IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 24

Civil Appeal No 188 of 2020

Between

National Oilwell Varco Norway AS (formerly known as Hydralift AS)

… *Appellant*

And

Keppel FELS Ltd (formerly known as Far East Levingston Shipbuilding Ltd)

… *Respondent*

JUDGMENT

[Arbitration — Enforcement — Setting aside leave to enforce — Misnomer]

National Oilwell Varco Norway AS (formerly known as Hydralift AS)
v
Keppel FELS Ltd (formerly known as Far East Levingston Shipbuilding Ltd)

[2022] SGCA 24

Court of Appeal — Civil Appeal No 188 of 2020
Sundaresh Menon CJ, Judith Prakash JCA and Quentin Loh JAD
24 November 2021

16 March 2022 Judgment reserved.

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

Introduction

1 The enforcement of arbitral awards in Singapore is provided for in s 19 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") which empowers the court to enforce an award "in the same manner as a judgment or an order *to the same effect*" [emphasis added] and to enter judgment against the debtor only "*in terms of* the award" [emphasis added].

2 The process that is entailed in this regard has been described as being mechanical in nature in at least two senses. First, as recognised in *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another* [2006] 3 SLR(R) 174 (at [27]), the court undertakes a largely formalistic examination of the matter when the application for leave to enforce an award is made *ex parte* under O 69A

r 6(1) of the Rules of Court (2014 Rev Ed) ("Rules of Court"), with the aim of determining whether the requirements for leave to be granted appear to have been met. Typically, for instance, the court would examine the document produced as the arbitration agreement under which the award is made and consider whether that is capable of constituting an arbitration agreement under Singapore law. Second, if no grounds are raised at either the *ex parte* stage or in any subsequent *inter partes* hearing that would warrant the refusal of enforcement, the court will enter a judgment, *but only in terms that implement the award*. As noted in Robert Merkin, *Arbitration Law* (Informa UK, March 2021 release) at para 19.48, it follows from this that:

> … the award cannot be enforced on *terms not specified in the award*. … In particular, an award *can only be enforced against a losing party in the arbitration*. The party successful in the arbitration is not, therefore, entitled to seek enforcement of the award against another person who is alleged in the enforcement proceedings to be the principal of the losing party in the arbitration. … [emphasis added in italics]

3 In the present case, the appellant, National Oilwell Varco Norway AS ("NOV Norway"), seeks to enforce a final award dated 4 September 2019 (the "Award"), which was issued not in its name, but in the name of a company that no longer exists, A/S Hydralift ("Hydralift"). Following two mergers as part of a corporate restructuring exercise, NOV Norway assumed all the assets, rights, obligations, and liabilities of Hydralift. When the respondent, Keppel FELS Ltd ("KFELS"), commenced an arbitration against Hydralift, NOV Norway appeared, defended the claim and succeeded in its counterclaim in the arbitration. NOV Norway did all this purporting to be Hydralift and it never disclosed the fact that the mergers had occurred or that Hydralift no longer existed.

4 In HC/OS 1543/2019 ("OS 1543"), NOV Norway made an *ex parte* application for and obtained leave from the General Division of the High Court ("ORC 462") to enforce the Award against KFELS. Subsequently, KFELS filed HC/SUM 495/2020 ("SUM 495") to set aside ORC 462. In *National Oilwell Varco Norway AS (formerly known as Hydralift AS) v Keppel FELS Ltd (formerly known as Far East Levingston Shipbuilding Ltd)* [2021] SGHC 124 (the "GD"), the High Court judge (the "Judge") allowed SUM 495 and set aside ORC 462.

5 CA/CA 188/2020 ("CA 188") is NOV Norway's appeal against the Judge's decision. Its case is that the use of the name Hydralift represents nothing more than a misnomer (meaning an inconsequential mistake as to its name) and that in fact and in substance the Award was made in NOV Norway's favour and it is therefore entitled to enforce the Award. The respondent, on the other hand, contends that the appellant cannot enforce the Award because it was issued in favour of a different and non-existent entity, Hydralift. It contends that any order enforcing the Award would be contrary to the arbitral tribunal's intention to issue the Award in favour of Hydralift and not NOV Norway.

6 We heard the parties on 24 November 2021 and reserved judgment. Having considered the matter, we conclude that the Judge erred in not appreciating that the effect of the mergers under Norwegian law is that NOV Norway, is for all intents and purposes, the same legal entity as Hydralift. This is a situation of a true misnomer. As we explain below, the court in such circumstances has the power to, and should, enforce the Award. We therefore allow CA 188.

Facts

7 The material facts are set out comprehensively in the GD (at [6]–[14]). It suffices for us to highlight only the salient facts.

8 On 7 May 1996, KFELS (then known as Far East Levingston Shipbuilding Ltd) and Hydralift entered into a contract for the design and supply of a turret bearing system and a turret turning and locking system (the Contract"). Hydralift is a company incorporated in Norway while KFELS is a company incorporated in Singapore. The Contract is governed by Singapore law and contains an agreement for disputes to be resolved by arbitration in Singapore.

9 A dispute under the Contract arose between KFELS and Hydralift in 1999 in relation to certain alleged defects in the works by Hydralift and the parties tried in vain to resolve this until sometime in 2007. KFELS commenced the arbitration against Hydralift on 27 June 2007, seeking the equivalent of $5.5m in damages for breach of contract.

10 However, by this time, Hydralift was no longer in existence. In 2002, it became a wholly owned subsidiary of a Norwegian company called National Oilwell-Hydralift AS ("NOH"). On 6 October 2004, it merged with NOH and was struck off the Norwegian register of companies. Then, on 15 October 2004, NOH merged with National Oilwell Norway AS (which is the predecessor of NOV Norway), a company incorporated in Norway. We refer to the two mergers hereafter as the "2004 mergers". In 2010, National Oilwell Norway AS changed its name to NOV Norway.

11 NOV Norway, in the name of Hydralift, defended the claim and mounted a counterclaim for the equivalent of $1.2m in damages against KFELS for alleged breach of contract.

12 KFELS knew that Hydralift had been acquired around 2002 but it denies knowledge of the 2004 mergers or the fact that Hydralift ceased to exist as a result of the merger. It claims that it only learnt in 2019 that Hydralift ceased to exist. NOV Norway for its part accepts that it did not disclose to KFELS that Hydralift had ceased to exist, but maintains that KFELS must have been aware of the mergers.

13 An arbitral tribunal was constituted in 2008 (the "Tribunal"). In 2015, KFELS filed three originating summonses (HC/OS 168/2015 ("OS 168"), HC/OS 223/2015, and HC/OS 680/2015) in the High Court to remove one or more members of the Tribunal on grounds of alleged impartiality. In these applications, KFELS named the Tribunal members and Hydralift as defendants. The Judge dismissed the applications and awarded $50,000 in costs, ostensibly in favour of *Hydralift*. In 2016, KFELS filed another originating summons, CA/OS 15/2016, before this court seeking leave to appeal against the Judge's refusal to grant leave for KFELS to appeal to this court against the dismissal of its application for the proceedings in OS 168 to be continued as if it had been commenced by writ under O 28 r 8(1) of the Rules of Court. The originating summons again named the Tribunal members and Hydralift as defendants. The leave application was dismissed and we awarded $2,000 in costs again, in favour of *Hydralift*. For convenience, we refer to these applications as "the related litigation".

14 The Tribunal issued the Award on 4 September 2019, dismissing the claim by KFELS and allowing the counterclaim by Hydralift. KFELS' liability

under the Award is the equivalent of $0.7m in damages and $3.1m in costs, plus interest on both sums.

15 On 6 January 2020, an assistant registrar issued ORC 462 granting leave for NOV Norway to enforce the Award. KFELS then filed SUM 495 to set aside ORC 462.

Decision below

16 The Judge allowed SUM 495 and set aside ORC 462. The Judge noted that the 2004 mergers were governed by Norwegian law since Hydralift, NOH and NOV Norway were all companies incorporated in Norway (GD at [21]). The Judge also made three observations regarding the expert evidence adduced on Norwegian law (GD at [24]–[28]). First, it was undisputed that Hydralift ceased to exist since it was struck off the Norwegian register of companies upon its merger with NOH taking effect on 6 October 2004. Second, there was no evidence that under Norwegian law, the transferee acquires the *name* of the transferor after a merger or that the use of Hydralift's name on and after 6 October 2004 is deemed to be a reference to NOH or NOV Norway (or its predecessor). Third, NOV Norway had never been known by the name of NOH or Hydralift. Therefore, it was factually wrong for NOV Norway to describe itself, as it did in the title of the proceedings, as being "formerly known as Hydralift AS".

17 The Judge found in favour of KFELS on three independent grounds.

(a) First, the Judge found that the Tribunal intended to and did issue the Award in favour of Hydralift and not NOV Norway (GD at [30]). Applying s 19 of the IAA and applying the mechanical approach to enforcement, the court would not be enforcing the Award in the same manner as a judgment to *the same effect* if it were to allow the enforcement application (GD at [51]–[56]).

(b) Second, the Judge found that the use of Hydralift was not a mere misnomer because both parties objectively intended to use Hydralift's name to refer only to Hydralift and not to NOV Norway (GD at [94], [118] and [134]). Thus, the arbitration and the Award were a nullity from the outset. In any event, a misnomer can only be corrected by taking the appropriate steps in the arbitration and this had not been done (GD at [67]–[68] and [145]).

(c) Third, the Judge found that NOV Norway was estopped by its representations in the arbitration and in the related litigation from denying that Hydralift (rather than itself) was the respondent in the arbitration. In reliance on those representations, KFELS spent substantial time and expense over 12 years prosecuting the claim and defending the counterclaim in the arbitration (GD at [150]–[151]).

18 At the same time, the Judge also agreed with NOV Norway that cl 21.1 of the Contract did not prohibit the 2004 mergers from transferring Hydralift's rights under the Contract (including its rights under the arbitration agreement) to NOV Norway under Norwegian law (GD at [173]). Therefore, the Judge was satisfied that an arbitration agreement did exist between NOV Norway and KFELS and this was not a basis to refuse enforcement of the Award.

19 Finally, the Judge also found that NOV Norway did not fail in its duty to make full and frank disclosure of the material facts and this was not a basis to set aside ORC 462 (GD at [179]–[184]).

20 The Judge noted that he allowed SUM 495 with great reluctance. The arbitration had lasted 12 years and there had been no impediment in the arbitration to the parties presenting their cases. Furthermore, the fact that Hydralift ceased to exist did not detract from the Tribunal's resolution of the parties' dispute or from the procedure it followed in doing so. He also noted that the limitation period for any fresh arbitration to be commenced on the same claim and counterclaim had long since expired. However, despite these misgivings, the Judge considered that the appellant's predicament was a result of its own decision to impersonate Hydralift in the arbitration and the related litigation (GD at [190]–[192]).

