IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 61

Originating Summons No 1446 of 2019

Between

CJD

… *Plaintiff*

And

(1) CJE
(2) CJF

… *Defendants*

GROUNDS OF DECISION

[Arbitration] — [Arbitral tribunal] — [Joinder of third parties] — [Jurisdiction]

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Introduction

1 The principle of party autonomy lies at the very heart of arbitration and permeates practically all aspects of it. Party autonomy allows parties a wide latitude to agree on almost all aspects of how a dispute is to be arbitrated. In the context of a multi-party contract, that autonomy may include the ability to agree on *who* may be party to an arbitration reference in the event a dispute arises.

2 Underpinning the principle of party autonomy is the fundamental principle of consent or agreement of the parties. Thus, in an area of dispute resolution where consent plays such a central role, the notion of a "forced joinder" of a party would appear somewhat out of place and, some might say, anathema to the very definition of consent.

3 Certain institutional arbitration rules do, however, empower an arbitral tribunal to order a forced joinder of third parties in certain circumstances. Among these are the London Court of International Arbitration Rules 2014 ("**LCIA Rules 2014**"). I refer in particular to Article 22.1(viii) of the LCIA Rules 2014.

4 In this regard, a "forced joinder" refers to a third party consenting to be joined as a party to extant arbitration proceedings on the application of one of the arbitrants *despite* objections to the joinder raised by *the other arbitrant(s)*. Thus, notwithstanding the impression given by the phrase, a "forced joinder" does not in fact refer to forcing a third party to join an arbitration against its wishes. Nevertheless, the application of a forced joinder has been viewed as a significant derogation from the principle of party autonomy and consent (see, for example, the Court of Appeal decision in *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*") at [188]).

5 The application before me in Originating Summons No 1446 of 2019 ("**OS 1446**") raised interesting issues revolving around the proper interpretation and ambit of Article 22.1(viii) of the LCIA Rules 2014. As there is sparse authority on forced joinders in general and Article 22.1(viii) of the LCIA Rules 2014 in particular, this case presents a good opportunity to consider the issues in greater detail. I thus provide the full grounds for my decision. I start by summarising the material facts.

Facts

6 The plaintiff is CJD ("**plaintiff**"). It is a limited liability company incorporated and existing under the laws of Narnia. The plaintiff is the respondent in the underlying arbitration ("**Arbitration**").

7 The first defendant is CJE ("**1st defendant**"), an offshore company also incorporated in Narnia. It is the claimant in the Arbitration. The second defendant is CJF ("**2nd defendant**"), a limited liability company incorporated in Telmar. The 2nd defendant owns 100% of the issued shares in the 1st defendant.[1] It is not a party to the Arbitration.

8 On 24 April 2014, the plaintiff entered into a joint venture agreement ("**Joint Venture Agreement**") with the 1st defendant, 2nd defendant and three other parties for the purpose of developing a mixed-use residential/commercial tower, hotel and/or service apartments complex in Narnia. A joint venture company was subsequently established pursuant to the Joint Venture Agreement ("**Joint Venture Company**"). The 1st defendant and the plaintiff each holds 50% of the shares in the Joint Venture Company pursuant to clause 3.2 of the Joint Venture Agreement.[2]

9 Of particular relevance to OS 1446 is clause 36.3 of the Joint Venture Agreement which contains an arbitration clause as follows:

> 36.3 If, after 30 (Thirty) days from the commencement of such informal negotiation, the Parties have been unable to amicably resolve any dispute, difference or disagreement, *it is agreed that the same shall be referred to and finally resolved by Arbitration in accordance with the London Court of International Arbitration Rules (LCIA Rules) in force and, unless otherwise*

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1 DBOD Vol 1 p 15; DBOD Vol 1 p 517.

