IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 249

Originating Summons No 853 of 2019

In the matter of Section 15 of the Legal Profession Act
(Cap 161, 2009 Rev Ed)

And

In the matter of Originating Summons No 685 of 2019

And

In the matter of an application by Matthew Peter Gearing, Queen's Counsel of England

Matthew Peter Gearing

… *Applicant*

JUDGMENT

[Legal Profession] — [Admission] — [*Ad hoc*]

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Re Gearing, Matthew Peter QC

[2019] SGHC 249

High Court — Originating Summons 853 of 2019
Steven Chong JA
4 October 2019

18 October 2019 Judgment reserved.

Steven Chong JA:

Introduction

1 Any application to admit foreign senior counsel under the *ad hoc* admissions regime prescribed by section 15 of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("the Act") is predicated, *inter alia*, on the complexity of the case to warrant the admission. If the issues which are engaged by the case in question are within the competence of local counsel, it would be impermissible to overstate the complexity in order to justify the admission.

2 This admission application was filed in response to an action brought by a party to an arbitration agreement who had failed in its jurisdictional challenge against the arbitration. Various jurisdictional objections were raised but were dismissed by the tribunal. In its decision on jurisdiction, the tribunal disposed of the objections, *inter alia*, "by the plain and textual reading" of the relevant instrument which it described as "unusually clear". However, in the applicant's quest to satisfy the admission criteria, the issues have been described as

"complex", "significant", "completely novel" and of "potential precedential value"[1] notwithstanding the tribunal's contrary assessment *in favour* of the party whom the applicant is seeking to represent. Instead, one would expect that it would intuitively be in the interest of the putative party who is seeking the admission to show that the tribunal's decision was correctly decided on the strength of clear and settled principles of law. Ultimately, it is for the court hearing the admission application to fairly and objectively assess the complexity, *if any*, of the issues irrespective of the parties' subjective perceptions.

Procedural history

3 This is an application under s 15 of the Act for the applicant, Mr Matthew Peter Gearing QC ("Mr Gearing") to be admitted to represent the defendant in Originating Summons No 685 of 2019 ("OS 685").

4 The plaintiff in OS 685 seeks to set aside a decision on jurisdiction arising from an investor-state arbitration ("the Arbitration") which was commenced pursuant to a bilateral treaty ("the Bilateral Treaty") and the 2013 Arbitral Rules of the United Nations Commission on International Trade Law ("the UNCITRAL Rules").[2] The Arbitration has its legal seat in Singapore.[3]

5 On 23 September 2019, shortly before the hearing, the Deputy Registrar of the Supreme Court ordered that OS 685 be transferred to the Singapore

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1 Applicant's Written Submissions ("Investor's Submissions"), dated 26 September 2019, at paras 79, 91, 100, 101, 106; 1st Affidavit of Monisha Cheong Rui Ying ("MCRY 1st Affidavit"), dated 5 July 2019, at para 42, and p 24.

2 Tribunal's Decision, at [3].

3 Tribunal's Decision, at [14].

International Commercial Court ("SICC") pursuant to O 110 rr 12 and 58 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court"). OS 685 was therefore converted to SICC Originating Summons No 8 of 2019. However, for ease of reference, I will refer to the suit before the SICC as "OS 685".

Factual background

6 The defendant is an investor ("the Investor") in the plaintiff, which is a foreign State ("the State"). The Investor and one of the plaintiff's constituent states entered into a Memorandum of Understanding ("MOU") regarding the Investor's investment. Some years later, the State entered into the Bilateral Treaty, under which the Investor seeks to bring its Arbitration claims. The Investor relies in particular, upon clauses that are typical of these sorts of treaties known as a fair and equitable treatment clause ("the FET clause") and an umbrella clause ("the umbrella clause").

7 The Investor's claims in the Arbitration are for certain payments due and owing pursuant to certain certificates ("the Certificates")[4] under the MOU.[5] However, as the Investor had not been paid the sums under those Certificates, it commenced the Arbitration proceedings on 23 February 2017 pursuant to the Bilateral Treaty and the UNCITRAL Rules. On that same day, the Investor also nominated its party-appointed arbitrator.

8 I pause here to note that it is of no small significance that the defendant in OS 685 (the Investor, and who is the party seeking to admit Mr Gearing) is

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4 Tribunal's Decision, at [148].

5 Tribunal's Decision, at [56].

the *claimant* in the underlying Arbitration, while the plaintiff in OS 685 (the State) is the defendant in the Arbitration.

9 On 1 May 2017, the Investor wrote to the Secretary-General of the Permanent Court of Arbitration ("PCA") to appoint the State's party-appointed arbitrator and the presiding arbitrator of the arbitral tribunal. There were some difficulties with the State's initial nominee for its party-appointed arbitrator. Eventually, on 31 October 2017, the PCA confirmed the State's party-appointed arbitrator. On 3 November 2017, using the list procedure in Art 8(2) of the UNCITRAL Rules, the Secretary-General of the PCA appointed the presiding arbitrator ("the Presiding Arbitrator") and the Arbitral tribunal ("the Tribunal") was constituted.

10 The State objected to the Tribunal's jurisdiction. It raised, among other things, four objections:

(a) First, the Tribunal was improperly constituted under the procedure prescribed in the Bilateral Treaty read with the UNCITRAL Rules ("the first objection");

(b) Second, the Investor's claims were barred under the Bilateral Treaty, as the Investor's subsidiaries have raised similar claims in the foreign State's court ("the second objection");

(c) Third, the Investor's claims are time-barred under the Bilateral Treaty ("the third objection"); and

(d) Fourth, the Investor's claims are contractual in nature under the MOU and subject to an exclusive jurisdiction clause under the MOU

that prevents it from commencing the proceedings in the underlying Arbitration ("the fourth objection").