The parties' arguments on appeal

Appellant's case

21 NOV Norway's case in the appeal is that KFELS should not be allowed to evade its liability under the Award purely because KFELS had named the respondent in the notice of arbitration as Hydralift and not NOV Norway. NOV Norway's arguments can be broadly grouped into four categories:

(a) First, the Judge erred in adopting an excessively mechanical and rigid approach to s 19 of the IAA. Section 19 should be read to allow the court to give "effect" to the true state of affairs where one of the parties has been misnamed. In this case, NOV Norway is, in substance, the true respondent to the arbitration. Indeed, NOV Norway is the only possible respondent in the arbitration since it has succeeded Hydralift which no longer exists as a separate legal personality. In line with this, NOV Norway has participated in the arbitration for 12 years.

(b) Second, the intended respondent to the arbitration was NOV Norway and not Hydralift. This is what makes this a case of a mere misnomer. In determining whether a case is indeed one of a misnomer, the test should be to ask who the party receiving the notice of arbitration (here NOV Norway) would reasonably have understood to be the party intended to be sued. It would have been clear to NOV Norway that *it* was the intended respondent despite KFELS having named Hydralift as the respondent in the arbitration because NOV Norway had succeeded to all the rights and obligations of Hydralift. The Judge also erred in holding that a misnomer can only be corrected within the arbitration since this is not a mandatory or necessary step in order to validate the arbitration.

(c) Third, no estoppel could arise since KFELS would have continued with the arbitration had it known of the true state of affairs before the commencement of the arbitration. In any case, since the Award was in NOV Norway's favour, KFELS' reliance on any representations by NOV Norway did not cause it any detriment.

(d) Finally, NOV Norway relies on the Judge's holding that cl 21.1 does not prohibit the transfer of rights under the Contract from Hydralift to NOV Norway.

Respondent's case

22 As against this, KFELS' case is that NOV Norway cannot be permitted to enforce an award rendered in favour of Hydralift, that being an indisputably *different* entity which had ceased to exist in 2004 even before the commencement of the arbitration. Its arguments too can be categorised into four groups:

(a) First, the Judge rightly found that to grant leave to NOV Norway to enforce the Award would be to assume a power to enforce an award that the Tribunal never intended to issue, had no reason to issue and did not in fact issue. The Judge's application of the mechanical approach followed and implemented the Tribunal's intent as manifest in its Award. Further, it was NOV Norway, who could have, but did not apprise the Tribunal of the true state of affairs.

(b) Second, in any event, the Judge was correct to find that the arbitration and the Award are a nullity since the respondent in the arbitration, Hydralift, did not exist from the arbitration's inception. The naming of Hydralift could not have been a misnomer or a simple mistake as to the name of the intended respondent since both KFELS and NOV Norway objectively regarded Hydralift as the respondent in the arbitration. Even if the naming of Hydralift was a misnomer, the Tribunal alone could correct that within the arbitration and this was not sought or done.

(c) Third, the Judge rightly found that NOV Norway was estopped by its undisputed representations in the arbitration and in the related litigation from denying that Hydralift was the respondent in the arbitration. Aside from the time and expense incurred in proceeding with the arbitration, KFELS also lost the chance to commence fresh proceedings against NOV Norway before another forum, defend the counterclaim in the arbitration on the basis that it was brought by a non-existent entity and undermine the credibility of NOV Norway's factual witness in the arbitration.

(d) Fourth, KFELS argues that the Judge erred in finding that cl 21.1 of the Contract did not prevent Hydralift from transferring its substantive rights thereunder to NOV Norway. Since cl 21.1 prohibits Hydralift from "assign[ing] the contract or any part thereof or any benefit interest [sic] therein or thereunder", Hydralift could not have transferred its rights to NOV Norway through the 2004 mergers. Thus, there was no arbitration agreement between NOV Norway and KFELS and enforcement ought also to be refused on this basis.

Issues on appeal

23 The overarching question before us is whether NOV Norway should be permitted to enforce the Award. In our judgment, the issues that arise are the following:

(a) What is the effect of the 2004 mergers under Norwegian law?

(b) Does cl 21.1 of the Contract prohibit the transmission of Hydralift's rights under the arbitration agreement to NOV Norway?

(c) Does the court have the power to enforce an arbitral award where a party to the arbitration has been named incorrectly and, if so, should it enforce the Award?

(d) Is NOV Norway estopped by its representations from denying that the respondent in the arbitration was Hydralift?

We deal with these in turn.

Our decision

What is the effect of the 2004 mergers under Norwegian law?

24 The crux of the appeal centres on the effect of the 2004 mergers under Norwegian law. The critical question is whether the legal personality of

Hydralift was effectively merged into and assumed by NOV Norway such that they are, for all intents and purposes, the same entity. If this is the case, then there may be merit in NOV Norway's contention that the use of the name Hydralift in the arbitration was simply a misnomer for NOV Norway and did not in law refer to a different entity. If, however, there was only a transfer of assets, rights, liabilities and obligations while the two entities remained distinct following the 2004 mergers, that is the end of NOV Norway's case. This is a logical corollary of the fact that NOV Norway cannot enforce the Award made in favour of another entity.

The effect of the mergers is to be determined under Norwegian law

25 It is undisputed as between the parties that the effect of the 2004 mergers is to be determined under Norwegian law. This is so because, under Singapore law, all matters relating to the status of corporations including the existence and incidents of its personhood fall to be determined by the law of the place of incorporation. As explained in *JX Holdings Inc and another v Singapore Airlines Ltd* [2016] 5 SLR 988 ("*JX Holdings*") (at [21]), the status of the foreign corporation as it exists under the law of the place of incorporation will be recognised in our courts.

The effects of corporate succession

26 Before turning to the expert evidence on Norwegian law, it is helpful to note that corporate reconstruction, amalgamation or succession may occur in a variety of forms. In Singapore, Part 7 of the Companies Act 1967 (2020 Rev Ed) (the "Companies Act") sets out the processes of arrangements, reconstructions and amalgamations. Section 215A of the Companies Act provides that "2 or more companies may amalgamate and continue as one company, which may be one of the amalgamating companies or a new

company". Under s 215G of the Companies Act, the effect of an amalgamation is stated as follows:

> **Effect of amalgamations**
>
> 215G. On the date shown in a notice of amalgamation —
>
> (*a*) the amalgamation is effective;
>
> (*b*) the amalgamated company has the name specified in the amalgamation proposal;
>
> (*c*) all the property, rights and privileges of each of the amalgamating companies are transferred to and vest in the amalgamated company;
>
> (*d*) all the liabilities and obligations of each of the amalgamating companies are transferred to and become the liabilities and obligations of the amalgamated company;
>
> (*e*) all proceedings pending by or against any amalgamating company may be continued by or against the amalgamated company;
>
> (*f*) any conviction, ruling, order or judgment in favour of or against an amalgamating company may be enforced by or against the amalgamated company; and
>
> (*g*) the shares and rights of the members in the amalgamating companies are converted into the shares and rights provided for in the amalgamation proposal.

27 The law of mergers in different jurisdictions may vary not only in the terms used but also in the substantive effect of the corporate succession. In *JX Holdings* (at [46]), the High Court examined several different forms of mergers under Japanese law. The evidence led was as follows:

> (a) In the case of what was described as an absorption-type merger, two or more companies will merge to form one company. One of the entities, which is designated the "surviving company", inherits all the rights and obligations of the absorbed company (or companies, as the case may be), which ceases to exist from the date of the merger. In this situation, because *all* the rights and obligations of the absorbed entities

are transferred to the surviving companies, there is no need to specify in the merger agreement the rights and obligations which are to be transferred.

(b) In the case of what was described as an incorporation-type company split, all or a part of the obligations of the "splitting company" will be hived off and transferred to a newly-incorporated entity. The original company ("the splitting company") will continue to exist in an attenuated form and will hold the rights and obligations not transferred. The rights and obligations to be transferred must be specified in a "split plan", which is to be prepared by the splitting company prior to the split.

(c) In the case of what was described as an absorption-type company split, the "splitting company" likewise transfers some of its rights and obligations to another company, except in this case, the company which receives it is an existing company (known as the "succeeding company"). This is why it is an "absorption" and not an "incorporation". The splitting company will continue to exist and will hold all rights and obligations not absorbed by the succeeding company. The rights and obligations which are to be absorbed must be specified in the split agreement between the splitting company and the succeeding company.

28 The High Court also recognised the transfer of assets and liabilities of a foreign corporation through a process of universal transfer provided for under its law of incorporation. In so doing, the court explained the concept of a universal succession (at [43]) as follows:

> …
>
> (c) In some cases, the law of incorporation might recognise that an entity has the *status of a 'universal successor'*. What is usually meant by this is that the entity is seen as ***having***

> ***inherited the legal personality of another company, with the attendant consequence that it inherits all the assets and liabilities of its predecessor***. This process does not necessarily entail that there is a continuity of legal personality between the old and new entities; the process can be discontinuous, but the ***'essence of the transaction' is that the new entity has taken on either the whole or a part of both the assets and liabilities*** of its predecessor(s).
>
> [emphasis in original omitted; emphasis added in italics and bold italics]

29 The court referred (at [24]–[25]) to Lord Keith of Avonholm's explanation of universal succession in the decision of the House of Lords in *National Bank of Greece and Athens SA v Metliss* [1958] AC 509 (at 530) as follows:

> … This conception, as expounded in the evidence in this case, is common to other legal systems which have borrowed from the Roman law. Used generally with reference to an heir who takes up a succession on death, it carries with it a liability on the heir to the deceased's creditors for the deceased's debts. From this aspect he *represents the deceased*. The persona of the deceased is regarded ***as continued in the heir***, or, as it is otherwise expressed, he is *eadem persona cum defuncto*. He is no more to be regarded as a new party introduced into a contract than is an executor or administrator of a dead man's estate in English law …
>
> The ***extinction of a corporation under statute or decree and the passing of all its rights and liabilities to a successor exhibits, in my view, all the features of a universal succession***. It may not generally be so regarded, but the consequences appear to me to be in many respects indistinguishable …
>
> [emphasis added in italics and bold italics]

30 The High Court also noted that while the concept of "universal succession" is not one with a precise parallel in English law and may not be known to Singapore law, the "basic idea may be grasped by the use of [a] metaphor, which is that the *new entity merely 'steps into the shoes' of the old* and is to be considered, for all intents and purposes, to be the *same person*"

[emphasis added]. Additionally, while the concept of universal succession emphasises the successor's inheritance of rights and liabilities of the predecessor, it is equally important to consider whether there is sufficient *continuity* of legal personality such that it could be said that for all intents and purposes, the successor is the same legal person as the predecessor. The court went on (at [38]–[40]) to discuss this very point as follows:

> 38 The next case is the decision of the English High Court in *Centro Latino Americano de Commercio Exterior SA v Owners of the Ship 'Kommunar' (The 'Kommunar' (No 2))* [1997] 1 Lloyd's Rep 8 ('*The Kommunar (No 2)*'), which concerned the arrest of a vessel off the coast of Falmouth in 1995. The owner of the vessel was a Russian corporation, AOL, and the arrest had been made pursuant to certain debts which arose in relation to services provided to POL, AOL's predecessor and a State-owned enterprise, between 1991 and 1992. Under s 21 of the Supreme Court Act 1981 (c 54) (UK), the court would only be seised of its admiralty jurisdiction via an arrest *if and only if* the owner of the vessel at the time of arrest (in this case, in 1995) was also (a) the person who was liable on the claim in respect of which the arrest had been brought (to use the language of the statute, 'the person who would be liable *in personam*') and (b) the owner or charterer of, or in possession or control of, the vessel at the time when the cause of action arose (in this case, between 1991–1992). The question for the court was ***whether AOL was the same legal person as POL such that the admiralty jurisdiction of the court might be engaged***.
>
> 39 Colman J concluded AOL was not. He noted right from the outset that the case was different from that of *Metliss* … in the sense that in order for the admiralty jurisdiction of the court to be engaged, it would ***not suffice for AOL to be seen as a 'universal successor' of all the assets and liabilities*** of POL. Instead, ***what was required was that there had to be continuity of legal personality*** and on the facts he held that this was absent for the following reasons: (a) POL was an unincorporated state enterprise which was conceived as a branch of the Ministry of Fisheries whereas AOL was a joint stock company; (b) the incorporation of POL took place in stages and it was never contemplated that the entirety of its assets would be transferred to AOL; and (c) upon the incorporation of AOL, all of its shares were first held by a State-owned fund for sale by that fund to the public. Put together, these factors suggested that ***there were sufficient incidents of discontinuity that it could not be said***, at least for the purposes of s 21 of the Supreme Court Act (and in this regard,

> the court noted that this section had to be construed narrowly), ***that AOL was the same legal person as POL***. The first factor was one that Colman J focused particular attention on, for he said that the 'kind of legal entity created at the moment of registration differed so fundamentally from the kind of legal entity that existed up to that time, that to describe them as the same juridical person would be entirely improbable' (at 17).
>
> 40 *The Kommunar (No 2)* is useful for clarifying the nature of the doctrine of universal succession. The doctrine of universal succession does not require the unbroken and consistent existence of the former entity and its eventual transformation into a new. Rather, it is properly seen as a process of inheritance. Therefore, it can take place even if an entirely new entity is formed to take over the assets and liabilities of the old ... It would seem to suggest that the doctrine of universal succession can also apply even if the former entity continues to exist after it has given up its assets and liabilities. This might seem incongruous, given that the notion of 'succession' suggests the extinction of the former entity but as Prof Briggs cautioned, '[s]uccession is, in truth, an image; a metaphor, but not a straightjacket' ... Much depends, in the ultimate analysis, on what is recognised by the law of incorporation.
>
> [emphasis in original omitted; emphasis added in italics and bold italics]

31 It is therefore important to scrutinise the experts' evidence on Norwegian law to determine whether the effect of the 2004 mergers under Norwegian law entailed the succession of legal identity or only a transfer of assets, rights, liabilities, and obligations. This will, in turn, answer the question of whether the legal personality of Hydralift was assumed by NOV Norway such that it is, in substance, the same legal person as Hydralift.

The experts' evidence on Norwegian law

32 Mr Robert Sveen, NOV Norway's expert, and Mr Olav Perland, KFELS' expert, agree that the process and effect of mergers under Norwegian law are governed by chapter 13 of the Norwegian Private Limited Liability Companies Act (Act of 13 June 1997 No. 44) (the "Norwegian Companies

Act"). Chapter 13 is entitled "Merger (amalgamation of private limited liability companies)" and s 13-16 sets out the implementation of the merger as follows:

> **[s] 13-16. Implementation of the merger**
>
> (1) When the period for objections pursuant to [s] 13-14 has expired for all the companies that participate in the merger, and the relations with creditors that have made objections pursuant to [s] 13-15 have been clarified, the assignee company shall notify the Register of Business Enterprises on behalf of all participating companies that the merger shall take effect. When the merger has been registered, the following effects of the merger occur:
>
> 1. the assigning company is ***deemed liquidated***;
> 2. the assignee company is deemed incorporated or the share capital in the company is increased;
> 3. the assigning company's ***assets, rights and obligations are transferred to the assignee company***;
> 4. the shares in the assigning company are exchanged for shares in the assignee company. Shares in the assigning company that are owned by the assigning company itself or the assignee company, or which are owned by anybody acting in his own name but for the assigning or assignee company's account, may not be exchanged for shares in the assignee company;
> 5. any claim for consideration in assets other than shares matures, except as otherwise provided;
> 6. other effects as provided in the merger plan.
>
> …
>
> [emphasis added in bold italics]

33 It is also common ground that upon the 2004 mergers, Hydralift ceased to exist and all of the assets, rights, obligations and liabilities were transferred from Hydralift to NOV Norway by operation of law.

34 However, the experts disagree as to whether the effect of a merger was to secure a universal succession from Hydralift to NOV Norway. Mr Sveen, in

his first affidavit, stated that the merger rules "generally entail a universal succession" and results in the automatic transfer of all assets, rights and obligations from Hydralift to NOV Norway. In his second affidavit, he acknowledged that Mr Perland correctly noted that "universal succession" has no clear definition in Norwegian law and should not be used to derive conclusions. The term "universal succession" is a commonly-used description of the merger concept and the principle under which the assignee company takes over the assets, rights and obligations of the assigning company. Mr Sveen opined that the term "continuity" is also often used but a discussion on the precise meaning of the terms "universal succession" or "continuity" brings nothing new.

35 On the other hand, Mr Perland contended that the concept of "universal succession" does not apply in a merger but that certain principles of "continuity" may be relevant. According to him, the degree to which "continuity" applies depends on the legal issue in question. For instance, what was described as a transfer of formal positions as the holder of rights in assets was said not to be automatic. In essence, a merger does not necessarily mean that the acquiring company automatically takes the place of the transferring company for all intents and purposes.

Our analysis

36 The Judge observed (GD at [25]–[26]) that there was no evidence that the effect of a merger is such that the transferee acquires the *name* of the transferor. The Judge noted that even Mr Sveen did not go as far as to suggest that the transferor's name is deemed by Norwegian law to point to the transferee. The Judge also declined to resolve the disagreement between the experts regarding the meaning of the term "universal succession" (GD at [154]).

37 With respect, we consider that the Judge erred in his analysis because of his singular focus on the *name* of the corporation which is but one incident of a corporation's personhood. The question is not simply whether Hydralift's *name* is deemed by Norwegian law to point to NOV Norway. Indeed, this was not explicitly contended for by Mr Sveen. However, the correct question is whether the effect of the 2004 mergers is that NOV Norway is, under Norwegian law, the *same* legal person as Hydralift even if it continues to bear a different name. Unfortunately, the Judge did not consider this.

38 We agree with Mr Sveen that the use of the terms "universal successor" or "continuity" may not be determinative of this appeal given that the use and definitions of these terms are contested as matters of Norwegian law. We focus instead on scrutinising the substantive *effect* of the 2004 mergers. While the Norwegian Companies Act does not explicitly provide for an inheritance of the legal personality in a merger, the question is whether the amalgamation procedure seen in totality has this effect. We consider the following factors instructive:

(a) the preparatory materials of the Norwegian Companies Act;

(b) the status of the predecessor and successor entities following the mergers; and

(c) the extent to which assets, rights, obligations, and liabilities are transferred following the mergers.

39 In our judgment, all three factors point towards the conclusion that the effect of the 2004 mergers is that NOV Norway is, in law, the same legal person as Hydralift.

40 First, the preparatory materials of the Norwegian Companies Act strongly suggest the continuity of the transferring company's legal personality in the transferee company.

41 Mr Sveen cited the preparatory works issued by the then Ministry of Justice and Police ("Ministry") in relation to the predecessor to the Norwegian Companies Act, which stated that the "views of continuity the [Ministry] has previously presented, is conditioned on the whole business with all rights being transferred in the merger". Critically, the Ministry stated in relation to the dissolving of the assigning company in a merger that:

> The characteristic feature in a merger, as opposed to regular dissolving, is that the company's business shall be [continued/carried on] … as part of a larger legal unit. While for regular dissolving it is clearly correct to have a view of cessation, it will for mergers be reason to emphasise the continuity that will be made with regard to the business of the company.

The Ministry also stated in a general letter that mergers "are completed on the basis of company law rules that are founded on considerations of continuity – *the assigning company is considered to be carried on in the assignee company*" [emphasis added]. Mr Sveen contended that the effect of this is that the assigning company is not being dissolved in the sense that it "disappears", but rather is considered to be carrying on as part of the new merged entity.

42 Mr Perland, on the other hand, disagreed with Mr Sveen's view that the assigning company is considered to be carrying on as part of the new merged entity. He pointed out that the preparatory works merely stated that the "business" carried on and did not state that the legal personality carried on. The notion of being carried on in the new merged entity was merely an explanation of the principle of continuity which is not absolute and varies according to different fields of law. He cited another part of the same preparatory works that

stated that it was clear that a real dissolution of the transferring company takes place. Thus, he concluded that the transferring party is formally and effectively terminated upon completion of the merger.

43 We agree with Mr Sveen's reading of the preparatory materials. While the Ministry's contrasting of a merger and what it described as the "regular dissolving" of a company emphasised the continuation of the "business" of the assigning company and not explicitly, its legal personality, this is only logical given that continuation of the company's business is itself an incident of the continuation of its legal personality. This emerges from the Ministry's reference to the need to have a view of "cessation" in the case of the typical dissolution of a company, whereas in the context of a merger, the emphasis is instead on the "continuity … [of] the business of the company". The second quotation by the Ministry (above at [41]) clarifies any ambiguity as it states that "the assigning company is considered to be carried on in the assignee company". We consider that these words point more clearly to the transferring company's *legal personality* carrying on in the transferee company.

44 Mr Perland's response, that this is an explanation of principles of continuity, in fact does not contradict this. In our view, the general principle of continuity in Norwegian law, which provides that assets, rights, obligations, and liabilities of the transferring company are transferred following the mergers *automatically without any further action* to the transferee, fortifies the conclusion that the legal personality of the transferring company continues in the transferee. Crucially, there is no further need for an assignment or novation of these obligations, rights and assets; they vest in the transferee as a consequence of the merger, and the principle of continuity applies by operation of law.

45 Second, the status of the transferring company and the transferee after a merger also point to the continuation of the transferring company's legal personality in the transferee company. In s 13-16 of the Norwegian Companies Act, it is provided that "the assigning company is *deemed* liquidated" [emphasis added] when the merger has been registered. By operation of law, the transferring company ceases to exist.

46 In legal proceedings where the claimant had been dissolved following a merger, Norwegian law recognises that the claimant's name could be rectified and substituted by the transferee's name. Both experts referred to the decision of the Norwegian Supreme Court Appellate Committee in *Norsk Idekjop AS v Sandberg AS* (10 October 2002, SC) (Norway) for this proposition. Mr Sveen explained that in that case, following the completion of a merger, the court was faced with a situation where the named claimant was a dissolved company. The court regarded this as "a situation where the name of the party had to be rectified, rather than as an introduction of a new party". Mr Perland accepted that the case recognised that it was possible for a party to rectify its name following a merger (*but* before a ruling had been rendered in that case). We note that the court's recognition that this was a *rectification* instead of the introduction of a new party indicates that the legal personality of the transferring company continues in the transferee company such that the latter is considered to be the *same* party as its now dissolved predecessor and all that had to be done was to correctly reflect its new name. While it is true as a matter of fact that this concerned a situation where a substantive ruling had not yet been rendered, there is nothing to suggest that that fact was somehow material to the foregoing analysis or the conclusion reached in that case.

