teleconference was held on 15 January 2019. The participants included four of the plaintiffs' lawyers and four of the defendants' lawyers.

69 In the course of the teleconference there was mention of the "costs of the application". The accounts of this in evidence were sketchy. One was that one of the defendants' lawyers raised the issue of the "costs of the application", but did not mention Directions (2) or specify what the costs related to. Another was that the lawyer "indicated that the Defendants intend[ed] to address the issue of costs in respect of the Respondents' Applications, and intended to write on this thereafter". The third was that the lawyer informed the Tribunal "to expect a letter from [DF2] addressing the issue of costs in respect of the Plaintiffs' application that had been argued by way of written submissions and recently ruled upon by the Tribunal". On all accounts, the Tribunal indicated that it would deal with the costs of interlocutory applications at the end of the arbitration, and the matter was not pursued.

70 It is not clear whether the part of the third account from "that had" onwards was what was said, or the deponent's explanation. Having regard to all accounts I think the latter, and that the application was not referred to as one which had been argued and recently ruled upon. On any of the accounts, there was no explicit reference to Directions (2).

71 The defendants submitted that, the application to strike the first defendant out as a party being the only outstanding interlocutory application, this notified the plaintiffs that the application had been decided and amounted

to notice of Directions (2). I do not agree. What was said was reasonably to be understood (and on the plaintiffs' evidence was understood) as anticipating dealing with costs once the application had been decided. It did not inform the plaintiffs that there had been a ruling, let alone what the ruling was. It was not notice of the Directions (2) ruling for the purposes of Article 16(3) or s 10(3).

Is there power to extend time?

72 In their written submissions the plaintiffs relied only on an inherent power, referring to O 92 r 4 of the ROC:

> **4.** For the avoidance of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

73 Referring to *Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others* [2013] 1 SLR 636 ("*Astro*") at [119]–[120], the plaintiffs submitted that an extension of the 30 days should be granted, remedying their "procedural breach", in order to prevent injustice. They pointed to *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] SGCA 33 ("*Rakna*"), in which a respondent which chose not to participate in an arbitration because it objected to the Tribunal's jurisdiction was able to rely on lack of jurisdiction in setting aside proceedings after the issue of the final award, although it had not applied under Article 16(3) or s 10(3) following a preliminary decision on jurisdiction. The submission, as I understand it, was that this case, and *Astro* on appeal (*PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 ("*PT First Media*")), supported a less stringent approach to expedition and finality through the 30-day time limit.

74 I will return to the inherent power, but first address power otherwise to extend time.

75 The Model Law, as given the force of law in Singapore, makes no provision for extension of time. Article 5 provides that "in matters governed by [the Model Law], no court shall intervene except where so provided in [the Model Law]", and Article 16(3) does not allow for any extension of the 30 days. The position is akin to that of the three-month time limit for an application under Article 34(3) of the Model Law, as to which Judith Prakash J (as she then was) said in *ABC Co v XYZ Co Ltd* [2003] 3 SLR(R) 546 ("*ABC Co v XYZ Co Ltd*") at [9]:

> … It appears to me that the court would not be able to entertain any application lodged after the expiry of the three-month period as art 34 has been drafted as the all-encompassing, and only, basis for challenging an award in court. It does not provide for any extension of the time period and, as the Court derives its jurisdiction to hear the application from the article alone, the absence of such a provision means the Court has not been conferred with the power to extend time.

76 Article 34(3) states that an application "may not be made" after three months. Article 16(3) is not in similarly prohibitory terms, stating that request may be made within three months. The effect is the same, perhaps more clearly so in Article 16(3) in which the conferral of jurisdiction to hear the application includes that the request is made within the 30 days: that is the source of the jurisdiction. In *teleMates Pty Ltd v Standard SoftTel Solutions Pvt Ltd* (2011) 257 FLR 75 at [53], to which the defendants referred, it was held in the Supreme Court of New South Wales that the scheme established by the Model Law makes no provision for the period in Article 16(3) to be extended and the Court could not intervene where the request was not made in time.