11 Mr Gearing was the lead counsel before the Tribunal for the jurisdictional hearings. On 29 April 2019, the Tribunal rendered a 131-page decision ("the Decision") unanimously rejecting the State's objections and affirming its own jurisdiction to hear the Investor's claims. In OS 685, the State applied to set aside the Decision.

12 The present application is for Mr Gearing to be admitted to represent the defendant in OS 685 ("the Investor") and to urge the court in OS 685 to affirm the Tribunal's decision on jurisdiction.

The ad hoc admissions regime

13 In an application to admit a foreign senior counsel under s 15 of the Act, the court undertakes a two-stage sequential inquiry: see *Re Wordsworth, Samuel Sherratt QC* [2016] 5 SLR 179 ("*Re Wordsworth*") at [24]–[26]. Under the first stage of the inquiry, the court considers the statutory requirements as set out in s 15 of the Act, which states:

> **Ad hoc admissions**
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> **15.**—(1) Notwithstanding anything to the contrary in this Act, the court may, for the purpose of any one case, admit to practise as an advocate and solicitor any person who —
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> (*a*) holds —
>
> (i) Her Majesty's Patent as Queen's Counsel; or
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> (ii) any appointment or equivalent distinction of any jurisdiction;
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> (*b*) does not ordinarily reside in Singapore or Malaysia, but has come or intends to come to Singapore for the purpose of appearing in the case; and

> (*c*) has special qualifications or experience for the purpose of the case.
>
> (2) The court shall not admit a person under this section in any case involving any area of legal practice prescribed under section 10 for the purposes of this subsection, unless the court is satisfied that there is a special reason to do so.
>
> …
>
> (6A) The Chief Justice may, after consulting the Judges of the Supreme Court, by notification published in the Gazette, specify the matters that the court may consider when deciding whether to admit a person under this section.

14 It is only if the three mandatory requirements set out in s 15(1) of the Act are satisfied that the court is permitted to move on to the second stage of the inquiry. At this juncture, the court is exercising its discretion with regard to s 15(6A) of the Act read with para 3 of the Legal Profession (Ad Hoc Admissions) Notification 2012 (S 132/2012), which specifies four matters ("Notification matters") for the court's consideration. These are:

> **Matters specified under section 15(6A) of Act**
>
> **3.** For the purposes of section 15(6A) of the Act, the court may consider the following matters, in addition to the matters specified in section 15(1) and (2) of the Act, when deciding whether to admit a person under section 15 of the Act for the purpose of any one case:
>
> (*a*) the nature of the factual and legal issues involved in the case;
>
> (*b*) the necessity for the services of a foreign senior counsel;
>
> (*c*) the availability of any Senior Counsel or other advocate and solicitor with appropriate experience; and
>
> (*d*) whether, having regard to the circumstances of the case, it is reasonable to admit a foreign senior counsel for the purpose of the case.

15 Although there may often be substantial overlap between the third mandatory requirement (*ie*, whether the counsel in question has special

qualifications or experience) and the Notification matters, the former is still a distinct analytical inquiry that has to be answered in the affirmative before the court considers whether to exercise its discretion with regard to the Notification matters: *Re Beloff Michael Jacob QC* [2014] 3 SLR 424 ("*Re Beloff*") at [58].

The mandatory requirements

16 It is relatively uncontroversial that Mr Gearing meets the first two mandatory requirements under sections 15(1)(*a*) and (*b*) of the Act. However, counsel for the State, Ms Koh Swee Yen ("Ms Koh") and counsel for the Law Society of Singapore ("the Law Society"), Mr Christopher Anand Daniel ("Mr Daniel") took the position that Mr Gearing does not possess "special qualifications and experience for the purposes of the case" under the third mandatory requirement.[6] Mr Jeyendran Jeyapal ("Mr Jeyendran") on behalf of the Attorney-General, on the other hand, quite properly acknowledges that Mr Gearing "more than adequately" demonstrates that he has deep expertise and experience in the area of law that the court would be concerned with.[7]

17 A critical part of the inquiry under the third mandatory requirement is whether there is some notable and particular expertise relevant to the issues at hand: see *Re Beloff* at [57]. As I had observed in *Re Rogers, Heather QC* [2015] 4 SLR 1064 ("*Re Rogers*") at [17] and [21], it is not sufficient for the applicant to have general expertise pertaining to the *particular* issues that will be before the court. There had to be a "clear nexus" between the *specific* issues as

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6 Written Submissions of the Plaintiff in OS 685/2019 ("State's Submissions"), dated 26 September 2019, at paras 31–36; Written Submissions of the Law Society of Singapore ("Law Society's Submissions"), dated 1 October 2019, at paras 26–33.

7 Attorney-General's Written Submissions ("AGC's Submissions"), dated 1 October 2019, at para 12.

presented and the applicant's qualifications and experience. Hence, whether the applicant's qualifications are suitable for the purposes of the case would necessarily depend on the antecedent question of what the "purpose of the case" entails. If the target is framed too widely, the applicant's qualifications would always satisfy the criteria. If, on the other hand, the issue is framed too narrowly, it would be an impossible target and no applicant would possess the requisite experience: see *Re Rogers* at [22]; see also *Re Beloff* at [68].