2 DBOD Vol 1 p 619 [Request for Arbitration].

> *agreed, the seat of Arbitration shall be Singapore.* The First Party and the Second Party shall have a right to appoint one arbitrator each and both arbitrators shall appoint a third arbitrator as the chairman. The arbitration shall be carried out in English and all Parties agree that it shall be final and binding on them.
>
> [emphasis added]

The "First Party" refers to the plaintiff while the "Second Party" refers to the 1st defendant.[3] It is common ground that the London Court of International Arbitration ("LCIA") Rules which were expressly incorporated into the Joint Venture Agreement refer to the rules that were current as at 1 October 2014, *ie,* the LCIA Rules 2014.[4]

10 In late 2014, cracks began forming in the parties' relationship.[5] In gist, the 1st defendant alleged that the plaintiff had breached several terms of the Joint Venture Agreement by:

(a) delaying the transfer to the Joint Venture Company of title to land for the development of the complex in Narnia;

(b) delaying and eventually failing to seek the requisite regulatory approvals in Narnia;

(c) incurring liabilities and costs without the approval of the Joint Venture Company's board of directors;

(d) terminating the Joint Venture Agreement wrongfully and/or invalidly; and

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3 DBOD Vol 1 p 9; DBOD Vol 1 p 122.

4 DBOD Vol 2 p 210.

5 DBOD Vol 1 p 620.

(e) failing to act in good faith.[6]

11 On 21 October 2017, the 1st defendant applied to the courts in Narnia for an injunction against the Joint Venture Company's escrow agent in a bid to restrain it from releasing certain share certificates of the Joint Venture Company to the plaintiff.[7]

12 On 13 June 2018, the plaintiff commenced proceedings in Narnia's courts to seek the dissolution of the Joint Venture Company.[8]

13 On 14 August 2018, the 1st defendant obtained an anti-suit injunction from the Singapore High Court restraining the plaintiff from continuing with the dissolution proceedings in Narnia's courts and/or pursuing any proceedings there against the 1st defendant. One of the grounds for its application was that the parties had agreed in the Joint Venture Agreement that any dispute arising out of, or in connection with the Joint Venture Company would be resolved by way of an arbitration seated in Singapore in accordance with the LCIA Rules 2014.[9]

14 On 27 November 2018, the 1st defendant commenced arbitration proceedings in Singapore against the plaintiff, under the auspices of the LCIA, pursuant to clause 36.3 of the Joint Venture Agreement ("**Arbitration**").

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6 DBOD Vol 1 pp 623–625.

7 DBOD Vol 3 p 6.

8 DBOD Vol 1 p 10; DBOD Vol 3 p 8.

9 DBOD Vol 4 p 695.

The Arbitration proceedings and the tribunal's decision

15 On 30 June 2019, the plaintiff filed three applications in the Arbitration: (a) challenging the jurisdiction of the Tribunal, (b) seeking security for costs from the 1st defendant and (c) seeking to join the 2nd defendant as a party to the Arbitration.[10] Only the third application is relevant for the purpose of OS 1446 and I shall refer to it as the "**Joinder Application**".

16 On 22 October 2019, the Tribunal issued its decision rejecting the Joinder Application ("**Decision**").[11] It held that it did not have the jurisdiction to join the 2nd defendant to the Arbitration. The plaintiff received the Decision via email on 23 October 2019.[12]

17 The core of the Tribunal's reasoning in the Decision was laid out in five paragraphs which I reproduce below:

> 126. The Tribunal considers that the Respondent is correct to say that the Tribunal has the power to allow a third party to be joined in the arbitration if an existing party applies for joinder and if the third-party consents in writing to be joined. The Tribunal also considers that the Respondent is correct to say that such consent may be given in the arbitration clause itself, or in a document made after the arbitration has commenced. These two points are clear from the wording of Article 22 of the LCIA Rules. The Tribunal considers these to be 'threshold requirements', without which the Tribunal does not have jurisdiction to allow joinder.
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> 127. However, the Tribunal does not accept the Respondent's argument that the Joinder Respondent has consented to be joined. Merely because the Joinder Respondent signed the JVA does not mean that it has consented to be joined into the present arbitration.

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10 DBOD Vol 1 pp 520–521.

