IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA 1

Civil Appeal No 64 of 2021

Between

Anupam Mittal

… *Appellant*

And

Westbridge Ventures II Investment Holdings

… *Respondent*

JUDGMENT

[Arbitration — Agreement — Scope]
[Arbitration — Arbitrability and public policy]
[Arbitration — Interlocutory order or direction — Injunction]
[Civil Procedure — Stay of proceedings]

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Anupam Mittal
v
Westbridge Ventures II Investment Holdings

[2023] SGCA 1

Court of Appeal — Civil Appeal No 64 of 2021
Sundaresh Menon CJ, Judith Prakash JCA and Steven Chong JCA
29 June 2022; 5 September 2022

6 January 2023 Judgment reserved.

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

Introduction

1 In the High Court proceedings ("OS 242") from which this appeal arises, the court granted a permanent anti-suit injunction against the appellant. He was thereby restrained from: (a) pursuing Company Petition No 92 of 2021 before the National Company Law Tribunal ("NCLT") in Mumbai, India ("the NCLT Proceedings"); and (b) commencing other proceedings in respect of disputes relating to the management of a company incorporated in India named People Interactive (India) Private Limited ("the Company"). The appellant and respondent are shareholders of the Company.

2 The central issue before us is whether by the commencement of the NCLT Proceedings, the appellant acted in breach of an arbitration agreement with the respondent. The appellant submits that no breach occurred because:

(a) the disputes referred to the NCLT relate to oppression and the mismanagement of a company and such disputes are non-arbitrable under the law of the arbitration agreement which he avers is Indian law; and (b) in any case, the disputes do not fall within the scope of the parties' arbitration agreement. Even if they do, the appellant says the arbitration agreement is null and void for covering disputes which are non-arbitrable under the governing law of the arbitration agreement.

3 In the court below, the High Court Judge ("the Judge") postulated that the threshold question before him was: which system of law governs the issue of subject matter arbitrability at the pre-award stage? The alternative answers to this question were: (a) the law of the arbitration agreement; or (b) the law of the seat, which in this case is Singapore. The Judge decided that the answer was the law of the seat. Before us, the appellant challenges that finding, contending that subject matter arbitrability is governed by the law of the arbitration agreement, which he says is Indian law. As the Judge noted, prior to the hearing before him, the threshold question had not been decided in Singapore. This appeal therefore gives us the opportunity to consider the matter and, additionally, provide some guidance on what law governs an arbitration agreement which does not contain an express choice of law.

Facts

Parties and the SHA

4 The appellant is an Indian resident and a founder of the Company. Amongst other things, the Company owns and operates a well-known online and offline matrimonial service called "shaadi.com" ("Shaadi.com"). Shaadi.com was co-founded by the appellant and his cousins, Anand Mittal

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("AM") and Navin Mittal ("NM"), both of whom were among the initial shareholders of the Company. The appellant was the managing director of the Company from 30 November 2004 to 30 November 2019.

5 The respondent is a private equity fund incorporated under the laws of Mauritius. It invested in the Company in early 2006. Consequently, on 10 February 2006, the appellant and his cousins entered into two agreements with the respondent. One was a Share Subscription and Share Purchase Agreement under which shares in the Company were to be issued to the respondent. The second was a Shareholders' Agreement ("the SHA") regulating the parties' rights and responsibilities as shareholders. On 7 May 2008, the parties to the SHA signed the First Supplementary Subscription-Cum-Shareholders' Agreement ("the SSSA") with SVB India Capital Partners LP, SVB Financial Group and the respondent. Clause 20.2 of the SHA and cl 10.2 of the SSSA are identically worded governing law and arbitration clauses.