18 In the present case, the Law Society's submission is of a slightly different cast. Instead of suggesting that the issues are framed too widely by the Investor, Mr Daniel contends they have been framed in an exaggerated and complicated manner.[8] Ms Koh for the State, on the other hand, submits that even if Mr Gearing is generally well-versed and well-regarded in investor-state arbitration and public international law, his expertise in these areas is generic and non-specific to the questions at hand.[9]

19 Leaving aside the Investor's framing of the issues, I do not find the arguments by Mr Daniel and Ms Koh to be persuasive. The underlying dispute appears to involve issues of public international law, investor-state treaties, and international obligations. However, the application before the court in OS 685 concerns the Tribunal's decision on jurisdiction. Regardless of how the issues are framed, it is undisputed that the relevant issues would focus on the four objections raised by the State at [10] above. In this regard, it is difficult to see how it could conceivably be argued that Mr Gearing does not possess the relevant expertise. After all, Mr Gearing was the lead counsel who argued

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8 Law Society's Submissions, at para 26.

9 State's Submissions, at para 33.

against the State's four jurisdictional objections before the Tribunal and, I would add, argued them *successfully*. Given this, it would be exceedingly odd to suggest there is no clear nexus to the issues in OS 685, and that Mr Gearing does not possess the "special qualifications or experience for the purpose of the case".

20 Turning to the Law Society's objection that the issues should be framed objectively, there is no doubt that this should be done: see *Re Rogers* at [22]. However, insofar as the Investor has framed the questions too *narrowly* so as to tailor it specifically to Mr Gearing's expertise and buttress the necessity for his admission, or to thereby exclude other local counsel who do in fact have the necessary expertise, this is really a concern that falls to be determined during the second stage of the inquiry under the Notification matters. After all, as I have noted at [15] above, there is often a substantial overlap between the two stages of the inquiry. There is nothing prohibiting a court from returning to its analysis of how the issues are framed for the purposes of determining how its discretion should be exercised with regard to the Notification matters.

21 Accordingly, I find that Mr Gearing has satisfied the third mandatory requirement, and the mandatory requirements as a whole.

The Notification matters

The context of Mr Gearing's application

22 Before examining the four Notification matters, it is important to recognise the unique context of this application.

23 Mr Gearing is applying to be admitted to represent the Investor in resisting the State's application in OS 685 to set aside the Tribunal's decision on jurisdiction. The Decision did not deal with the merits of the underlying dispute. Hence, the nature of the issues in OS 685 (and the decision on jurisdiction) is the relevant inquiry.

24 Mr Gearing, if admitted, would be representing the party for whom the Tribunal had rendered its Decision *in favour of*. Unlike other cases where admitted applicants were arguing *against* some pre-existing award (see *Re Wordsworth* and *Re Joseph David QC* [2012] 1 SLR 791 ("*Re Joseph David*") at [12]), or even applicants who were *not* admitted even though they purported to be addressing complex and novel issues of law (see *Re Beloff* at [75] and *Re Rogers* at [51]–[54]), this is not a situation where the cards could be said to be stacked against the Investor. To the contrary, counsel for the Investor, Mr Thio Shen Yi *SC* ("Mr Thio") accepts that in OS 685, it would be seeking to *defend* the Tribunal's Decision.

25 I recognise that the mere fact of an underlying decision in a party's favour does not necessarily mean that the issues it will face at the hearing will necessarily be simple. Such a defendant may well have to address complex and thorny issues raised by the plaintiff in order to uphold the Tribunal's decision especially since OS 685 would be by way of a rehearing.

26 Be that as it may, there are unique features of *this* Decision and its context that weigh against admitting Mr Gearing. First, Mr Thio accepts that even if OS 685 is by way of rehearing, it is nonetheless the *State's* application and the burden would be on *it* to persuade the court in OS 685 to set aside the Decision. In this regard, Mr Thio could not point to any part of the Decision which he disagrees with, which is obvious since it is in his favour.

27 Second, even a cursory review of the Tribunal's Decision would reveal that the Tribunal resolved several of the purportedly "complex considerations of public international law and investor-state arbitration principles"[10] through a plain textual interpretation of the Bilateral Treaty and by relatively straightforward factual analyses. In this regard, I would also observe that the allegedly complex arguments would not be raised by the Investor (and for whom Mr Gearing would be assisting), but by the *State*. It is of some significance that despite this, the State is not seeking to admit foreign senior counsel to argue its application.

28 Third, the crux of the Investor's submission is that in addition to defending the Tribunal's Decision, it would need to respond to any arguments that the State might raise.[11] Hence, even though the Tribunal's decision ultimately turned on a plain textual interpretation of the Bilateral Treaty, the Investor might need Mr Gearing's assistance to respond to the novel and complicated arguments that the State would be raising in OS 685.

29 While this submission appears attractive at first blush, I was ultimately not persuaded. Without in any way commenting on the merits of the Tribunal's Decision, it is apparent the Decision was a thoroughly reasoned judgment carefully setting out its reasoning, *and the arguments of the parties* on each of the four objections. Insofar as the issues that *potentially could arise* are novel and complex (and as shall be seen in a moment, they are not), the Investor could hardly be said to be taken by surprise by them. In fact, the Investor has *already* argued against those purportedly novel and complex objections before the

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10 Investor's Submissions, at para 79.

11 Investor's Submissions, at paras 86 and 89.

Tribunal, and succeeded. I would imagine that it would be adequately prepared to address those same issues should they arise, with or without Mr Gearing's assistance.

30 Hence, the Investor has the additional benefit of the detailed and reasoned grounds rendered by the Tribunal which had considered and rejected the State's four objections. This is not to say the Tribunal is necessarily correct in its decision, but the foregoing considerations must surely inform the backdrop upon which the Notification matters are to be assessed.