77 Having regard to Article 16(3) alone, the time cannot be extended. I do not think the plaintiffs seriously submitted otherwise.

78 At the hearing, attention was drawn to the power to extend time in cl 7 in Schedule 1 to the SCJA, recently considered by Anselmo Reyes IJ in *BXS v BXT* [2019] SGHC (I) 10 ("*BXS v BXT*"). Supplementary written submissions were invited, and were received.

79 Section 18(2) of the SCJA gives the High Court the powers set out in Schedule 1. Clause 7 in the Schedule states:

> 7. Power to enlarge or abridge the time prescribed by any written law for doing any act or thing or taking any proceeding, whether the application therefor is made before or after the expiration of the time prescribed, but this provision shall be without prejudice to any written law relating to limitation.

80 Does this permit extension of the 30 days in Article 16(3), or in s 10(3) if it can be seen as an independent basis for application to the High Court (which was touched on in the hearing but need not be considered), as a time prescribed by a written law?

81 In *BXS v BXT*, Reyes IJ held that it did not permit extension of the three-month time limit for an application under Article 34 of the Model Law, because Article 34 was "relating to limitation" within the proviso in cl 7. By reference to the decision of the Court of Appeal in *Obegi Melissa and others v Vestwin Trading Pte Ltd and another* [2008] 2 SLR(R) 540 ("*Obegi*"), the question was one of its substance: whether the Article extinguished a right of action rather than imposing a deadline for taking a procedural step. In providing that an application to set aside an award "may not be made" after three months, it imposed a mandatory limit, and once the three months had expired, the right to apply to set aside the award was extinguished or lost. Adopting the analysis of

Prakash J in *ABC Co v XYZ Co Ltd* at [19], in which her Honour equated an application to set aside an arbitral award with the bringing of a cause of action, his Honour considered that cl 7 could not be used to revive the right which had been lost.

82 As earlier noted, Article 16(3) is not in the prohibitory terms of Article 34(3); similarly, neither is s 10(3) of the IAA. The plaintiffs submitted that their terms are permissive ("may request, within thirty days"/"may, within 30 days … apply"); that in *BXS v BXT* at [37], Reyes IJ had particularly considered that Article 34(3) imposed a mandatory limit; and that Article 16(3) and s 10(3) were to be seen differently. They said (with reference to *Obegi* at [34]) that the language of permissiveness and lack of any contrary intention left it open to the Court to extend time, such that s 10(3) should be understood as "may, within 30 days … or within such other time as the Court may so direct, apply …" (and Article 16(3) should be correspondingly understood). They further submitted that Prakash J had been "too absolute" in equating an application to set aside an arbitral award with bringing of a cause of action, and that an application under Article 16(3) or s 10(3) was in substance an appeal, albeit to be heard d*e novo* (and Prakash JA (as her Honour had then become) had referred to it as an appeal in *Rakna*); thus, they said, the time limit was to be seen as imposing a procedural deadline which could be enlarged.

83 While Article 16(3) and s 10(3) are in different terms from Article 34(3), that does not mean that their substance is different. As was said in *ABC Co v XYZ Co* at [9], cited at [75] above, the Court derives its jurisdiction to hear an application to set aside an award from Article 34(3); similarly, it derives its jurisdiction to hear an application to decide a jurisdictional matter from Article 16(3) or s 10(3). Article 34(3) conditions the right to apply upon timely application by the prohibitory "may not be made", hence the reference to the

time limit as mandatory, and the equation with "the bringing of a cause of action". But Article 16(3) and s 10(3) are even more definite in conditioning the right to apply upon timely application. The statements that the party "may request, within 30 days after having received notice of that ruling", or "may, within 30 days after having received notice of that ruling, apply", tie the right to request or apply to the time within which it can be made. When the Court derives its jurisdiction from timely application and the time has passed, application cannot be made: the right is lost.