6 Clause 20 of the SHA states:

> 20 GOVERNING LAW AND ARBITRATION
>
> 20.1 This Agreement and its performance shall be governed by and construed in all respects in accordance with the laws of the Republic of India. ***In the event of a dispute relating to the management of the Company or relating to any of the matters set out in this Agreement***, parties to the dispute shall each appoint one nominee/representative who shall discuss in good faith to resolve the difference. In case the difference is not settled within 30 calendar days, it shall be referred to arbitration in accordance with Clause 20.2 below.
>
> 20.2 All such disputes that have not been satisfactorily resolved under Clause 20.1 above shall be referred to arbitration before a sole arbitrator to be jointly appointed by the Parties. In the event the Parties are unable to agree on a sole arbitrator, one of the arbitrators shall be appointed jointly by the Founders and the second arbitrator will be appointed by [the respondent] and the third arbitrator will be appointed by

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> the other two arbitrators jointly. *The arbitration proceedings shall be carried out in accordance with the rules laid down by International Chambers of Commerce and the place of arbitration shall be Singapore.* The arbitration proceedings shall be conducted in the English language. The parties shall equally share the costs of the arbitrator's fees, but shall bear the costs of their own legal counsel engaged for the purposes of the arbitration.
>
> …
>
> [emphasis in original omitted; emphasis added in italics and bold italics]

7 In 2014, NM sold his shares to the respondent and resigned as a director of the Company. According to the appellant, as of 30 March 2021, on a "fully diluted basis", the respondent held 44.38% of the shares in the Company, AM had 13.13% and he himself owned 30.26%.

8 Under the SHA, the respondent was entitled to appoint a nominee director to the Board of the Company. From 24 April 2019, one Shobitha Anne Mani ("Ms Mani") was the respondent's nominee director.

Parties' relationship deteriorates in 2017

9 The parties' relationship soured in 2017 when the respondent expressed an interest in exiting from the Company.

10 Clause 3.4 of the SHA envisaged that the Company was to complete an initial public offering ("IPO") within five years from closing (as defined in the SHA). If it did not do so, the respondent would be able to exit its investment through redemption of its shares and, if necessary, "drag along" rights as provided for in the SHA. The latter meant that the respondent could compel the Founders (*ie*, the appellant, AM and NM) to sell all or part of their shares, together with the respondent's shares, to a third-party buyer. As no IPO was

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achieved, the respondent wanted to disengage. Accordingly, discussions on the potential sale of the Company were held with an entity known as Info Edge (India) Limited ("Info Edge"), which was a competitor of the Company. The appellant's position is that Info Edge is a "Significant Competitor" of the Company within the meaning of that term in the SHA.

11 The disengagement did not proceed smoothly as the parties disagreed on several matters including the potential sale of the Company to Info Edge, the respondent's refusal to consent to the re-appointment of the appellant as managing director in 2019 and the re-appointment of NM as a Founding Director, another position defined in the SHA.

12 The appellant is unhappy over the potential sale to Info Edge because of its position as a Significant Competitor. According to the appellant, when the sale of the Company's shares was first being explored, the respondent refused to negotiate with any interested buyer apart from Info Edge. The appellant says that, at this time, he did not know that the respondent also held investments in Info Edge. At the appellant's instigation, the Company and Info Edge entered into a Non-Disclosure Agreement on 13 April 2017 for a term of two years to protect the Company's sensitive and confidential information. Sometime in 2018, when the respondent unexpectedly withdrew support for the sale of shares to Info Edge, the appellant placed on record his objections to the respondent's conduct, especially since the Company's sensitive and confidential information had been shared with Info Edge in discussions leading up to the deal. In 2019, the respondent initiated a revival of discussions with Info Edge. The appellant accuses the respondent of colluding with AM to secure terms from Info Edge that were favourable to it.

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13 The appellant also asserts that, after he voiced his concerns about re-opening discussions with Info Edge in 2019, the respondent and AM "started taking steps in earnest" to oust him from the position of managing director of the Company.