The first Notification matter

31 It is helpful to set out the Notification matters which the court should have regard to:

(a) the nature of the factual and legal issues involved in the case ("the first Notification matter");

(b) the necessity for the services of a foreign senior counsel ("the second Notification matter");

(c) the availability of any Senior Counsel or other advocate and solicitor with appropriate experience ("the third Notification matter"); and

(d) whether having regard to the circumstances of the case, it is reasonable to admit a foreign senior counsel for the purpose of the case ("the fourth Notification matter").

32 Unlike the two-stage inquiry, the assessment of the four Notification matters is a holistic rather than sequential exercise: see *Re Harish Salve and*

another appeal [2018] 1 SLR 345 ("*Re Harish Salve*") at [42]. "[E]ach matter is a signpost pointing to the ultimate question of whether it is reasonable to admit the applicant". The broad principle underpinning this exercise of ascertaining reasonableness is "need", and each of the Notification matters allows the court to assess this "need" from different vantage points. That said, while the weight attributed to each Notification matter is a fact-dependent exercise that is "incapable of mathematical precision", the court remains duty bound to consider all four Notification matters and to identify the relevant factors: *Re Wordsworth* at [27]–[28] and *Re Beloff* at [21], [53], and [59]–[60].

33 In my view, although the exercise is not necessarily sequential, the determination of the first Notification matter can be dispositive of the three remaining Notification matters. This is because the complexity of the issues in the application (rather than the underlying dispute), or the lack thereof will necessarily have an impact on the court's assessment of the necessity for foreign senior counsel and consequently the relative availability of local counsel with the appropriate expertise. As the Court of Appeal had observed in *Re Beloff* at [61], the "more [the issues are complex or difficult, or novel, or of significant precedential value], the smaller might be the pool of local advocates able and available to deal with the case at hand and the greater might be the need for the admission of foreign counsel".

34 With this in mind, I turn to consider the four objections to the Tribunal's Decision through the lens of the first Notification matter, *ie*, whether they are complex, difficult, novel, or of significant precedential value. In examining the alleged complexity of these four objections (and indeed the complexity of the issues alleged in similar applications), the first port of call will necessarily be the decision-maker's grounds. After all, the State's task in OS 685 is to show that the Tribunal had erred in rejecting its objections. The corollary of this,

which Mr Thio accepts, is that the Investor's first line of argument would be to demonstrate that the Tribunal was correct in reaching their Decision.

The first objection

35 Before the Tribunal, the State's first objection was that in appointing the Presiding Arbitrator using the list procedure of the UNCITRAL Rules, the Secretary-General of the PCA had failed to follow the procedure prescribed in the Bilateral Treaty read with the Article 9 of the UNCITRAL Rules.

36 The State submits that under Article 9, the appointment of the Presiding Arbitrator should have been made *30 days* after its party-appointed arbitrator had been appointed and provided the two arbitrators could not agree on the choice of the presiding arbitrator. The Secretary-General of the PCA, on the other hand, had pursuant to the Bilateral Treaty gone ahead and appointed the Presiding Arbitrator only days after the State's party-appointed arbitrator was appointed.

37 The Tribunal was of the view although the default procedure for the Arbitration was governed by the UNCITRAL Rules, this was *to the extent modified by the Bilateral Treaty*. In other words, on a plain reading of the relevant Treaty provision, the Treaty would prevail in the event of any conflict between the Treaty and the UNCITRAL Rules.[12]

38 Despite the simple and economical way the Tribunal dealt with the State's first objection, the Investor submits that the first objection would be invariably complex given the setting of an investor-state and treaty-based

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12 Tribunal's Decisions at [105]–[115].

arbitration, the need to apply the principles elaborated in the Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331 (entered into force 27 January 1980) ("the VCLT"), and the "interplay between [the] provisions of the [Bilateral Treaty] and the UNCITRAL Rules".[13]

39 In my view, Mr Thio has overstated the complexity of the State's first objection. Taken at its highest, the issue does not concern any unique issue of public international law or an investment treaty dispute. The subject-matter of the first objection is simply the dispute over the appointment of an arbitrator, which is a fairly common occurrence in commercial arbitration.[14] Of course, investor-state arbitration is a different species from commercial arbitration, but the mere fact that public international law is now the focus does not necessarily elevate the complexity of the issues involved. The real legal issue is simply the proper interaction of the Bilateral Treaty read with Article 9 of the UNCITRAL Rules.

40 In this regard, the legal issue in the first objection is no different from fundamental principles of statutory interpretation firmly established by our local jurisprudence: see *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850. Insofar as an element of treaty interpretation was involved, this is also not alien to our courts. In fact, the VCLT has been applied in the context of investor-state treaty arbitration (see *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 ("*Sanum Investments*") at [125]–[149] and *Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho* [2019] 1 SLR 263 ("*Swissbourgh*") at [60]) as well as in contexts outside of

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13 Defendant's Submissions, at paras 80 and 83.

14 State's Submissions, at para 42.

treaty-based arbitration: see *Lee Hsien Loong v Review Publishing Co Ltd and another and another suit* [2007] 2 SLR(R) 453 and *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129.

41 In my view, I do not see any complexity in the first objection that is beyond the competence of any local senior practitioner, who may or may not be a senior counsel.

The second objection

42 The State's second objection is that the Investor's claims were barred under the Bilateral Treaty because the Investor's subsidiaries have commenced an action challenging the constitutionality of certain measures in the foreign State's courts.