84 It is not to the point, then, that Article 16(3) and s 10(3) use the permissive "may" rather than the prohibitory "may not". These are different ways of conditioning the right to apply upon timely application, and there is no warrant for reading into the provisions "or within such other time as the Court may direct". A right so conditioned is extinguished or lost once the 30 days has passed.

85 I do not accept the plaintiffs' submission that the time limit is procedural because the application is in substance an appeal. It is not an appeal within the curial system and thereby open to the Court's procedural control. The provisions say no more than that the Court shall "decide the matter", and the Court decides the matter in its original jurisdiction: to repeat, a jurisdiction derived from Article 16(3) or s 10(3), which make no provision for extension of time; and the equation of making an application with bringing a cause of action is in my view sound. The language of reversal and appeal in the Originating Summons was not apt, and the references to "appeal" in *Rakna* should be seen as convenient shorthand.

86 In my view, Article 16(3) and s 10(3) are "relating to limitation" within the proviso in clause 7. Clause 7 does not permit extension of the 30 days.

87 As was Reyes IJ (see *BXS v BXT* at [40]), I am fortified in this conclusion by considerations of certainty and finality in the arbitral process. I note that, although in a different context, in *PT First Media* Sundaresh Menon CJ observed at [130]:

> … 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. … [emphasis in original]

88 In *BXS v BXT* there was mention also of O 69A r 2 of the ROC, which repeats the time stipulation. Order 3 r 4(1) of the ROC provides that the Court may, on such terms as it thinks just, "by order extend or abridge the period within which a person is required or authorised by these Rules ... to do any act in any proceedings". But a power to extend time under a Rule cannot overcome a time limitation in primary legislation; and in any event, the 30 days in Article 16(3) and s 10(3) is not a period within which an applicant is required to do an act in proceedings, but a time limit for commencing the proceedings.

89 I return to the inherent power. In the light of the preceding discussion, it does not avail the plaintiffs. The court does not have an inherent power to extend the time for invoking its jurisdiction, when the jurisdiction is denied to it.

90 *Astro* at [119]–[120], to which the plaintiffs referred, does not say otherwise. The mention of O 92 r 4 related to extension of the time in O 69A r 2(4) for challenging an award under s 24 of the IAA, but s 24 does not stipulate a time limit. The point was made at [119] that "*unlike the IAA*, the ROC is subject to a savings provision, namely O 94 r 2 ..." [emphasis added]. The ability to raise a jurisdictional challenge in *PT First Media* has no bearing on the

present case, and the ability in *Rakna* was founded on, and confined to, non-participation of the party in the arbitration (see in particular *Rakna* at [72]–[77]).

Should time be extended?

91 Extension of the time does not arise. I should say, however, that it is difficult to see why time should be extended. On my finding that the Directions (2) email was received on 8 January 2018, it must have been not noticed or not acted upon for reasons which, since the plaintiffs' case was that it had not been received, have not been explained. In the absence of explanation, the exercise of a relieving power to prevent injustice is hardly attracted.

Orders

92 The Originating Summons is dismissed. Ordinarily, costs will follow the event. I order that the plaintiffs pay the defendants' costs, but with liberty to apply should either side seek a different or further order as to costs. The liberty to apply is exercisable within 14 days and may be exercised by letter to the Registry. If it is exercised, directions will be given for dealing with costs.

Roger Giles
International Judge

Palmer Michael Anthony, Reuben Tan Wei Jer and Chen Yi-Tseng (Quahe Woo & Palmer LLC) for the plaintiffs;
Francis Xavier S/O Subramaniam Xavier Augustine SC, Tan Hua Chong, Edwin, Tee Su Mien and Ang Tze Phern (Rajah & Tann Singapore LLP) for the defendants.