11 Affidavit of CJD's Deputy CFO dated 10 December 2019 pp 487 – 507.

12 Affidavit of CJD's Deputy CFO dated 10 December 2019 p 508.

> 128. The Tribunal would expect express wording to have been used if the Joinder Respondent was agreeing to be joined. For example, a subcontract may provide that if any issue in dispute between the main contractor and the employer touches upon an issue involving the subcontractor, then the subcontractor agrees to be joined into the main contract arbitration. There is no such express wording in the present case.
>
> 129. As for consent given after commencement of the arbitration, there appears to be none, and the Respondent has not suggested that there is any such consent. Indeed the opposite is the case, in that the Joinder Respondent clearly and expressly does not consent to be joined.
>
> 130. The Tribunal considers that the Respondent has not satisfied the threshold requirement of showing that the Joinder Respondent has agreed in writing to be joined, and therefore the Tribunal holds that the Respondent's Joinder Application must fail.

18 On 22 November 2019, the plaintiff filed OS 1446. It asked that the Decision be reversed and/or wholly set aside under s 10(3)(*b*) or s 24(*b*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("**IAA**").

19 On 4 March 2020, the defendants filed an application in Summons No 1075 of 2020 ("**SUM 1075**") for all proceedings related to OS 1446 to be heard in chambers under s 22 of the IAA and for a sealing order to be made in respect of OS 1446.

20 On 30 July 2020, I heard the parties on both SUM 1075 and OS 1446. I allowed SUM 1075 and reserved my decision in respect of OS 1446. I also directed parties to tender further submissions on their respective positions on the applicability of ss 10(2) and 10(3) of the IAA, in respect of which I had raised certain questions during the hearing. The parties filed their further submissions in the form of *aides memoire* in August 2020.

21 On 4 September 2020, I delivered oral grounds dismissing OS 1446.

Decision

22 The sole issue for my determination in OS 1446 was whether the Tribunal had, in the Decision, erred in declining to join the 2nd defendant to the Arbitration. I answered this question in the negative.

A preliminary point on the court's powers

23 As a preliminary point, it was necessary to first determine the proper basis for the exercise of the court's powers to set aside or reverse the Decision under the IAA. OS 1446 was framed as being brought in reliance upon two alternative provisions, *ie,* s 10(3)(*b*) or s 24(*b*) of the IAA.

24 The relevant sections provide as follows:

> **Appeal on ruling of jurisdiction**
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> **10.**—(1) This section shall have effect notwithstanding Article 16(3) of the Model Law.
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> (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,
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> any party may, within 30 days after having received notice of that ruling, apply to the High Court to decide the matter.
>
> …
>
> **Court may set aside award**
>
> **24.** Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if —

> (*a*) the making of the award was induced or affected by fraud or corruption; or
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> (*b*) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

25 Article 16 of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), which is referred to in s 10(1) of the IAA, provides as follows:

> Article 16. Competence of arbitral tribunal to rule on its jurisdiction
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> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
>
> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
>
> (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.

26 In Singapore, both Article 16 of the Model Law and s 10 of the IAA allow the High Court to review a tribunal's determination regarding its

jurisdiction. However, unlike Article 16 of the Model Law which allows the High Court to review only a positive ruling by a tribunal on its jurisdiction, s 10 of the IAA was enacted by Parliament to allow the High Court to review both positive and negative rulings (*Singapore Parliamentary Debates, Official Report* (9 April 2012) vol 89 at 65 (K Shanmugam, Minister for Law) and *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131 ("*Rakna*") at [52]). Section 10(3)(*b*) in particular applies where a tribunal makes a ruling that it has no jurisdiction.

27 In contrast, s 24 of the IAA applies only to an "award". This is defined in s 2 of the IAA as referring to "a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award but excludes any orders or directions made under section 12".

28 This distinction is important because following *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*"), it is clear that the definition of an award does not include a negative determination or ruling on jurisdiction. This is because such a determination or ruling is not a decision on the substance of the dispute. On the contrary, it is a decision **not** to determine the substance of the dispute (*PT Asuransi* at [66]). Thus, in the context of OS 1446, as the Decision was not an "award", s 24 of the IAA would not apply. Indeed, both parties were in agreement that the Decision was not an award as defined in the IAA.[13]

29 Both parties were also in agreement that OS 1446 engaged the court's powers of review under s 10(3) of the IAA. Following the hearing before me, I