43 The State's second objection before the Tribunal is partly predicated on a "fork-in-the-road" provision in the Bilateral Treaty. The effect of such provisions is that they may prevent investors from commencing duplicative proceedings in respect of the *same* investment dispute.[15] Mr Thio contends that this "fork-in-the-road" provision will involve "careful [contextual] consideration of the scope and operation of [the Bilateral Treaty] in accordance with the VCLT".[16] Moreover, Mr Thio points out that the parties took opposing doctrinal positions with regard to when "fork-in-the-road" provisions were triggered. The State favoured the "fundamental basis" test, while the Investor favoured the "triple identity test".

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15 Tribunal's Decision, at [173].

16 Investor's Submissions, at para 85.

44 In my view, a careful scrutiny of the second objection would similarly show this is ultimately not an issue beyond the competence of local counsel.

45 What might initially be said in the Investor's favour is that the Tribunal considered it unnecessary to resolve the doctrinal debate.[17] Mr Thio submits that this unresolved dispute would necessitate Mr Gearing's assistance, because "given [the State's] position, the [court in OS 685] may find it necessary to consider treaty case law on the operation of "fork-in-the-road" clauses in other treaties" and decide whether the competing jurisprudential "fundamental basis" test or "triple identity" test should be preferred.[18]

46 As I see it, Mr Thio's submission is pitched at a contingency too far. Many otherwise simple cases might have complex and interesting theoretical issues lurking in the background. But the question here is whether foraying into these theoretical issues is *necessary* for the disposition of the case – necessity, after all, being the touchstone of admission: *Re Rogers* at [60]. It is apposite to consider the Tribunal's Decision on the second objection. There, the Tribunal observed that while the parties "expended significant energy in a doctrinal debate [on "fork-in-the-road" provisions] generally, which is interesting and important academically", this was "ultimately unnecessary…*because* the plain text of [the Bilateral Treaty] is *unusually clear*, leaving very little to be decided regarding the applicable test" [emphases added].[19]

47 The issue here is quite straightforward. Would the provisions of the Bilateral Treaty be engaged in a situation where the Investor's subsidiaries have

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17 Tribunal's Decision, at [208].

18 Investor's Submissions, at para 86.

19 Tribunal's Decision, at [208].

commenced a constitutional writ action in the foreign State's courts? This necessarily depends on the construction of the relevant provision in the Bilateral Treaty. It entails elementary enquiries about whether a subsidiary is a "disputing investor" and whether the constitutional challenge amounts to an "investment dispute" within the meaning of the provisions in the Bilateral Treaty. Significantly, both key provisions *ie*, "disputing investor" and "investment dispute" are *expressly* defined in the Bilateral Treaty.

48 Hence, the essential exercise is one of treaty interpretation, governed by Article 31(1) of the VCLT, which states:

> SECTION 3. INTERPRETATION OF TREATIES
>
> *Article 31*
>
> *General rule of interpretation*
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

49 What is required for the purposes of meeting the State's second objection is nothing more than examining the ordinary meaning of the Bilateral Treaty's terms, bearing in mind the object and meaning of the Treaty. The Investor's task is made much easier by the fact that the plain text of the provision is "unusually clear". *If* it is necessary to go beyond questions of construction, it does not follow that the next forensic step would invariably engage peculiar rules of investment treaty law and public international law principles. All that may be required are basic principles of treaty interpretation, which any reasonably competent lawyer should have in his or her repository.

50 Even if I am prepared to take the Investor's case at its highest, and to assume that the doctrinal debate on the "fork-in-the-road" provision would somehow arise for determination in OS 685, I am not persuaded the Investor

would be left at a loose end without Mr Gearing's representation for several reasons.

51 First, for the reasons set out at [23]–[30], it must be recalled that the Investor is defending against the State's application to set aside the Tribunal's Decision. The doctrinal debate is *not* an unforeseeable contingency; to the contrary, not only has the Investor *already argued* it before the Tribunal (and would therefore have all the necessary research and authorities at its disposal), the Tribunal itself also took the pains to set out the contours of the debate, the arguments made by the parties, and the relevant facts.[20]

52 Second, and inter-relatedly, even if Mr Gearing is not admitted, there is nothing preventing him from assisting with the Investor's case in OS 685. In fact, given that the essential contours of the doctrinal debate and the parties' positions have already been helpfully set out in the Tribunal's Decision, this is an *a fortiori* case where Mr Gearing's assistance by way of contributing to written submissions could be brought to bear: see *Re Beloff* at [84] in the context of setting-aside summonses.

53 Third, even if Mr Gearing is somehow not inclined to offer his assistance specific to OS 685 (and I can see no reason why he would not be since he remains after all, the lead counsel in the Arbitration, for which the jurisdiction phase has not even concluded), local counsel representing the Investor would not be bereft of the extant research, or the Tribunal's detailed grounds. Moreover, the relevant "fork-in-the-road" provision is also not unique to *this* Bilateral Treaty. As Mr Jeyendran aptly points out, that exact same provision in

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20 Tribunal's Decision, at [175]–[207].

the context of a China-Laos treaty was considered by the Court of Appeal in *Sanum Investments*. There, local senior counsel were clearly capable of arguing such issues, and I can see no reason why they would be left floundering here.

54 Mr Thio suggests that *Sanum Investments* concerned the "fork-in-the-road" provision in the China-Laos treaty, whereas the State's second objection had to do with the "fork-in-the-road" provision in the Bilateral Treaty, which is a different treaty that heretofore had not featured in any of the Singapore courts' reported or published judgments.[21] This is a distinction without a difference. Of course all treaties are unique to themselves and the parties involved, but the true question in this application is whether the *specific* public international law principles involved in the relevant treaty is sufficiently unique and complex.