47 Third, the extent to which assets, rights, obligations, and liabilities are transferred following a merger further reflects the continuation of the legal

personality of the transferring party in the transferee. In the decision of the Norwegian Supreme Court Appellate Committee in *China Sunergy Co Ltd v REC Wafer Norway AS and Nordea Bank Norge ASA* (15 July 2010, SC) (Norway) ("*China Sunergy*"), the court held (at [28]) as follows:

> In relation to transfer of obligations, it is clear that a breach of a prohibition of transfer *will not result in the termination of the liability*. The acquiring company has ***assumed all values***, and if obligations have been transferred in a merger in breach of the prohibition of transfer, the ***acquiring company must still be held liable for these***. This, however, does not apply to rights. As a general rule, ***a right that has been transferred in breach*** **[*of*]** ***a prohibition to transfer, may not be claimed by the acquirer***. In the Committee's opinion, this must also apply in mergers. ***As the transferring company has been liquidated in the merger, a breach of the prohibition of transfer of rights in a merger may result in a situation in which the right may not be claimed by anyone***. [emphasis added in italics and bold italics]

48 The experts agree that the effect of *China Sunergy* is that a transfer of *obligations* in breach of a contractual prohibition of transfer "will not result in the termination of the liability", but a transfer of *rights* in breach of a contractual prohibition of transfer may result in a situation where these *rights* may not be enforced. The court noted that in the case of a merger where a right is transferred in breach of a contractual prohibition, the acquirer may not claim the right and that this may result in a situation in which the right may not be claimed by anyone. However, in the case of obligations, the acquiring company is considered to have "assumed all values" and will be held liable for them. We consider this analysis to be consistent with the notion that the legal personality of the transferring company continues in the transferee. This provides a conceptual explanation for why the transferee may be held accountable for all obligations and liabilities undertaken, while yet remaining bound by the contractual agreement of its predecessor entity with third parties not to transfer certain rights.

49 Aside from that, while the experts agree that assets, rights, obligations and liabilities are transferred automatically, they disagree on the extent to which *formal or legal positions* may be transferred.

50 Mr Sveen explained that the starting point is that assets, rights, and obligations are transferred *without any further action being required*. However, there are exceptions. Section 13-17 of the Norwegian Companies Act gives the transferee the right to transfer formal positions as owner or holder of rights in assets. This can be viewed as an *effect* of s 13-16 by providing the transferee with the right to "perfect" the transfer by ensuring, securing or registering its formal legal positions and in this way to secure or enhance the protection accorded by the law to the transferee's interest in such assets. He explained that all this contemplated was the "perfection" of the transfer by reflecting in a formal way, the substantive legal positions that follow upon the merger. For instance, for the transfer of real property, title is transferred automatically under s 13-16 but further action to formalise the transfer is required for the registration of the new name under s 13-17.

51 On the other hand, Mr Perland testified that a merger does not necessarily mean that the acquiring company automatically takes the place of the transferring company *for all intents and purposes*. He did not agree that all legal positions (as holder of rights) are automatically transferred upon the completion of a merger. He drew a distinction between assets, rights and obligations which may be automatically transferred, and formal positions which gave the transferee a *right* to get the transfer but only upon that right actually being *exercised*. He gave as an example of an action which must be taken to transfer a formal position "the filing of a pleading for the acquiring party to enter into subsequent civil proceedings or an arbitration". Thus, the legal position of a party in a court case is not automatically transferred, and specific

legal actions must be taken by the acquiring company to become a party to the legal proceedings and be subject to the ruling or award.

52 With respect, it seemed to us that to the extent the experts disagreed over whether formal positions are automatically transferred, this was immaterial. Even if it were accepted that some procedural steps might have to be taken in order to give formal effect to the substantive rights acquired by the transferee following a merger, the fact remains that those substantive rights and/or obligations would have been transferred automatically by operation of law. Section 13-17 of the Norwegian Companies Act which states that "… the assignee company may pursuant to general rules transfer formal positions as owner of or holder of rights to assets that have belonged to an assigning company" must be read coherently with s 13-16, and on that basis, it seems to us that s 13-17 clarifies that insofar as there are any procedural steps to be taken to rectify *the formal position as reflected in the records*, the assignee company may do the necessary. This is essentially a matter of formality and does not detract from the recognition that the legal personality of the transferring company continues in that of the transferee company. This was the effect of Mr Sveen's evidence and on the whole it seemed to us to cohere better with the legislative material.

53 For the foregoing reasons, we hold that the effect of the 2004 mergers is that although Hydralift ceased to exist as a separate entity thereafter, its legal personality continued to survive and was subsumed in that of NOV Norway. It follows that for all intents and purposes, NOV Norway is the same legal person as Hydralift.

Does cl 21.1 of the Contract prohibit the transmission of Hydralift's rights under the arbitration agreement to NOV Norway?

54 Following the 2004 mergers, NOV Norway succeeded to all the rights and obligations of Hydralift. These included the rights under the arbitration agreement. NOV Norway relied on its rights under the arbitration agreement to pursue the counterclaim in Hydralift's name against KFELS and that is the counterclaim that gave rise to the Award.

55 On appeal, KFELS contends that cl 21.1 of the Contract prohibits the transfer of Hydralift's rights under the arbitration agreement to NOV Norway. Since there is no arbitration agreement between NOV Norway and KFELS, enforcement of the Award ought to be refused on this basis. NOV Norway, of course, disagrees with this.

56 Clause 21.1 of the Contract provides as follows:

> 21 ASSIGNMENT AND SUBCONTRACTING
>
> 21.1 [Hydralift] may not assign the contract or any part thereof or any benefit interest [*sic*] therein or thereunder and, for the avoidance of doubt and without limiting the generality of foregoing [*sic*], [Hydralift] may not assign any receivables or any sums due from the company under the terms of the contract.

The experts' evidence

57 Following the *China Sunergy* decision, it is accepted that under Norwegian law, a contractual provision between the holder of rights, who enters into a merger, and a third party, the effect of which provision is to prohibit the transfer of a particular right, may prevent such a transfer that is in breach of the prohibition from taking effect. However, the experts disagree on the test to be applied when determining whether a contractual provision prohibits a transfer or transmission of rights upon a merger under Norwegian law:

(a) Mr Sveen's evidence was that in a merger under Norwegian law, the principle of continuity is the default rule and any restriction on transferability would be the exception. The principle of continuity means that the transferee company continues the whole business of the transferor company and treats the transferor company as being continued in and by the transferee. A "specific basis" must exist for a contractual provision to operate as a prohibition on a transfer of rights upon a merger. This imposes a high threshold to be met. A "specific basis" will exist if the provision *specifically* prohibits a transfer of rights upon a merger and absent compelling circumstances, this will not be found to be the case if the provision does not *expressly* refer to mergers, amalgamations, change of control or the like. This "specific basis" requirement is a rule of Norwegian company law and therefore applies to the prohibition on transfer in cl 21.1 of the Contract, even though the Contract itself is governed by Singapore law.

(b) Mr Perland's evidence on the other hand was that the "specific basis" requirement does not apply to cl 21.1 of the Contract because that is a rule of Norwegian *contract* law and not of Norwegian *company* law. As the Contract is governed by Singapore law, the "specific basis" requirement has no application to cl 21.1. Additionally, the rationale of the "specific basis" requirement is not engaged by cl 21.1. The interpretation of a contract must take into account the parties' background. While Norwegian parties entering into a contract governed by Norwegian law are taken to be aware of the "specific basis" requirement and can be reasonably expected to draft their contracts with that in mind, there is no reason to expect KFELS, a non-Norwegian legal person, contracting under Singapore law to do so.

58 The Judge preferred Mr Sveen's evidence over Mr Perland's on this issue. He noted that Mr Perland did not cite any authority for his propositions. There was also no contradiction in cl 21.1 being subject to Singapore law and yet also being subject to the "specific basis" requirement of Norwegian law, this being a rule of Norwegian company law and one that applies when examining the effect of cl 21.1 on a merger under Norwegian company law (GD at [160]–[161]).

59 The Judge found that cl 21.1, on its proper construction under Singapore law, does not meet the "specific basis" requirement of Norwegian company law (GD at [173]). Clause 21.1 of the Contract does not expressly prohibit a transfer of rights upon a merger but prohibits only an assignment. The question was whether a transfer of rights upon a merger comes within the meaning of "assign" in cl 21.1 (GD at [163]). He held, on the authority of the decision of the English High Court in *A v B* [2017] 1 WLR 2030 ("*A v B*"), that Singapore law does not consider a transfer that occurs in such circumstances to be an assignment. As a result, Hydralift did not "assign" its rights under the Contract to NOV Norway within the meaning of the clause. Further, the Judge noted that the Contract drew a distinction between what was prohibited by cl 21 and what occurs during a merger, which is dealt with in cl 13.1(c) (GD at [169]–[172]).

60 Thus, he concluded that cl 21.1 of the Contract did not prohibit the 2004 mergers from transferring Hydralift's rights under the Contract (including its rights under the arbitration agreement in the Contract) to NOV Norway under Norwegian law. While NOV Norway had the right to mount a counterclaim arising from the Contract, the Judge nonetheless thought that this did not assist it in enforcing the Award (GD at [174]–[175]).

Our analysis

61 We agree with the Judge that cl 21.1 of the Contract does not prohibit the transfer or transmission of Hydralift's rights under the arbitration agreement to NOV Norway through the 2004 mergers.

62 The Judge was correct in preferring Mr Sveen's evidence over Mr Perland's. Mr Sveen explained *China Sunergy* in a detailed way and the Norwegian Supreme Court Appellate Committee's observations (at [26]–[28]) supports NOV Norway's case that any stipulation against transferability or transmissibility must be interpreted in the light of the principle of continuity so that a "specific basis" would be required to prohibit transferability or transmissibility in a situation of a merger. Although the principle affects how a contractual stipulation is to be construed, the underlying rationale is to uphold the transfer or transmission of rights, duties and obligations in the context of a merger, which is a matter concerning Norwegian company law.

63 Mr Perland's contention that the "specific basis" requirement does not apply since it is part of Norwegian contract law rather than Norwegian corporate law was not supported by authority. There was also no evidence produced by Mr Perland to substantiate his suggestion that as a matter of Norwegian corporate law, the "specific basis" requirement would not apply to contractual prohibitions for contracts signed between a Norwegian entity and a foreign entity (which is the case here), and we therefore reject it.

64 Mr Perland also relied on the decision of the Norwegian Supreme Court in *Tjelle Eiendom AS v Astero AS* (31 August 2017, SC) (Norway) ("*Tjelle*") but in our judgment, this does not assist his position. According to Mr Perland, *Tjelle* addressed the question of whether a merger triggered a right of first

refusal to a property that was transferred in a merger and concluded that it did not. The court stated (at [35]):

> There is no basis that the parties at the time of entering into the agreement had any reflected or agreed attitude to what «sale» should include. As both the High Court and the Court of Appeal have held, I think that owner of Tjelle Eiendom, Lars Ole Tjelle, must carry the risk for any potential assumptions. He acted on behalf of his real estate company and had, at least for most part, knowledge about the merger concept. The fact that he exercised the right of first refusal in relation to the merger in the belief that the agreement gave him such right in such transactions, cannot lead to another conclusion.