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[13] Plaintiff's *Aide Memoire* at para 3; Defendants' *Aide Memoire* at para 3.1.1; Plaintiff's Written Submissions ("PWS") paras 12, 16–18; Defendants' Written Submissions ("DWS") paras 5, 5.2.2–5.3.2.

directed parties to tender further submissions on the ambit of ss 10(2) and 10(3) IAA. After having heard the parties' oral submissions and considered their respective *aides memoire*, I was satisfied that the Decision was: (a) in response to a plea that the Tribunal had no jurisdiction; and (b) a negative determination or ruling by the Tribunal on its jurisdiction, such that ss 10(2) and 10(3)(*b*) of the IAA were engaged. I elaborate below.

A plea had been raised that the Tribunal lacked jurisdiction

30 After being notified of the Joinder Application, the 2nd defendant had "rejected and resisted" the application by way of its response dated 16 July 2019.[14] It argued that the Tribunal did not have the jurisdiction to join the 2nd defendant to the Arbitration.[15] This was not disputed by the plaintiff who in fact also took the view that s 10(3)(*b*) of the IAA was applicable on the facts of OS 1446 and "wholly align[ed]" itself with the defendants on this point.[16]

31 Further, on the plain wording of Article 16(2) of the Model Law, the 2nd defendant's objection to the Joinder Application constituted a "plea" by the 2nd defendant (and also by the 1st defendant which aligned itself with the 2nd defendant).[17] Factually, this plea was raised before the plaintiff submitted its Statement of Defence.[18] In a similar vein, the objection raised by the 2nd defendant would also fall within s 10(2) of the IAA – this was because it was a plea, raised during the Arbitration, that the Tribunal "has no jurisdiction" to join

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14 DBOD Vol 1 p 521 read with DBOD Vol 2 p 384 [Joinder Respondent's Submissions in Response to The Respondent's Application for Joinder of CDF at para 2.1].

15 Defendants' *Aide Memoire* at para 3.1.1.

16 Plaintiff's *Aide Memoire* at paras 2 and 3.

17 DBOD Vol 1 p 521 (see in particular para 2.3.5(c)).

18 DBOD Vol 2 pp 977–978 (see in particular para 16(c)).

the 2nd defendant as a party to the Arbitration. I was therefore satisfied that there was indeed a "plea" that the Tribunal had no jurisdiction, which the Tribunal had ruled on in the Decision. Section 10(3)(*b*) of the IAA was therefore engaged.

32 I add that my decision above is consistent with the approach taken by the Court of Appeal in *Rakna* at [56]–[57] that an objection or "plea" on a tribunal's jurisdiction need not be in any specified form. There is also nothing in the wording of s 10(2) of the IAA that limits the application of that provision only to instances where the "plea" of the lack of jurisdiction is raised by the party applying to the High Court to decide the matter. On the contrary, s 10 expressly states that "**any party** may, within 30 days after having received notice of that ruling, apply to the High Court to decide the matter" [emphasis added].

The Decision was a negative determination on jurisdiction

33 It is settled law that the true nature of a ruling by a tribunal is determined by its substance and not its form. The mere titling of a document as an award (or in this case a "Decision on the [plaintiff's] Joinder Application") does not render it as such (*PT Asuransi* at [70]–[71]; see also the Court of Appeal's approach in *Rakna* at [59]).

34 In this case, the Tribunal had indicated in its separate partial award on jurisdiction and preliminary applications dated 8 October 2019 (*ie,* the first of the three applications referred to above at [15]) that it would be issuing "one or more Procedural Orders" in respect of the Joinder Application and the application relating to security for costs. Nevertheless, it is evident that the

Decision concerned, in substance, a ruling by the Tribunal on its *jurisdiction* to order a joinder of the 2nd defendant to the Arbitration.