55 Fourth, Mr Thio points out that in *Sanum Investments*, the Court of Appeal had invited J Christopher Thomas QC and Prof Locknie Hsu to assist as learned *amici curiae*.[22] This implied that the assistance of a foreign senior counsel would be required in any event. However, Mr Jeyendran brought to the court's attention that while the court in *Sanum Investments* appeared to derive assistance on the issue of customary international law and state succession, no reference was made to the *amici curiae*'s assistance on the issue of treaty interpretation and the "fork-in-the-road" provision.

56 Mr Thio's submission ultimately does not assist the Investor's case. After all, if the *contingency* arises that the SICC court hearing OS 685 might feel that further assistance might be needed to resolve the doctrinal debate on

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21 Investor's Submissions, at paras 91–92.

22 Investor's Submissions, at para 110.

"fork-in-the-road" provisions, it is similarly open to that court at that stage to invite an *amicus curiae* to assist it.[23]

The third objection

57 The State's third objection is even simpler and pertains to a limitation period. The key operative term in the Bilateral Treaty is "the knowledge that the disputing investor had incurred loss or damage". The Tribunal found that the triggering information for when the limitation period of three years would start to accrue was the time of the "knowledge of harm".[24]

58 It seems to me that this issue is a factual one. Whether the Investor had knowledge of harm within three years from 23 February 2017 (when it filed its statement of claim) is something to be determined at the merits hearing of the Arbitration (if any). I fail to see how such a fact-centric inquiry can be said to be "complex", "difficult", or "novel". Such factual inquiries are done in every case which goes to trial.

59 In addition, time-bar issues are frequently encountered by local counsel in a wide variety of contexts, and the additional gloss of the time-bar arising from a treaty (as opposed to statute) does not render the matter beyond the comprehension or competence of local counsel. At most, the third objection would involve elementary issues of treaty interpretation. For the reasons I had canvassed above, this does not make the relevant issues sufficiently complex.

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23 AGC's Submissions, at para 24.

24 Tribunal's Decision, at [324].

60 The Investor's task is made even simpler by the concession it made before the Tribunal that it is only pursuing claims based on Certificates issued *after* 23 February 2014. In effect, the Investor's concession would permit the Tribunal to deal with the third objection on a factual basis *ie*, only claims in relation to Certificates issued *post* 23 February 2014 will be pursued. Since there is no information before me that the Investor is backtracking from that concession, I can see no reason why such a straightforward issue will suddenly escalate in complexity in OS 685.

The fourth objection

61 The Investor's claims are premised on breaches of the FET clause and umbrella clause of the Bilateral Treaty. The State's fourth objection essentially relates to the insufficiency of the Investor's pleadings. If the Investor's pleadings are insufficient, then the breach is not serious enough for the purposes of treaty-based breach under the FET clause and umbrella clause, and is simply a contractual breach under the MOU.

62 The Tribunal considered that for the purposes of jurisdiction, the relevant test is not whether the Investor's claims as pleaded *would succeed* on the merits, but whether the facts as pleaded could present a treaty question for the Tribunal's determination.[25]

63 In this regard, I would note that the Investor has nailed its colours to the mast. It would have to stand or fall based on its claims under the Bilateral Treaty. As for the exclusive jurisdiction clause of the MOU, which might take

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[25] Tribunal's Decision, at [261].

effect to preclude the Arbitration proceedings, this turns on the interpretation of the Bilateral Treaty in accordance with general treaty interpretation principles. As Ms Koh and Ms Jeyendran have observed, any analysis on this front would involve the same degree of complexity as analyses in stay of proceeding applications in favour of foreign arbitration, conflict of laws issues, and abuse of process arguments. This is certainly not beyond the competence of local counsel who commonly handle litigation with cross-border elements.[26]

The second and third Notification matters

64 For the foregoing reasons that I have canvassed at [33] above, the fact that the factual and legal issues involved are insufficiently complex (with an eye to the availability and relative competency of local counsel) is sufficient to dismiss Mr Gearing's application for admission. Nevertheless, for the sake of completeness I will examine the second and third Notification matters to show how these similarly militate against Mr Gearing's application.

65 Because of the inevitable overlap between the second and third Notification matters, the court traditionally considers them together: see *Re Wordsworth* at [53].

66 In considering the test of "necessity" under these Notification matters, the Court of Appeal in *Re Beloff* has helpfully articulated at [62] that "need" contemplates a somewhat higher threshold than "desirability" or "preference":

> (a) The non-exhaustive factors for consideration under the second Notification matter of "the necessity for the services of a foreign senior

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[26] State's Submissions, at para 44; AGC's Submissions, at para 36.

counsel" would include the urgency of the case, the principle of equality of arms, and considerations of costs. These factors are somewhat open-ended and one powerful animating consideration is whether the party would stand to suffer *substantial* prejudice in the conduct of their case if the foreign counsel in question were not admitted (*Re Beloff* at [62]); and

(b) Factors for consideration under the third Notification matter of "the availability of any Senior Counsel or other advocate and solicitor with appropriate experience" would include efforts which have been made to engage local counsel (and not simply senior counsel). One preclusive factor is whether the party in question has access to appropriately competent legal counsel (*Re Beloff* at [63]).

The Investor's search of local counsel

67 Before delving into the analysis proper, it is helpful to set out certain matters that are set out in the affidavits by counsel for the parties. On 5 July 2019, an affidavit was filed on behalf of the Investor in support of Mr Gearing's application. It did not indicate whether any local counsel had actually been approached, but floated the names of two local senior counsel, which it claimed the Investor had considered.[27] This included Mr Alvin Yeo *SC* ("Mr Yeo"), who is the counsel for the State in OS 685 and was therefore ruled out.