In our respectful view, the court's observations regarding the parties' common intention at the point of entering the contract was essentially an affirmation of an objective approach taken to the interpretation of the agreement. It does not set out any principle of law that non-Norwegian contracting parties would be exempt from the "specific basis" requirement in Norwegian law.

65 There is also no contradiction with cl 21.1 being governed by Singapore law and yet being subject to the "specific basis" requirement of Norwegian law. Simply put, when construing what the clause means, we would apply Singapore law on the interpretation of contracts. Having done that, the question is whether the clause, so interpreted, has the effect of prohibiting such a transfer or transmission of rights as has taken place pursuant to Norwegian company law.

66 As we have said, the Judge was correct to conclude that cl 21.1 is not specific enough to meet the high threshold of the "specific basis" requirement. Mr Sveen reasoned, based on *China Sunergy*, that clauses that prohibit transfers or transmissions of rights in general terms without specifically prohibiting such transfers or transmissions of rights pursuant to mergers, amalgamations and changes of control would fail to meet the "specific basis" threshold. This is consistent with the "specific basis" requirement being an exception to the

general principle of continuity. It is also supported by the facts of *China Sunergy* where the "specific basis" threshold was satisfied by a contractual prohibition which specifically prohibited a "transfer of controlling interest or a merger". We note that Mr Perland acknowledged that the general presumption of continuity in the area of private law regulation of transfer of ownership applies but is subject to *clear contrary regulations between the private parties*. We do not consider the wording of cl 21.1 which simply prohibits *assignment* to be a sufficiently clear regulation to displace the presumption of continuity under Norwegian law.

67 We also agree with the Judge that KFELS' argument that a transfer or transmission of rights upon a merger comes within the meaning of "assign" in cl 21.1 of the Contract is untenable. The Judge accepted that the decision of the English Court of Appeal in *Stansell Ltd and another v Co-operative Group (CWS) Ltd* [2006] 1 WLR 1704 ("*Stansell*") supported KFELS' argument, which was to the effect that the word "assign" in an anti-assignment clause connoted "an *inter vivos* disposition by one party in favour of another as an act of their joint volition" (at [64] and [66] of *Stansell*). It was argued that this would extend to encompass dispositions of assets that took place in the context of a merger on the basis that a merger was an event that both parties agreed to participate in and hence had the requisite quality of being an act of their joint volition. However, the Judge declined to follow *Stansell*. He considered that the natural meaning of the verb "assign" requires the acts to be the direct cause of the transfer of rights and not merely an ultimate or indirect effect of the transfer. An assignment requires a voluntary act, which, in itself, directly brings about the transfer of rights and that would exclude a transfer that was a consequence of a merger. In a merger, it is the statute or court order which operates in law to bring about the transfer of rights. The voluntary acts merely initiate the process

and satisfy the conditions precedent for the statute or court order to operate to bring about the transfer (GD at [165]).

68 This is also supported by *JX Holdings* and *A v B*. In *JX Holdings*, the High Court drew a distinction between a "transfer" which is a voluntary disposition of legal title to the shares brought about by an act of the shareholder and a transmission which is an automatic devolution of title taking place by operation of law upon the occurrence of a legally significant event (at [18]). The court held that the transfer of shares upon a merger is not a "transfer" within the meaning of s 130(1) of the Companies Act (Cap 50, 2006 Rev Ed) but is instead a "transmission" (at [43(d)]). While KFELS submits that *JX Holdings* was not concerned with the interpretation of the word "assign", the court's reasoning nevertheless supports the distinction drawn by the Judge between the transfer or transmission of shares upon a merger and a contractual transfer by the owner of the shares.

69 In *A v B*, the English High Court held (at [44]–[45]) that there is a well-established distinction between a transfer of rights upon a scheme of amalgamation and a transfer of rights upon an assignment. The distinction turns on whether the rights are transferred as a whole or only by a series of particular transfers. A transfer of the latter type is an assignment but not one of the former variety. Since, as Mr Perland submitted, the effect of the Norwegian Companies Act was to transfer the assets, rights, liabilities and obligations of Hydralift ultimately to NOV Norway "as a whole", the Judge was correct that this entire transmission was not an "assignment".

70 Finally, the Judge's finding that the Contract drew a distinction between what is prohibited by cl 21 and what occurs during a merger *is not challenged* by KFELS in this appeal. First, the Judge noted that the subject matter of cl 21

being "Assignment and Subcontracting" is consistent with assignment being limited to a voluntary transfer following which the transferor continues to exist upon a merger. Second, he considered cl 13.1(c) which addresses the possibility of Hydralift undergoing a merger, and noted that the omission of any reference to reconstruction or amalgamation in cl 21.1 indicated that the latter clause was not intended to prohibit a transfer of rights upon a merger (GD at [171]–[172]).

71 For the foregoing reasons, we affirm the Judge's finding that cl 21.1 of the Contract does not prohibit a transfer or transmission of rights from Hydralift to NOV Norway upon the 2004 mergers under Norwegian law. Hence, an arbitration agreement exists between NOV Norway and KFELS. While the Judge did not consider that this assisted NOV Norway in enforcing the Award, as we will explain shortly below, we disagree with this.

Does the court have the power to and should enforce the Award?

72 We turn next to address the court's power to enforce the Award and whether it should do so. We have held (above at [53]) that in substance, NOV Norway was the same legal person as Hydralift following the mergers. The fact remains, however, that the Award was made in favour of Hydralift. The cases have dealt with misnomers where a party to an arbitration or court proceeding has been misnamed. Such a situation typically arises when that party has changed its name and/or transferred its rights under the contract to another legal entity and/or ceased to exist. In the context of the enforcement of an arbitral award, the difficulty arises because the court is being asked to enforce an award in favour of or against a party which is not itself named in the award.

73 KFELS' case against the enforcement of the Award is grounded on three contentions. First, it submits that the court has no power to enforce the Award because the Tribunal intended to and did make the Award in favour of Hydralift.

Enforcing the Award would be contrary to the mechanical approach to enforcement under s 19 of the IAA. Second, Hydralift was not a misnomer for NOV Norway. Third, even if Hydralift was a misnomer for NOV Norway, the misnomer was not corrected during the arbitration and the arbitration is thus a nullity.

74 NOV Norway refutes each of these contentions. It contends that, under s 19 of the IAA, the court has the power to give "effect" to the true state of affairs in a situation where one of the parties has been incorrectly named. In this case, Hydralift was a mere misnomer for NOV Norway. NOV Norway has standing to enforce the Award because it is, in substance, the true respondent to the arbitration. Finally, there is no requirement that a misnomer must be corrected within the arbitration since it is not mandatory or necessary to do so in order to validate the arbitration.

75 As we explain below, we agree with NOV Norway. We are satisfied that the court has the power to enforce an award in a misnomer situation and enforcement of the Award should be granted.

The power of the court to enforce an award in a misnomer situation

76 In our judgment, the power to enforce an arbitral award in a misnomer situation is not inconsistent with the mechanical approach to enforcement. The Judge referred to the decision of the English High Court in *Norsk Hydro ASA v State Property Fund of Ukraine and others* [2002] EWHC 2120 (Comm) ("*Norsk Hydro*"). In *Norsk Hydro*, a tribunal issued an award against a number of legal persons including a single legal person named in the arbitration and in the award as "The Republic of Ukraine, through the State Property Fund of Ukraine". The court had initially granted the creditor leave to enforce the award

against, among others, two separate legal persons: (a) the Republic of Ukraine; and (b) the State Property Fund of Ukraine ("State Property Fund").

77 Gross J subsequently set aside the leave order. He endorsed the application of the mechanical approach in enforcement and observed as follows (at [17]–[18]):

> 17 … There is an important policy interest … in ensuring the effective and speedy enforcement of such international arbitration awards; the corollary, however, is that the task of the enforcing court should be as *'mechanistic' as possible*. Save in connection with the threshold requirements for enforcement and the exhaustive grounds on which enforcement of a New York Convention award may be refused … *the enforcing court is neither entitled nor bound to go behind the award in question, explore the reasoning of the arbitration tribunal or second-guess its intentions*. Additionally, the enforcing court seeks to ensure that an award is carried out by making available its own domestic law sanctions. …
>
> 18 Viewed in this light, as a matter of principle and instinct, ***an order providing for enforcement of an award must follow the award***. No doubt***, true 'slips' and changes of name can be accommodated***; suffice to say, that is not this case. Here it is sought to enforce *an award made against a single party, against two separate and distinct parties*. To proceed in such a fashion, necessarily requires the enforcing court to stray into the arena of the substantive reasoning and intentions of the arbitration tribunal. Further, enforcement backed by sanctions, is sought in terms other than those of the award. … In my judgment, this is all inappropriate territory for the enforcing court. The right approach is to seek enforcement of an award in the terms of that award.
>
> [emphasis added in italics and bold italics]

78 From the wording of s 19 of the IAA, the Judge held that the court only grants leave to enforce an award and to enter judgment thereafter in terms which *mirrors, precisely and mechanically,* the dispositive terms of the award. The court has no power to vary or deviate from that. The Judge found that this was dictated by the policy imperatives of party autonomy and minimal curial intervention. The Judge suggested that the court may deviate from this to correct

a minor clerical error, take into account post-award changes in circumstances, make changes in accordance with parties' consent at the time of enforcement and with a statutory basis (GD at [40]–[50]).

79 Some of the Judge's observations may have gone further than was necessary to dispose of the present case and to that extent, we reserve our views, including on the precise ambit of the exceptions to the mechanical approach to enforcement, to another occasion when it is necessary to consider these points. For the purposes of this appeal, we limit ourselves to considering a true misnomer situation, being one where all that has happened is that an actual party to the arbitration has been described or referred to by an incorrect name. Where that is so, we are satisfied that the enforcing court may deviate from the name used in the dispositive terms of an award and instead enforce the award in favour of the correct party even if it is not named as such in the award.

80 *Norsk Hydro* was not a true misnomer situation. In *Norsk Hydro*, the claimant seeking enforcement argued that both it and the tribunal considered the Republic of Ukraine as the "true respondent". It applied to strike out the reference to the State Property Fund (at [15]). While the claimant seemed to be contending that the "The Republic of Ukraine, through the State Property Fund of Ukraine" was simply a misnomer for the Republic of Ukraine, in fact, the State Property Fund was an agency of the government, and distinct from the Republic of Ukraine. Thus, the agreement, on which the claimant commenced arbitration proceedings, named "the State Property Fund of Ukraine, being an agency of the Government of Ukraine and having its principal offices in Kiev, Ukraine (hereinafter referred to as the 'State Property Fund')" as a party to the agreement (at [3]).

81 Additionally, all communications regarding the arbitration were sent to the address of the State Property Fund. While the State Property Fund did not participate in the arbitration, it did contest the jurisdiction of the tribunal. There was no independent communication to or participation on the part of the Republic of Ukraine (at [5]). Given that the State Property Fund was a distinct entity from the Republic of Ukraine and that the latter did not participate in the arbitration, enforcing the award against the Republic of Ukraine would be tantamount to enforcing it against a non-party. That is quite different from a situation of a true misnomer.