35 In considering the plaintiff's request to join the 2nd defendant to the Arbitration, the Tribunal referred expressly to Article 22.1(viii) of the LCIA Rules 2014 which provides that:

> The Arbitral Tribunal shall have the power, upon the application of any party or (save for sub-paragraphs (viii) …) upon its own initiative, but in either cases only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide:
>
> (viii) to allow one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented to such joinder in writing following the Commencement Date or (if earlier) in the Arbitration Agreement; and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration;

36 The Tribunal considered that its powers to effect a joinder under Article 22.1(viii) were premised on the fulfilment of two "'threshold requirements', without which the Tribunal does not have jurisdiction to allow joinder". Firstly, an existing party to the Arbitration must apply for joinder, and secondly, the third party must consent in writing to be joined (Decision at para 126). It dismissed the Joinder Application on the basis that the second threshold requirement had not been met, namely, the 2nd defendant had not consented in writing to being joined to the Arbitration (Decision at para 130). It also declined to consider any arguments that were, in its view, related to the merits of the Joinder Application as it was not "entitled to take [them] into consideration" (Decision at para 131).

37 Adopting the approach in *Rakna* at [59] and *PT Asuransi* at [71], I was satisfied that the Decision was, in substance, a ruling by the Tribunal on its

jurisdiction. It was also a negative ruling in light of the Tribunal's refusal to join the 2nd defendant to the Arbitration. In the circumstances, only s 10(3)(*b*) of the IAA was applicable (not Article 16 of the Model Law) and which enabled *any party* to apply to the High Court within 30 days of the Decision for the court to decide the issue.

38 Both parties made clear in their submissions (both written and oral) and *aides memoire* that their primary position was that the Decision was *not* an award. I agree. The Tribunal had taken pains to make it explicit that the Decision "[was] not an award" and was "made without prejudice to, and does not purport to address, the substantive issues in dispute" in the Arbitration (Decision at paras 135 and 139). It is also plain from the Decision that the Tribunal did not touch on any aspect of the merits of the dispute in rendering the Decision. As noted at [28] above, the Decision does not fall within the definition of an "award" that could be set aside under s 24(*b*) of the IAA. In the circumstances, I did not have to consider the plaintiff's alternative prayer any further.

There was no consent in writing by the 2nd defendant to being joined

39 A tribunal's own view of its jurisdiction has no legal or evidential value before a court that has to determine that very question. Thus, a court faced with an application under s 10(3) of the IAA applies a *de novo* standard of review (*PT First Media* at [162]–[164]). This was common ground between the parties.

40 It was also common ground, and as found by the Tribunal in its partial award on jurisdiction and preliminary applications (at paras 197–198)[19] that the law governing the arbitration agreement and the Arbitration is Singapore law.[20]

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19 DBOD vol 2 p 429.

20 DWS para 4.1.5; PWS para 9.

41 The plaintiff challenged the Decision on the ground that the Tribunal did have jurisdiction to permit the joinder of the 2nd defendant to the Arbitration. Counsel for the plaintiff, Mr Timothy Tan, argued that the 2nd defendant had consented to being joined by: (a) signing the Joint Venture Agreement which, by virtue of the arbitration agreement in clause 36.3, incorporated Article 22.1(viii) of the LCIA Rules 2014; and (b) through its conduct in behaving as if it was already a rightful party to the Arbitration.[21] Mr Tan also contended that the intention behind the Joint Venture Agreement was that every party to it could be joined to any arbitration arising from the Joint Venture Agreement.[22]

42 In my view, the nub of the issue that I had to determine in OS 1446 lay in the interpretation of Article 22.1(viii) of the LCIA Rules 2014 and drilling down further, the element of "consent" referred to therein.

43 To recapitulate, Article 22.1(viii) of the LCIA Rules 2014 states as follows:

> The Arbitral Tribunal shall have the power, upon the application of any party or (save for sub-paragraphs (viii) …) upon its own initiative, but in either cases only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide:
>
> (viii) to allow one or more third persons to be joined in the arbitration as a party provided ***any such third person and the applicant party have consented to such joinder in writing*** following the Commencement Date or (if earlier) in the Arbitration Agreement; and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration;
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> [emphasis added]

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21 PWS paras 23, 24–30.

22 PWS paras 33–34, 36.

44 As prefaced at [3] above, this rule provides for what is commonly termed a "forced joinder" – *ie,* an arbitral tribunal has the power to allow the joinder of a consenting third party to an ongoing arbitration, provided that an existing party consents to the joinder, even if the other parties to the arbitration proceedings object (See Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd Ed) ("*Gary Born*") at p 2601–2602, and *PT First Media* at [176] in the context of Article 22.1(h) of the LCIA Rules 1988).