68 On 1 August 2019, the State filed a reply affidavit contending that the Investor's search had not been reasonably conscientious. The State proposed the names of five other local senior counsel and four local counsel, all of whom had

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27 MCRY 1st Affidavit, at para 47(b).

experience in investor-state arbitration, or with extensive experience in international commercial arbitration.[28]

69 On 4 September 2019, the Investor replied by way of affidavit indicating that it did not consider any of the additional nine proposed names as "appropriate".[29] Again, it did not appear that the Investor had actually approached any of the local counsel proposed by the State, much less conducted a wider search.

70 At the hearing, Ms Koh, Mr Daniel, and Mr Jeyendran submitted that the necessary inference to be drawn from the Investor's coyness was that no local counsel had actually been approached by the Investor. All that counsel for the Investor, Mr Thio could reply was that "for better or for worse, that was how [the Investor] approached it".

The necessity for the services of a foreign senior counsel

71 For a start, it appears to me that Mr Thio is the only counsel (whether senior counsel or not) that the Investor had actually approached. Even then Mr Thio, to his credit, did not say he is not sufficiently competent to argue OS 685. To the contrary, the court was informed at the hearing that he would be *co-counselling* even if Mr Gearing were admitted. In fact, when directly asked about the most allegedly complex of the issues – *ie*, the "fork-in-the-road" provision in the second objection – Mr Thio admitted that he could argue it "in

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28 1st Affidavit of Hannah Lee Ming Shan ("HLMS 1st Affidavit"), dated 1 August 2019, at paras 28–29.

29 3rd Affidavit of Monisha Cheong Rui Ying ("MCRY 3rd Affidavit"), dated 4 September 2019, at paras 15–47.

a pinch" if he studied and worked very hard at it. Mr Thio's concession revealed that the Investor's case was ultimately one of preference rather than necessity.

72 Eventually Mr Thio's submissions boil down to the fact that while these are issues that could be argued on first principles, they are nevertheless issues that local counsel do not deal with on a regular basis.[30] Mr Thio referred me to the Court of Appeal's decision in *Re Harish Salve*, where at [49], the court observed that a foreign senior counsel with "years of experience in the relevant law and policy in a wide variety of cases would naturally be of greater assistance than local counsel, who…would not have the same breadth of background."[31]

73 I hesitate to accept this submission. The foreign senior counsel in *Re Harish Salve* were experts in *Indian law* and Indian law was very much the focus in the underlying application. Unfamiliarity with foreign law was very different from public international law, and was one of kind rather than degree. It was obvious that local counsel were unlikely to be acquainted with the municipal law of a foreign jurisdiction, but here, the issues of public international law involve *basic* principles of treaty interpretation.

74 Hence, while I accept that Mr Gearing's extensive experience would mean that he might be *better* placed than the average local counsel to argue these issues, that did not hew toward the touchstone of necessity, but is simply a matter of preference. The basis for the court's determination from this vantage point of the inquiry (the second Notification matter) is to juxtapose the applicant's experience against the complexity of the issues involved (the first

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30 MCRY 1st Affidavit, at para 47.

31 Investor's Submissions, at para 127.

Notification matter). Vast experience in a particular area of law would not make the counsel "necessary" if the issues were otherwise uncontroversial, which is why the determination of the first Notification matter can be dispositive of the considerations in the other Notification matters: see [33] above.

The availability and competence of local counsel

75 I cannot help but observe that the Investor's search for counsel was sorely lacking. As the High Court noted in *Re Caplan Jonathan Michael QC* [2013] 3 SLR 66 at [23], it is incumbent on the party supporting the application to provide "full details of the party's efforts in securing local counsel". The importance of reasonably conscientious efforts cannot be overlooked because until such efforts have been made to ascertain the availability of counsel in the local bar, the court would not be placed in the best position to assess the relative competence of local counsel against the applicant's expertise. In this regard, it bears noting that in the initial affidavit accompanying Mr Gearing's application, counsel for the Investor did no more than cursorily offer the names of two local counsel, one of which was Mr Yeo, who was already the opposing counsel in OS 685.

76 In the reply affidavit dated 4 September 2019, counsel for the Investor listed reasons to reject each of the nine additional counsel suggested by the State. I note that these names were *proposed* by the State, and it does not appear as though the Investor even went to the trouble of searching for these counsel, still less approaching them. In any event, I am not impressed with the Investor's reasons for rejecting the names proposed. For one, the Investor rejected several senior counsel on the basis that they are already sitting as a presiding arbitrator

or party-appointed arbitrator in arbitral tribunals involving the State.[32] However, any such conflict was for the *State* or the local counsel in question to declare. After all, it is the *State*'s interest in the other arbitral proceedings that is at stake. If the State is content to waive any such interest and allow the local counsel in question to represent the Investor against the State in OS 685, it hardly lies in the Investor's mouth to reject those counsel out of hand.

77 I am still less persuaded by the Investor's purported concern that local counsel proposed had previously represented the State.[33] Presumably the State's brief with those local counsel had already concluded. I could not see how there is any legal conflict of interest, but should there be any such conflict of interest, I would expect local counsel to uphold their ethical duties and to forthrightly declare them. In any event, the point is rendered moot since the Investor had not even approached said counsel to check.