14 In light of these disagreements, the appellant summarises his complaints against the respondent as follows:

> (a) The collusion complaint: "contrary to the joint venture or quasi-partnership nature of the Company since 2006, the NCLT Defendants colluded to oppress the Appellant (being the minority shareholder) with the intention being to wrest control of the management of the day-to-day operations of the Company in a manner contrary to the interests of the Company, and marginalise the Appellant as a shareholder and Board Member".
>
> (b) The breach of fiduciary duty complaint: "[AM] and [Ms Mani] in their capacity as directors of the Company, were in breach of their fiduciary duties and failed to act in the interests of the Company on a number of occasions".

NCLT Proceedings commenced

15 On 3 March 2021, the appellant filed a petition in the NCLT seeking remedies for corporate oppression. On or about 24 March 2021, the NCLT petition was assigned its case number, *ie*, Company Petition No 92 of 2021. In the NCLT Proceedings, the appellant is the petitioner and the Company, the respondent, Ms Mani, AM and NM are named as the respondents. The Judge

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summarised the reliefs sought by the appellant in the NCLT Proceedings in these terms:

> (a) an injunction to restrain the respondent and the respondent's directors, employees, servants, agents and or any person claiming through or under them, from in any manner, disrupting the management and operation of the Company and/or conducting the affairs of the Company in a manner prejudicial or oppressive to any member of the Company or to itself;
>
> (b) a declaration that the appellant's continuation as an executive director of the Company, pursuant to the resolution passed by the Board of directors at the meeting held on 28 November 2019, is valid and that all actions taken by the appellant as an executive director of the Company are not invalid;
>
> (c) an injunction to restrain the respondent, the Company and certain others, their directors, employees, servants, agents and/or any person claiming through or under them, from in any manner, whether directly or indirectly hindering and/or prohibiting the appellant from performing his functions as an executive director of the Company;
>
> (d) an order to direct the respondent, the Company and certain others to initiate a process for identifying and appointing a suitable, independent, non-partisan and impartial candidate to be managing director of the Company in a time-bound manner; and
>
> (e) certain other declarations and interim reliefs.

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OS 242 commenced

16 The respondent reacted to the filing of the NCLT Proceedings by filing OS 242 on 15 March 2021. On the same day, Andrew Ang SJ granted the respondent:

(a) an urgent *ex parte* interim anti-suit injunction against the appellant; and

(b) leave to serve OS 242 on the appellant out of jurisdiction in India.

17 Thereafter, the appellant took action to neutralise the effect of the interim anti-suit injunction. He commenced an action in Bombay, which we elaborate on below. Separately, on 31 March 2021, the appellant filed an application to set aside the interim anti-suit injunction. However, when a permanent anti-suit injunction was issued against the appellant on 26 October 2021, that application was rendered moot.

Bombay proceedings commenced

18 The action in the Bombay High Court ("the Bombay suit") was started on 18 March 2021. By it, the appellant seeks the following orders:

(a) a declaration that the NCLT is the only competent forum to hear and decide the disputes raised in the NCLT petition; and

(b) a permanent injunction restraining the respondent or its agents, directors, employees, servants or any person claiming through or under it from, in any manner, whether directly or indirectly:

(i) enforcing the anti-suit injunction; and

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(ii) pursuing or continuing with OS 242 and related proceedings in the Singapore High Court.

19 As far as we are aware, the Bombay suit has not been fixed for hearing yet. In March 2021, the appellant filed an interlocutory application in the Bombay suit by which he sought an interim injunction restraining the respondent from enforcing the interim anti-suit injunction granted by Ang SJ. This prayer has since been amended to refer to the permanent anti-suit injunction granted by the Judge. The application was originally fixed for hearing on 5 September 2022 but had to be adjourned to a date to be fixed.

Submissions and decision below

20 The respondent's primary basis for seeking the anti-suit injunction pursuant to OS 242 was that the arbitration agreement in the SHA had been breached by the commencement of the NCLT Proceedings.