45 Further, Article 22.1(viii) uses the term "third persons" to refer to the joining party, and places no restrictions on the class of persons who may be joined to the arbitration so long as both the applicant and proposed joinder party *have consented to the joinder in writing.* There is no requirement that the proposed joinder party must also be a party to the arbitration agreement under which the arbitration was commenced (Shai Wade, Philip Clifford and James Clanchy, *A Commentary on the LCIA Arbitration Rules 2014* (Sweet & Maxwell) ("*LCIA Commentary*") at para 22-028 and *PT First Media* at [174]).

46 In my judgment, the requisite "consent" in Article 22.1(viii) of the LCIA Rules 2014 may be established in the following three situations:

> (a) where the third person and applying party have consented to such joinder in writing after the Commencement Date (defined in Article 1.4 of the LCIA Rules 2014 as the date on which the Registrar of the LCIA receives the Request for Arbitration from the party wishing to commence the arbitration);
>
> (b) where the third person and applying party have consented to such joinder in writing earlier in the arbitration agreement; or

(c) where the written consent of the third person and the applying party to such joinder involves applying a combination of (a) and (b) above.

47 Neither party contended that the first permutation was applicable. OS 1446 thus hinged on whether the second or third permutations had been met. Drilling further down, it was also not in dispute that the plaintiff, as the applying party, had (quite obviously) consented in writing to the 2nd defendant being joined. Its application to the Tribunal would constitute consent in writing of the applying party, after the Commencement Date, to the 2nd defendant being joined. The crux was whether the *2nd defendant*, by virtue of it having signed the Joint Venture Agreement and being a party to the arbitration agreement in clause 36.3, had also thereby *consented in writing to being joined* as a party to the Arbitration.

48 I answered this question in the negative. Fundamentally, I disagreed with the plaintiff's contention that simply being a signatory and party to the Joint Venture Agreement and therefore, the arbitration agreement, was sufficient in and of itself to constitute consent by the 2nd defendant *in writing to being joined* in any arbitral reference involving any of the other parties to the Joint Venture Agreement. I disagreed with this argument for two reasons.

49 First, the plain wording of Article 22.1(viii) does not lend itself to such an interpretation. The provision refers to the consent by the third person "*to such joinder in writing*…" being contained "in the Arbitration Agreement" if such consent was given earlier than the Commencement Date [emphasis added]. There is no mention in the rule of the requisite consent in writing being found simply by being a party to an arbitration agreement no matter how generally worded. That rule could quite easily have been drafted in those terms if indeed

that was the intent of the drafters of the LCIA Rules 2014. It would, in my view, involve a strained and unnatural reading of Article 22.1(viii) to hold that the requisite consent in writing ***to being joined*** existed simply by virtue of the third person having signed the contract containing the arbitration agreement.

50 Such a broad reading of "consent" would mean that so long as a proposed joinder party was party to a contract containing an arbitration agreement incorporating the LCIA Rules 2014, it could be joined to any ongoing arbitration involving other parties to the contract at any point, regardless of its views on the matter. In my view, this is problematic for two reasons. Firstly, the joinder party would be forced to live in a state of uncertainty as to whether it would be called upon to defend itself or advance claims in the ongoing arbitration from the commencement of the arbitration till its eventual conclusion. Such a joinder could also conceivably occur at any point in the arbitral proceedings, including, after the close of pleadings or the evidentiary hearings. Second, the joinder party might well be deprived of the opportunity to nominate or participate in the selection of its own arbitrator if it was indeed joined to the arbitration. Such an outcome would represent a significant derogation from the fundamental requirement of party autonomy in international commercial arbitration.[23]

51 I also noted that no authority was cited by the plaintiff where a tribunal or a court has concluded that under Article 22.1(viii) of the LCIA Rules 2014 or other equivalent arbitral rules, the consent of a third party in writing to being joined could be found simply by virtue of that third person being a party to, and having signed the contract containing the arbitration agreement, without more.