78 To militate against the lack of effort on their part, Mr Thio relies on my holding in *Re Wordsworth*, where the applicant was admitted despite the applicant's counsel having omitted to undertake a search for local counsel. However, my holding in *Re Wordsworth* has to be construed in context. In particular, I observed at [64]:

> …What constitutes a reasonably conscientious search would naturally depend on the nature of the issues in each case. Although this procedural requirement does not appear to have been fulfilled on the face of the supporting affidavit, I have already taken cognisance of the lack of available local counsel in the field of public international law…In these *unique* circumstances, there might have been little utility in formally approaching local counsel and recording the details of their inability or unavailability to accept the brief. This might have

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32 MCRY 3rd Affidavit, at paras 22–26.

33 MCRY 3rd Affidavit, at para 27.

> been an exercise in futility. That counsel for the applicant omitted to do so is hence understandable. I should, however, caution that the dispensation of the requirement to take steps to ascertain the availability of competent local counsel would only be permitted in exceptional circumstances of which the present case is one.
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> [emphasis in original]

79 The present case is plainly *not* an "exceptional situation", precisely because the issues in the present case are fairly straightforward. In *Re Wordsworth*, the foreign senior counsel was admitted to argue against an arbitral award on the merits (*Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd and others* [2019] 3 SLR 12, and on appeal in *Swissbourgh*) which engaged many complex issues of public international law unlike the present award on jurisdiction which concerns issues arising from the plain text of the Bilateral Treaty and the UNCITRAL Rules.

80 I would close off my remarks by stating that approaching local counsel on the basis that the issues involved may be so complex as to be beyond their ability is a somewhat delicate proposition. However, if the issues of fact and law involved are really so esoteric and complex, I have every confidence that local counsel are open and candid enough to admit when this is so and to be willing to second chair or co-chair for learning purposes so they may take the lead the next time round.

The fourth Notification matter

81 The fourth Notification matter is "whether, having regard to the circumstances of the case, it is reasonable to admit a foreign senior counsel for the purpose of the case". This is described as laying down the ultimate question of whether in all the circumstances, considering both the mandatory requirements and the other three Notification matters, there are good and

sufficient reasons to admit the applicant, or negative factors weighing in the opposite direction such that it would be unreasonable to do so: *Re Beloff* at [64].

82 I have two remarks here. First, the Investor's written submissions waxed lyrically and at length about Singapore's ambitions to be a leading investor-state arbitration hub, citing speeches by several public figures.[34] At the hearing, Mr Thio accepted that this is not strictly relevant. This concession was rightly made. As the Court of Appeal noted in *Re Harish Salve* at [50], "the promotion of Singapore as a venue for international arbitration cannot be a significant factor in applications for *ad hoc* admissions. The emphasis in such applications must always be on what will assist the court [for the case in question] rather than on achieving external and unrelated ambitions."

83 Second, the Investor's written submissions raised the fact that OS 685 would be heard in the SICC.[35] I do not, with respect, see the significance of this point. As I had indicated previously in *Re BSL* [2018] SGHC 207 at [20], the position with regard to *ad hoc* admissions remains the same in SICC cases *even* in arbitration-related matters.

84 It is worthwhile to set out the comments made during the second reading of the Supreme Court of Judicature (Amendment) Bill (Bill 47 of 2017) with regard to the SICC as well as the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"):

> Key features of the SICC include:
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> …

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34 Investor's Submissions, at paras 6–12; and 159–164.

35 Investor's Submissions, at para 37.

> (b) its bench which combines **highly qualified and experienced local judges with high quality international judges, comprising eminent foreign jurists who can hear disputes governed by foreign law**;
>
> …
>
> Currently, **only Singapore-qualified lawyers in Singapore law practices may appear before the High Court for IAA and IAA-related matters**. There will be no change to this status quo.
>
> The IAA is part of Singapore law, with features that are tailored for the Singapore arbitration landscape, and **there is a developed body of local jurisprudence based on our Court's interpretation and application of the IAA provisions, which Singapore lawyers are well versed in**.
>
> Hence, parties which have arbitration related matters heard in the SICC must be represented by Singapore-qualified lawyers.
>
> Foreign lawyers, who may be registered to represent parties in an "offshore case" as defined in the Rules of Court, will not be able to appear before the SICC in respect of IAA maters. **This will be so notwithstanding that the foreign lawyers had represented the parties in the original arbitration**. The Rules of Court will be amended accordingly to clarify that an "offshore case" does not include matters under the IAA.
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> [emphases added]

See *Singapore Parliamentary Debates, Official Report* (9 January 2018) vol 94 (Indranee Rajah, Senior Minister of State for Law).

85 If anything, the fact that the SICC's bench comprises experienced local and foreign Judges would count *against* the supposed need for foreign senior counsel, since the court itself would possess the necessary expertise: see *Re Wordsworth* at [36]. That having been said, the issues in OS 685 are not of such complexity that would *necessitate* Mr Gearing's assistance, whether in the High Court or the SICC.

86 The comments cited at [84] above are also a salutary reminder that the context of the application in OS 685 is ultimately a setting-aside application under the IAA, in which local counsel are well-versed to handle. In this regard,

local counsel may have something to offer by way of expertise that Mr Gearing may not necessarily possess.

Conclusion

87 For the foregoing reasons, I dismiss Mr Gearing's application for admission.

88 Although the application is in Mr Gearing's name, the "true party" on whose behalf the application was made is the defendant in OS 685 (the Investor). Accordingly, it should bear the costs of the application: see *Re Rogers* at [66].

89 I exercise my discretion under O 59 r 2 of the Rules of Court to order that the Investor pay the State the costs of this application, which I fix at $6,000 inclusive of disbursements.

Steven Chong
Judge of Appeal

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