82 Before us, two other cases were cited: *International Movie Group Inc and The Movie Group Inc v Palace Entertainment Corporation Pty Ltd* (7 July 1995, SC) (Vic) ("*IMG*"), *International Movie Group Inc & Anor v Palace Entertainment Corporation Pty Ltd* [1995] 128 FLR 458 ("*IMG (Appeal)*") decided by the Supreme Court of Victoria and *A Consortium Comprising TPL and ICB v AE Ltd* [2021] HKCFI 2341 ("*TPL and ICB*") decided by the Hong Kong Court of First Instance. We address each of these cases in turn, which in our view *are* examples of a misnomer situation.

83 In *IMG*, Senior Master Mahony gave leave to the plaintiffs, International Movie Group Inc and The Movie Group Inc ("TMG"), to enforce parts of the award against the defendant, Palace Entertainment Corporation Pty Ltd. The award referred to the parties in the arbitration as The Movie Group and Palace.

84 In the notice of arbitration, the plaintiffs were the claimants and referred to collectively as The Movie Group. Palace Entertainment Corp and Palace Films Pty Ltd were named as respondents in the arbitration. These were the names of the plaintiffs' contracting counterparties in the relevant contracts which were the subject of the arbitration. The notice of arbitration stated that

The Movie Group believed that the "respondents are either the same company, related companies or the alter egos of each other" and referred to them collectively as Palace (at 3).

85 The plaintiffs initially sought leave to enforce the award against Palace Films Pty Ltd. However, it subsequently came to light that Palace Entertainment Corp and Palace Films Pty Ltd both did not exist (at 10–11). The plaintiffs were later granted leave to amend the originating motion to enforce the award against the defendant (namely, Palace Entertainment Corporation Pty Ltd) (at 22–23). The defendant resisted enforcement on the basis that the award could not be enforced in Australia unless it became binding on it in California pursuant to s 8(5)(f) of the International Arbitration Act 1974 (Cth). This required the application of ss 1285 to 1288 of the California Code of Civil Procedure (US) (1872) which dealt with petitions for confirmation, correction and vacation of awards (at 33–34).

86 Senior Master Mahony accepted that the reference to Palace Entertainment Corp was simply an abbreviation of the defendant (at 55) and Palace Films Pty Ltd was another name to which the defendant answered (at 68). There was never any evidence suggesting that any issue concerning the identity or lack of identity of the respondents in the arbitration had ever been raised before the tribunal. He noted that the defendant was the only legal entity at the address at which the notice of arbitration was served. The defendant responded to it and joined with the plaintiffs for the selection of the arbitrators. He found that the defendant was a party to the arbitration (at 59). He thus allowed leave for the plaintiffs to enforce the award against the defendant without the need for a correction (at 60–61 and 88).

87 In *IMG (appeal)*, the defendant attempted to resist enforcement on another ground. It argued that the named plaintiffs, International Movie Group Inc and TMG, were not the correct corporate entities seeking to enforce the award because the reference to "International Movie Group Inc" in the arbitration award was a reference to an American company which was not a party to the contract (at 463).

88 This arose because of structural and name changes within the International Movie Group. A company was incorporated in Canada on 5 September 1980 under the name Trio-Archean Developments Inc. That company later changed its name to International Movie Group Inc ("IMG Canada"), the company which entered into some of the contracts with Palace Entertainment Corp. On 30 November 1990, International Movie Group Inc (Delaware) ("IMG Delaware") was incorporated. On 16 May 1991, IMG Delaware took over IMG Canada and IMG Canada changed its name to International Movie Group (Canada) Inc. TMG was, when the contracts were entered into by it, a subsidiary of IMG Canada but later became a subsidiary of IMG Delaware on 29 June 1993 (at 463).

89 The defendant argued that since the notice of arbitration referred to TMG and its parent company and before the arbitration commenced, TMG had become a subsidiary of IMG Delaware, the intended plaintiffs were TMG and IMG Delaware instead (at 463).

90 Smith J rejected this. He was satisfied that when the notice of arbitration was served on 30 April 1993, IMG Canada was the parent company of TMG and that, in any event, it was always intended by those responsible for bringing both the arbitration proceedings and enforcement proceedings that TMG and IMG Canada were to be the claimants in the arbitration and the plaintiff in the

enforcement proceedings. Therefore, he held that the situation was one of misdescription of the relevant party in the arbitration proceedings and the enforcement proceedings. Thus, he allowed the amendment to the originating motion in the enforcement proceedings to identify International Movie Group (Canada) Inc as the plaintiff instead of IMG Canada (at 464).

91 Smith J explained that the dominant consideration ought to be fidelity to the substance of the award (at 474):

> Alternatively, if it matters that another party was named in the arbitration proceedings and the award, it seems to me that a judgment against one party will be a judgment to the same effect as the award. *What the Act is concerned with is the substance of the orders sought to be made and the substance of the award made.* I am encouraged to take this approach because to interpret the section in the way sought would cause practical difficulties and create technical obstacles to a practical procedure; for example, one defendant may be in the jurisdiction while another defendant may not be. [emphasis added]

92 Turning next to *TPL and ICB*, there the awards had been issued in favour of the applicant, the "Consortium comprising TPL and ICB", against the respondent, AE Limited. When the applicant sought to enforce the awards in the name of the "Consortium comprising TPL and ICB", the respondent argued that enforcement should be refused as the applicant was not a legal entity capable of suing and being sued under the laws of Hong Kong and had no capacity to institute the present action (at [2]). On the applicant's case, TPL and ICB were separate and distinct legal entities in law but entered into a joint venture for the purposes of the contract which gave rise to the dispute submitted to arbitration (at [11]). The applicant applied for leave to amend the originating summons to add TPL and ICB respectively as the second and third applicants (at [6]).

93 Mimmie Chan J allowed leave to amend the application to allow TPL and ICB to be joined as applicants and granted leave in favour of TPL and ICB to enforce the awards against the respondent (at [23] and [34]). In coming to her decision, she noted that the request for arbitration was served in the name of "A Consortium comprising TPL and ICB". There was no issue raised that the claimant's name in the arbitration was not a legal entity and it was clear that the respondent in the arbitration was under "no doubt or confusion as to who had commenced the Arbitration and made the claims against it" (at [13]). The applicants had also provided two separate powers of attorney, executed by and on behalf of each of TPL and ICB in the arbitration, to demonstrate that the representatives had authority to act on behalf of TPL and ICB. The parties signed the terms of reference which confirmed the parties' agreement that the powers of attorney were valid and enforceable (at [14]). The awards also made clear that the claimant in the arbitration was a consortium comprising TPL of the United Arab Emirates and ICB of Lebanon (at [15]).

94 The respondent argued that the Hong Kong courts have held that the enforcement of arbitral awards should be as mechanistic as possible. Therefore, the jurisdiction of the court was limited only to entering judgment in terms of the award (namely, in favour of "A Consortium comprising TPL and ICB") and not any other entity. Chan J disagreed. She considered that even applying a mechanistic approach, the court is not prevented from giving effect to an award *on its plain reading*. It was reasonably clear from a reading of the awards that it was made in favour of a consortium said to comprise the two entities, TPL and ICB. As the named components of the consortium, the applicants were jointly entitled to the benefits of the awards (at [19]).

95 In coming to her decision, Chan J explained (at [21]) the interaction between the mechanistic approach and the policy of facilitating enforcement of awards as follows:

> Notwithstanding the advocacy of a mechanistic approach to the enforcement of arbitral awards, the Courts have nevertheless declined to be rigid if it would be contrary to the spirit of the Ordinance which is to *facilitate the enforcement of arbitration agreements and awards*. In the first instance decision of the Court in *Xiamen v Eaton Properties Limited and ors* HCCT 54/2007, 24 June 2008, Reyes J pointed out that there is nothing in the Ordinance which ties the Court's hand to enforcing only part of an award where appropriate, and further, that the Court has a degree of flexibility in the deployment of the means of enforcement available to it. In *JJ Agro Industries (P) Ltd v Texuna International Ltd* [1992] 2 HKLRD 391, Kaplan J also held that the doctrine of severability of an award enables the Court to enforce such part of an award as is within its jurisdiction, and that it would be contrary to the spirit of the Ordinance if enforcement were to be refused in respect of a severable part of an award which is not in issue. These decisions go beyond the identification of the parties named in the award. ***To be blind to the natural and reasonable meaning as is apparent from the Awards, and refuse enforcement of the Awards in this case would be obstructing rather than "facilitating" arbitration***, and entirely contrary to the aim and objectives of the Ordinance in section 3. ***This is so when there is no need whatsoever to 'go behind' the Awards to understand what it means, or to be embroiled in the underlying dispute or the tribunal's reasoning for the Awards, in order to identify the party or parties named in the Awards***.
>
> [emphasis added in italics and bold italics]

We agree with these observations. Where there is no need for the court to be embroiled in the tribunal's reasoning and the merits of the dispute to identify the parties named in the award, the court is not powerless to enforce the award in a situation of a true misnomer. The court endeavours to facilitate the enforcement of arbitral awards. An unduly rigid approach towards enforcement would be antithetical to this aim. As acknowledged by Gross J in *Norsk Hydro* (above at [77]), true "slips" and changes of name *can* be accommodated within the mechanical approach to enforcement.

96 It follows that in our judgment, the court has the power to enforce the award in favour of or against a party not expressly named in the award where this entails a true misnomer. We reject KFELS' submission to the contrary that to enforce the Award in favour of NOV Norway pursuant to s 19 of the IAA would be to give effect to the Award *otherwise* than in accordance with its terms. With respect, it seems to us that this places undue emphasis on form even when it is obvious what the substance of the Award entails. Allowing the enforcement of an award in a situation of a misnomer does not undermine or contradict the mechanical approach to enforcement under s 19 of the IAA. In substance, the court is only accommodating a change of name for a mistakenly named party albeit at a very late stage. The court nonetheless remains faithful to the substance of the orders made in the award and, in no way, interferes with the tribunal's reasoning in the award or the merits of the dispute.

Whether the court should enforce the Award in the present case

97 In our judgment, the Judge erred in holding that Hydralift was not a misnomer for NOV Norway. Since we have found (above at [53]) that the effect of the 2004 mergers is that the legal personality of Hydralift continued in NOV Norway such that Hydralift is the same legal person as NOV Norway, the very premise of KFELS' case, which is that Hydralift is a *indisputably different* entity from NOV Norway (above at [22]), falls away.

98 The parties disagree as to the appropriate test that should be applied to identify a misnomer. NOV Norway submits that the test is to ask: who the party receiving the notice of arbitration would reasonably have understood to be the party intended to be sued (the "Unilateral Test"). KFELS, on the other hand,

submits that the test is to ask to whom did each party reasonably understand the other party to be referring to when it used the non-existent legal person's name in the arbitration (the "Bilateral Test"). The Judge agreed with KFELS' formulation of the test (GD at [81]).