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[23] DWS para 4.4.6.

52 Second, it is of course entirely possible and, consistent with the freedom conferred by party autonomy, that an arbitration agreement could be drafted in terms that clearly and unambiguously stipulate that a third person (by being a party to the contract and the arbitration agreement contained therein) thereby also signifies its consent in writing to being joined as a party in any arbitral reference between any of the other parties to the arbitration agreement.

53 In my view, clause 36.3 of the Joint Venture Agreement did not contain any such clear and unambiguous wording. It bears emphasising that the very idea of a forced joinder in the context of arbitration is considered a drastic one (see *PT First Media* at [188] and [197]). Therefore, in a multi-party contract such as the present, the wording of both the relevant rule in the LCIA Rules 2014 *and* the arbitration agreement must be clear and unambiguous in (a) empowering an arbitral tribunal to allow a forced joinder, and (b) containing or evidencing the express consent in writing to such joinder by the third person proposed to be joined (*PT First Media* at [177] and [197]).

54 On the one hand, the wording of Article 22.1(viii) clearly empowers an arbitral tribunal to permit a joinder of a third person based on the relevant parties' consent in writing "to such joinder" being contained in the arbitration agreement itself. However, the wording of clause 36.3 of the Joint Venture Agreement on the other does not, in my judgment, contain the necessary clear and unambiguous consent in writing of the 2nd defendant to being joined to the Arbitration between the 1st defendant and the plaintiff.

55 Mr David Chan, counsel for the defendants submitted that, in effect, the plaintiff was (despite its submissions to the contrary) seeking to persuade this court to *infer* consent in writing by virtue of the 2nd defendant having signed the Joint Venture Agreement and thereby being a party to it and the arbitration

agreement contained therein.[24] Mr Chan also contended that even if such consent could be inferred on the facts, that was insufficient for purposes of Article 22.1(viii). I agreed with the defendants' submissions. It is clear that for Article 22.1(viii) to be triggered, the consent of the third person to being joined must be ***express*** and ***in writing***. Therefore, even assuming, *arguendo*, that consent could be implied or inferred in this case by virtue of the 2nd defendant being a party to the Joint Venture Agreement and the arbitration agreement, it would, in my view, still not be enough to meet the threshold requirements of Article 22.1(viii) of the LCIA Rules 2014.

56 As for the plaintiff's contention that the 2nd defendant's conduct could be taken as suggesting that it had consented to the joinder, this was clearly a non-starter for the same reasons laid out at [55].

57 For the reasons above, I found that the Tribunal did not err in dismissing the Joinder Application. I agreed with the Tribunal's reasoning at paragraphs 127 and 128 of the Decision as reproduced at [17] above.

The doctrine of double separability

58 My conclusion above was sufficient to dispose of OS 1446. However, the defendants had a second arrow in their quiver which would also, in my view, be determinative of OS 1446.

59 That second arrow was the doctrine of "double separability". As noted by the Court of Appeal in *PT First Media* at [166], the doctrine of double separability distinguishes between the original arbitration contract between the parties and the *separate* contract that arises between the arbitrants to a dispute

[24] Notes of Argument ("NOA") 30 July 2020 at p 12 lines 16 -19.

in a particular arbitration reference. It is because the third person (who may be a party to the *original* arbitration contract) is a stranger to the *second* contract that arises between the arbitrants in the arbitration reference that the third person's consent to being joined is required, and indeed, essential (*PT First Media* at [166]).

60 In *PT First Media,* the Court of Appeal was concerned with the question of whether r 24(b) of the 2007 Singapore International Arbitration Centre Rules ("SIAC Rules 2007") allowed the tribunal to join parties that were not parties to the underlying contract or the arbitration agreement contained therein. For context, the said rule gives an arbitral tribunal the power to "allow other parties to be joined in the arbitration with their express consent, and make a single final award determining all disputes among the parties to the arbitration".