99 The parties both relied on the decision of the English Court of Appeal in *SEB Trygg Liv Holding AB v Manches and others* [2006] 1 WLR 2276 ("*SEB Trygg (CA)*"). In *SEB Trygg (CA)*, four corporate vendors sold shares to a purchaser. The four vendors commenced an arbitration against the purchaser and the purchaser counterclaimed (at [2]). However, before the arbitration commenced, one of the vendors ceased to exist. Through some agreements, the non-existent vendor's bare right to sue under the contract was transferred to its parent company. After discovering that one of the vendors had ceased to exist, the purchaser sought a declaration from the court that the tribunal had jurisdiction over the parent company and that the parent company would be bound by any award on the counterclaim against the non-existent vendor (at [12]). The parent company argued that it had never been a party to the arbitration.

100 At first instance, in *SEB Trygg Holding Aktiebolag v Manches* [2005] EWHC 35 (Comm) ("*SEB (HC)*"), the English High Court held that the arbitration was not a nullity because the non-existent vendor's name was used as a misnomer for the parent company and the arbitration was commenced on behalf of the parent company (at [38]–[40]). In considering whether the case was one of a misnomer, Gloster J stated that "the cases show that the identity of the party intended to be a claimant in an arbitration is to be determined objectively in accordance with the ordinary principles for the construction of the contract, by reference to the notice of arbitration and the surrounding circumstances" (at [26]). She noted that "it was *clear to the parties* at the time

that the arbitration proceedings were intended to be brought on behalf of the company which was a party to the relevant sale agreement at the date of the reference to the arbitration" [emphasis added] (at [36]).

101 In *SEB Trygg (CA)*, the Court of Appeal affirmed Gloster J's decision. As regards the test for identifying a misnomer, the court (at [51]–[52] and [54]) stated as follows:

> 51 … We prefer to state the question as one of principle, namely, ***who would reasonably have been understood by the party against whom the claim was asserted to be the entity bringing the claim****?* Within the misnomer cases, that approach is that of Lloyd LJ in *The Sardinia Sulcis* [1991] 1 Lloyd's Rep 201 …. In our case, the proceedings were commenced on the instructions of [the vendors' agent], acting on the authority of [a director]. But what was the nature of that authority? Plainly, to protect the interests of the vendors … [The vendors' agent] had no business to include a claimant in the proceedings, and [the director] had no business to permit him to do so, unless that claimant was one of those vendors. [The non-existent vendor] was therefore a claimant as, but only as, one of the vendors.
>
> 52 That would have been obvious, to the extent of not even needing thought, to [the purchaser]. And it would also *have been obvious from a scrutiny of the pleadings. … [T]he best source for what the claimant actually intended is to be found in the points of claim.* In our case the pleadings unequivocally said that they were brought jointly by the [vendors]. In those circumstances the fact that the title of the proceedings did not record that the relevant vendor had transferred all of its rights to [the parent company] under the transformation agreement was indeed a mere misnomer.
>
> …
>
> 54 The approach suggested above matches with that of this court in a case … concerning a landlord's counter-notice, *Lay v Ackerman* [2004] HLR 684. The notice is valid if it leaves the tenant in no doubt that it comes from the landlord. By the same token, *the pleadings in this case could not leave anyone in any possible doubt* that they were advanced on behalf of the vendors … and of no one else.
>
> 55 The arbitral proceedings accordingly were not and are not a nullity. [The parent company] even if not already a party

> to them joined in them by instructing its solicitors to put its name in the place of the fourth claimant.
>
> [emphasis added in italics and bold italics]

102 In our judgment, both the Unilateral Test and Bilateral Test are somewhat fixated on the parties' intentions at the point of the commencement of the arbitration or during its currency. Unfortunately, this may not always paint a full picture. The parties' intentions may be useful in simple cases where it is clear from the pleadings, the conduct of the parties and the award itself that the case concerns a true misnomer. *SEB Trygg (CA)* is an example where the court considered it "obvious from a scrutiny of the pleadings" that the name of the non-existent vendor was a misnomer for the parent company. Similarly, *TPL and ICB* is another example where the court considered it clear that there was "no doubt or confusion as to who had commenced the Arbitration and made the claims against it". In these cases, inquiring into the parties' objective intentions was a useful way to determine whether there was a misnomer.

103 However, the issue can also arise in circumstances where one of the parties and/or the tribunal may have been misled or mistaken as to the non-existence of a named party to the award. In our judgment, the question must turn on the substance of whether the correct party is before the court and this cannot be constrained solely by what the parties may have intended because of what they knew or did not know at the material time. If the mistaken or misled party is ignorant that its counterparty no longer existed at the point of commencement of the arbitration or during the arbitration, its intention, as shown from its pleadings and conduct during the arbitration, would logically point towards its misunderstanding that the counterparty was in existence and participating in the arbitration.

104 We therefore prefer to frame the test more simply as whether the name stated in the award, seen objectively against the relevant factual and legal background, is nothing more than the incorrect name of the legal person the award is in fact and in law to be enforced in favour of or against?

105 In the present case, the critical consideration is that, in *law*, NOV Norway is the same legal person as Hydralift. While there were two entities once, Hydralift and NOV Norway, there is now and was throughout the course of the arbitration in substance only one legal entity because the legal personality of Hydralift continued in NOV Norway following the 2004 mergers. The fact that the 2004 mergers were concealed from both KFELS and the Tribunal does not change that analysis.

106 Ms Wendy Lin, counsel for the respondent, submits that enforcing the Award would be contrary to the Tribunal's intent as manifested in the Award. The Judge too considered that the Tribunal intended to issue the Award in favour of only Hydralift and not NOV Norway. We disagree. Given that the 2004 mergers were not known to the Tribunal, and it was not even in issue before the Tribunal whether the Award should be made in favour of Hydralift or NOV Norway, the Tribunal never directed its mind to this question at all. From this perspective, it seems artificial to say that the Tribunal's intent was to issue the Award in favour of Hydralift and not NOV Norway.

107 The Tribunal's mandate was essentially to adjudicate upon the liability arising from the specific defects in the works as arising under the Contract. That is precisely what it did. More accurately construed, the Tribunal's intent was simply to issue the Award in favour of the party which succeeded in the arbitration in terms of establishing its entitlement to damages for defective works under the Contract. That party may have borne the name Hydralift as far

as the Tribunal was concerned. However, as a matter of Norwegian law, that party is now NOV Norway following the 2004 mergers. The court is not, in any way, going behind the Award to stray into the arena of the substantive reasoning and intentions of the arbitral tribunal (as cautioned against in *Norsk Hydro* above at [77]). On the contrary, it is simply giving effect to the Tribunal's mandate and facilitating the enforcement of the Award.

108 It follows that in our judgment, the court should exercise its power to enforce the Award.

Whether a misnomer needs to be corrected within the arbitration proceedings

109 The final point is whether a misnomer needs to be corrected within the arbitration proceedings. The Judge proceeded on the basis that a proceeding commenced by and against a non-existent legal person renders the arbitration a nullity (GD at [63]). Thus, the Judge found that even if Hydralift's name was a misnomer for NOV Norway, this would be insufficient to save the arbitration from being a nullity because the misnomer was not corrected within the arbitration itself (GD at [66]–[67]).

110 NOV Norway argues that the Judge erred in holding that a misnomer saves an arbitration from being a nullity *only* if it is corrected during the arbitration. It relies on *IMG* for that proposition and submits that *SEB Trygg (CA)* does not contradict this. It also notes that to hold otherwise would be illogical since if the proceedings were a nullity to begin with, it is difficult to see how any order made in the arbitration can validate them.

111 As against this, KFELS defends the Judge's conclusion as well-supported by the authorities and rightly reflecting the notion that it is the arbitral tribunal which is competent to decide and rule on matters of procedure relating

to the arbitration and any issues of jurisdiction at first instance. In accordance with the principle of minimal curial intervention, it is said the court has no power under the IAA to intervene and allow a substitution of parties or correct a misnomer in the arbitration, at the enforcement stage. As a matter of policy, encouraging all parties to take the necessary corrective steps during arbitration promotes the certainty and finality of awards.

112 In our judgment, the Judge erred in holding that a misnomer will void the arbitration unless it is corrected within the arbitration itself. The Judge relied on *SEB Trygg (CA)* (at [50]) for this proposition. The English Court of Appeal held that the arbitration in that case was not a nullity and stated as follows:

> 50 … If the proceedings were started on behalf of a party who did not exist, then they were a nullity. If on the other hand it was clear who the party was, but there *was simply an error in naming him, the proceedings were not a nullity and the error* ***can, in appropriate circumstances,*** *be corrected within them…* The present case differs from the orthodox in two ways. First, it concerns an arbitration, governed by the law of contract and not by rules of court. Second, it is a singular feature of the case that it is the claimant in that arbitration who asserts that the proceedings in which he has taken an active part are a nullity because the claim was brought not in his name but in the name of a non-existent company. [emphasis added in italics and bold italics]

113 Given that we have found that Hydralift was a misnomer for NOV Norway, the arbitration in the present case is not a nullity. We do not read [50] of *SEB Trygg (CA)* as stating that a misnomer can *only* be remedied within the arbitration itself. That was simply not an issue before the court in that case since the arbitration was ongoing and the parties could very well correct the misnomer before the tribunal. The question that is raised before us was therefore not raised in *SEB Trygg (CA)*.

114 At first instance, Gloster J in *SEB (HC)* considered (at [24]–[25]) that if it was a case of a true misnomer, the proceedings would "nonetheless be validly constituted" and the record could even be corrected by the court:

> 24 The question which arises under this head is, simply stated, what was the identity of the corporate entity which Manches, the solicitors then acting, intended should be a claimant in the arbitration proceedings? Did Manches simply get the name wrong, because they did not know about the merger, or Old Aachener Re's dissolution, or could it be said that their mistake was not merely the use of a wrong name, or a 'misnomer', but evinced a more fundamental error, that is to say an intention to bring the proceedings by a wrong claimant, which was no longer in existence. *If the case was one of mere 'misnomer', then the authorities show that the position can be corrected be simply amending the name of the party to the proceedings,* ***which are nonetheless validly constituted***; on the other hand, if the intention was in fact to bring the proceedings on behalf of a wrong party, then the proceedings are indeed a nullity.
>
> 25. Thus where proceedings are begun in the name of a non-existent company, they are a nullity and the defect cannot be cured by amending to substitute another company (ie a different legal entity) as claimant: *Lazard Brothers v Midland Bank Ltd* [1933] AC 289 (HL). However, *the rule is different if the case is one of misnomer. In cases of misnomer, even where the name on the record refers to an entity which no longer exists,* ***the court can correct the record and the proceedings are correctly constituted ab initio***: *The Sardinia Sulcis* [1991] 1 Lloyd's Rep 201, 205 (CA).
>
> [emphasis added in italics and bold italics]

Gloster J cited *The Sardinia Sulcis* [1991] 1 Lloyd's Rep 201 (at 205) for the proposition that in cases of misnomer, even where the name on the record refers to an entity which no longer exists, the *court* can correct the record and the proceedings are correctly constituted *ab initio*. There, an award had been issued in the name of a party which had ceased to exist by reason of a merger with its parent company even before the commencement of the arbitration. The court explicitly considered that "this [did] not undermine the award" (at 208).

115 We also agree with NOV Norway that *IMG* supports the conclusion that there is no strict necessity for a misnomer to be corrected within the arbitration proceedings itself. In *IMG*, Senior Master Mahony ultimately allowed leave to the plaintiffs to enforce the award after accepting that the references to Palace Entertainment Corp and the Palace Films Pty Ltd were misnomers for the defendant, Palace Entertainment Corporation Pty Ltd (above at [83]–[86]). The Senior Master did not require that the misnomer have been corrected within the arbitration for leave to enforce the award to be granted.