61 The Court of Appeal held at [192] that the words "other parties" referred to "other parties to the agreement to arbitrate who are not yet party to the arbitration reference". It also provided a hypothetical example to illustrate the utility of r 24(b) of the SIAC Rules 2007 in the course of its analysis (at [192]–[193]) as follows:

> 192 … r 24(b) would very much serve a useful purpose. It is not difficult to imagine, for example, a tripartite commercial transaction involving A, B and C with all three parties agreeing to submit any disputes inter se to arbitration. Separate disputes between A and B and A and C then arise in short succession. A and B may have already formally commenced arbitration in respect of their dispute. When the dispute between A and C is sought to be resolved, A has two options. The first is to have a separate arbitration to resolve its dispute with C. The other option would be for A to apply in the arbitration between itself and B, for C to be joined into that arbitration. The efficacy of such joinder is palpable, and r 24(b) serves that useful function …
>
> …

> 193 It is also sensible that only C's consent would be required in such circumstances, given that all three parties would already have consented to the same arbitration agreement. Mr Landau uses the same factual matrix to demonstrate how it is precisely because of the doctrine of 'double separability' that recourse to r 24(b) would be necessary for C to be joined to an arbitration between A and B. As the arbitration reference for the first arbitration between A and B had already been constituted, a procedural mechanism for C to be joined would be necessary, notwithstanding that C had agreed, through the arbitration agreement, to arbitrate its disputes with A and/or B (see *Syska* at [166] above).

62 In this regard, the hypothetical example above broadly resembles the situation that presented itself in OS 1446. C would, broadly, be equated with the 2nd defendant, with A being the plaintiff and B the 1st defendant. Therefore, *despite* C (*ie,* the 2nd defendant) already being a party to the arbitration agreement, C's consent to *being joined* in an arbitration between A (*ie,* the plaintiff) and B (*ie,* the 1st defendant) would *still* be required. Drawing on the example above, merely being a party to the arbitration agreement contained in clause 36.3 of the Joint Venture Agreement was *not*, in and of itself, sufficient to signal consent in writing from the 2nd defendant to being joined and being made party to that second contract between the 1st defendant and plaintiff arising out of the arbitration reference in the Arbitration. I found this argument persuasive and it was one which the plaintiff was unable to respond to satisfactorily.

63 As for the objections raised by the plaintiff that the Tribunal should have considered its arguments that the 2nd defendant was, in essence, the real party to the Joint Venture Agreement and the 1st defendant was merely its agent, I was of the view that these arguments had no merit and I had no hesitation rejecting them. They amounted, in substance, to an invitation that this court pierce (or at the minimum, look behind) the corporate veil, which was something I was not prepared to do based on affidavit evidence. In any event, these arguments

potentially raised issues that involved the law of Narnia as the law governing the Joint Venture Agreement (on which no evidence was led). More importantly, the arguments raised by the plaintiff seemed to impinge on the underlying dispute and its merits, which this court had no business traversing in the context of this application.

64 Finally, I add that the dismissal of this application would not cause any material prejudice to the plaintiff. The plaintiff would not be without recourse or be deprived of an opportunity to bring the 2nd defendant into the arena in order to advance a claim against it. On the contrary, the plaintiff had already intimated, in its Statement of Defence and Counterclaim filed in the Arbitration, its intention to issue a separate request for arbitration against the 2nd defendant, and have those proceedings consolidated with the Arbitration. That is a course of action entirely within the plaintiff's rights under the arbitration agreement in the Joint Venture Agreement.[25]

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25 DBOD Vol 3 p 20 [CJD's Statement of Defence and Counterclaim in the Arbitration dated 18 March 2020 at para 2.2(d)(ii)(A)]; NOA 30 July 2020 at p 11 ln 7–13, p 13 ln 11–13

Conclusion

65 For all of the reasons mentioned above, I dismissed OS 1446 with costs. I ordered the plaintiff to pay costs to the defendants fixed at $11,500 together with reasonable disbursements (to be agreed and failing agreement, taxed) for OS 1446 and SUM 1075.

S Mohan
Judicial Commissioner

Tan Thye Hoe Timothy and Koh Wen Yin Vanesse (AsiaLegal LLC) for the plaintiff;
Chan Ming Onn David, Fong Zhiwei Daryl and Abhinav Ratan Mohan (Shook Lin & Bok LLP) for the first and second defendants.