116 In the final analysis, the role of the court is to uphold the arbitral process and facilitate the enforcement of arbitral awards whenever possible. As observed by Chan J in *TPL and ICB* (at [21]), denying the enforcement of an award in a misnomer situation would *obstruct* rather than *facilitate* the arbitral process (above at [95]). The present case illustrates the potential devastating effect of putting to nought 12 years of arbitration and the time and expense the parties had incurred in seeking a resolution to their dispute should the enforcement of the Award be refused.

Is NOV Norway estopped by its representations from denying that the respondent in the arbitration was Hydralift?

117 We turn to consider KFELS' final defence which is that NOV Norway is estopped by representation from denying that the respondent in the arbitration was Hydralift. It is common ground between the parties that the three elements of estoppel by representation are a representation of fact, reliance on the representation and detriment caused by such reliance (*Yokogawa Engineering Asia Pte Ltd v Transtel Engineering Pte Ltd* [2009] 2 SLR(R) 532 at [7]).

118 The Judge found that NOV Norway was estopped by its representations in the arbitration and in the related litigation from denying that Hydralift (and

not itself) was the respondent in the arbitration. He was satisfied that NOV Norway had represented that Hydralift existed as a legal person and that Hydralift was the respondent in the arbitration. In reliance on those representations, KFELS spent substantial time and expense over 12 years in prosecuting the claim and in defending the counterclaim in the arbitration (GD at [148]–[151]).

119 NOV Norway does not contest the Judge's finding that it represented, both in the arbitration and in the related litigation, that Hydralift existed as a legal person and that Hydralift was the respondent in the arbitration. However, NOV Norway submits that there was no detrimental reliance on the part of KFELS. As the sole issue turns on the question of reliance, we will turn to this shortly.

120 However, we should state at the outset that we do sympathise with the Judge's unhappiness over the way NOV Norway conducted itself. We find NOV Norway's actions in concealing the 2004 mergers and the fact that Hydralift had been struck off the Norwegian register of companies from KFELS, the Tribunal, the Judge and this court altogether inexplicable and unsatisfactory. We highlight only the more striking aspects of NOV Norway's errant conduct:

(a) First, in Mr Frode Jensen's witness statement in support of NOV Norway in the arbitration, he omitted to disclose that Hydralift had been struck off the Norwegian register of companies due to the 2004 mergers. Instead, the use of the present tense in his statement that "NOV *is* the owner of Hydralift AS" [emphasis added] implies that Hydralift is an existing and separate legal person *owned* by NOV Norway and that Hydralift was indeed the respondent in the arbitration (GD at [123]). Mr

Kelvin Poon, counsel for the appellant, rightly conceded before us that it could and should have been more clearly put that Hydralift had long ceased to exist as a separate legal entity.

(b) Second, in the related litigation, NOV Norway appeared in the name of Hydralift and presented NOV Norway as having *acquired* Hydralift rather than having merged with Hydralift via NOH (GD at [125]–[127]). NOV Norway even volunteered a unique identification number for Hydralift, which was not Hydralift's historical identification number, but rather the identification number of a completely different legal entity (specifically, one Startfase 80 AS which later changed its name to "Hydralift AS" in 2004) (GD at [129]). Mr Jensen's explanation that they did so "in order not to complicate matters" does not change the fact that it was a conscious decision by NOV Norway to impersonate Hydralift for the sake of convenience.

(c) Third, in Mr Haavard Endal's affidavits filed in support of Hydralift in the related litigation, he stated that he was authorised to make the affidavits on behalf of Hydralift and that Hydralift and/or its solicitors had made information and documents available to him for that purpose. This clearly represented that Hydralift was still in existence as a separate legal person and it was Hydralift that was responding to KFELS' claims in the ongoing litigation (GD at [149(b)]).

Detrimental reliance

121 In our judgment, despite the unsatisfactory aspects of NOV Norway's conduct that we have outlined above, it is clear beyond doubt that the requirement of detrimental reliance is not satisfied. While KFELS did rely on NOV Norway's representations that Hydralift existed as a legal person and that

Hydralift was the respondent in the arbitration when it proceeded to prosecute the claim and defend against the counterclaim in the arbitration, *it did not suffer detriment in so doing*.

122 NOV Norway indeed submits that there was no detrimental reliance on the part of KFELS. Since the Award was in NOV Norway's favour, there is no basis for the argument that NOV Norway wanted KFELS to persist in its mistake so that it would have difficulties enforcing an award against NOV Norway. Even if the Award had been in KFELS' favour, NOV Norway would have been liable to KFELS on the basis that it would have succeeded to Hydralift's obligations and in any case would have been estopped from contending otherwise by virtue of its conduct of participating in the arbitration. In order for KFELS to succeed in its estoppel argument, it must prove that it would not have continued with the arbitration had it known that Hydralift ceased to exist and that NOV Norway had succeeded to all of Hydralift's rights and obligations under the Contract, including the arbitration agreement. There is no evidence at all of this.

123 KFELS on the other hand submits that if it had known about the true state of affairs, it would not have continued with the arbitration without more. It contends that it suffered detriment in the following ways:

(a) First, KFELS was dissatisfied with the original Tribunal and lost the chance to commence fresh arbitration proceedings before a different arbitral tribunal against NOV Norway, and this was something it could have done if it had known that the arbitration was defective.

(b) Second, NOV Norway's argument that it would have continued the arbitration without more wrongly assumed that the Tribunal would have granted any application to substitute NOV Norway as the respondent in the arbitration.

(c) Third, KFELS suffered detriment from being deprived of the opportunity to defend the counterclaim on the basis that it had been brought by a non-existent entity.

(d) Fourth, KFELS was deprived of the opportunity to address NOV Norway's misleading of the Tribunal and impeach the credibility of NOV Norway's witness, Mr Jensen. This was material since the Tribunal preferred the evidence of Mr Jensen over KFELS' witnesses.

124 This court, in *Tacplas Property Services Pte Ltd v Lee Peter Michael (administrator of the estate of Lee Ching Miow, deceased*) [2000] 1 SLR(R) 159 (at [67]), considered the following passage from Spencer Bower and Turner, *The Law Relating to Estoppel by Representation* (3rd Ed, 1977) at p 106, to be instructive in its consideration of detrimental reliance:

> It is further to be noted that a representee is deemed to have altered his position, not only when he has adopted a positive course of action which he would not have adopted but for his belief in the truth of his representation, but also *when he has abstained from taking measures for his protection, security or advantage which he had in contemplation, and which, but for the representation, he would have taken*; or when he has persisted in a line of conduct which otherwise he would have abandoned or was on the point of abandoning.
>
> [emphasis in original omitted, emphasis in italics added]

125 In our judgment, it is difficult to see how KFELS suffered any detriment. While the Judge accepted that KFELS suffered detriment in spending substantial time and expense over 12 years in prosecuting the claim and defending the counterclaim, he did not appreciate that the legal effect of the 2004 mergers under Norwegian law was that Hydralift's legal personality

continued in NOV Norway. It certainly cannot be said that if not for the representations that NOV Norway made, KFELS would have abandoned the arbitration proceedings against Hydralift. Considering that KFELS thought its claim well-founded at the material time, it would undoubtedly have substituted Hydralift's name with NOV Norway had it been fully aware of the true state of affairs and proceeded to incur the costs of prosecuting the claim and defending any counterclaim in any case.

126 Similarly, once it is appreciated that Hydralift's legal personality continued in NOV Norway, none of the alleged detriment suffered by KFELS withstands scrutiny. First, there would have been no basis for KFELS to strategically constitute a new tribunal if it had known of the true state of affairs. NOV Norway and KFELS had submitted to the jurisdiction of the Tribunal and it was up to the Tribunal to substitute Hydralift's name with NOV Norway.

127 Second, if the Tribunal had been privy to the true state of affairs that the legal personality of Hydralift had continued in NOV Norway, there would have been no reason for it to have refused the substitution or rectification of Hydralift's name with NOV Norway.

128 Third, KFELS would not have had the opportunity to defend against the counterclaim on the basis that it had been brought by a non-existent entity. If such an argument had been brought up during the arbitration, it would be implausible that NOV Norway would not immediately seek a rectification of Hydralift's name to NOV Norway during the proceedings. Since all the substantive rights under the arbitration agreement had been transferred to NOV Norway following the 2004 mergers, it would be well within NOV Norway's rights to commence the counterclaim against KFELS in its own name, and KFELS would have had to defend against the counterclaim in any case.

129 Fourth, while it is true that Mr Jensen ought to have disclosed the 2004 mergers and that Hydralift had been struck off the Norwegian register of companies in his witness statement, the fact that KFELS did not have the opportunity to undermine his credibility during the arbitration is not material to the underlying dispute. The substantive issues dealt with in the arbitration had no relation to the non-disclosure of the 2004 mergers. Aside from this, if NOV Norway had come clean, Mr Jensen's witness statement would never have taken the form it did. In short, the witness statement would not have altered the result of the arbitration.

130 At a practical level, the only disadvantage faced by KFELS is that it incurred costs and perhaps contested the enforcement proceedings because of how it viewed the consequence and effect of NOV Norway's representations. Arguably, the representations gave KFELS some basis to think that it had a good case to refuse the enforcement of the Award. However, this would not constitute material detriment especially since NOV Norway highlighted the facts to KFELS, albeit outside the 30-day window within which it could apply to the Tribunal to correct the Award under Art 33 of the Model Law. At that point, NOV Norway had informed KFELS that it was the successor company of Hydralift and given KFELS a copy of an extract from the Norwegian register of companies. NOV Norway had essentially ceased making the inaccurate representations before the enforcement proceedings. It was KFELS' choice to persist in taking the position that it was entitled to resist enforcement of the Award. Therefore, KFELS cannot be said to have detrimentally relied on the representations in challenging the enforcement of the Award.

131 We therefore find that NOV Norway is not estopped by its representations from denying either that the respondent in the arbitration was Hydralift or that Hydralift was a separate entity altogether.

Conclusion and costs

132 For the foregoing reasons, we allow CA 188. We make no order as to costs here and set aside the costs order made by the Judge below. The usual consequential orders apply. We find it appropriate that the parties bear their own costs even though NOV Norway succeeded on appeal. We make that order in the light of NOV Norway's errant conduct in concealing the 2004 mergers and the fact that Hydralift had been struck off the Norwegian register of companies from KFELS, the Tribunal, the Judge, and this court in the related litigation. As we noted (above at [130]), but for NOV Norway's conduct, there might not have been any need to resort to enforcement proceedings.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Quentin Loh
Judge of the Appellate Division

Poon Kin Mun Kelvin, Lee Eng Beng *SC*, Seow Hwang Seng John, Aleksandar Anatoliev Georgiev and Kristin Ng Wei Ting (Rajah & Tann Singapore LLP) for the appellant;
Lin Weiqi Wendy, Goh Wei Wei, Ling Jia Yu and Pranay Arvind Suryavanshi (WongPartnership LLP) for the respondent.