21 The respondent argued that:

(a) The subject matter of the disputes referred to the NCLT was arbitrable under Singapore law as the law of the seat of arbitration, since under Singapore law it is undisputed that even oppression and mismanagement claims are arbitrable. Even if the law governing arbitrability is the proper law of the arbitration agreement, Singapore law would nevertheless apply. Alternatively, even if Indian law applies as the proper law of the arbitration agreement, the pith and substance of the disputes is contractual as opposed to "dressed up" oppression and mismanagement claims, and therefore the disputes are arbitrable even under Indian law.

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(b) The disputes referred to the NCLT are essentially issues relating to the exercise of contractual rights under the SHA and fall within the scope of the arbitration agreement.

22 The appellant resisted the injunction on several grounds. He argued that:

(a) Under Indian law, the pith and substance of the NCLT Proceedings lies in minority oppression and mismanagement of the Company (it should be noted that the respondent argued below and on appeal that the disputes are contractual).

(b) The law governing the arbitration agreement determines whether the disputes referred to the NCLT are arbitrable. Indian law governs the arbitration agreement. Under Indian law, disputes relating to oppression and mismanagement are not arbitrable because the NCLT has exclusive jurisdiction to adjudicate these disputes. This result would render the arbitration agreement null and void.

(c) The disputes referred to the NCLT fall outside the scope of the arbitration agreement. Applying Indian law to interpret the scope of the arbitration agreement, parties could not have intended for such disputes to fall within the arbitration agreement since the arbitration agreement would be unworkable and liable to be declared void under Indian law.

23 The Judge granted the anti-suit injunction because he adjudged that the arbitration agreement was breached by the commencement of the NCLT Proceedings and there were no good reasons to withhold the injunction. His full grounds are set out in *Westbridge Ventures II Investment Holdings v Anupam Mittal* [2021] SGHC 244 ("the Judgment"). In concluding that the arbitration

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agreement had been breached, the Judge held: (a) the law that governed the issue of arbitrability at the pre-award stage was the law of the *seat*; (b) that the disputes between the parties were arbitrable under Singapore law being the law of the *seat*; and (c) assuming Indian law governed the arbitration agreement, the disputes fell within the scope of the arbitration agreement. We elaborate on each holding in turn.

24 First, the Judge held that the law of the seat of arbitration governs the question of whether the subject matter of a dispute is arbitrable for these reasons:

(a) subject matter arbitrability, when raised at the pre-award stage before the seat court, is essentially an issue of the tribunal's jurisdiction. The law of the seat should apply to decide when the tribunal's jurisdiction should be limited by prescribing what types of disputes are arbitrable;

(b) the same law should apply to arbitrability issues at both the pre-award and post-award stages;

(c) applying the law of the seat at the pre-award stage is more consistent with the policy of promoting international commercial arbitration. A State's rules on arbitrability may reflect a policy of favouring international arbitration. It is undesirable for Singapore courts to give effect to foreign non-arbitrability rules which may undermine Singapore's policy of supporting international commercial arbitration; and

(d) the weight of authority leans in favour of the law of the seat being applied.

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It should be noted that as the Judge had held that the law of the seat governed the issue of arbitrability, he did not find it necessary to decide what the proper law of the arbitration agreement was. At [62] of the Judgment, he stated that "even if" that proper law was Indian law, that would be of no relevance.

25 Secondly, the Judge held that the parties' disputes fell within the broad language of the arbitration agreement, *viz*, disputes "*relating to* the *management of the Company* or *relating to* any of the matters set out in this Agreement" [emphasis added]. He rejected the appellant's submission that parties could not have intended for disputes relating to oppression and mismanagement to fall within the scope of the arbitration agreement because it would then be declared void under Indian law. The Judge said that this purported intention contradicted the express wording of cl 20.1 of the SHA. Further, he found it speculative to assert that parties applied their minds to or contemplated excluding claims brought under Indian companies law legislation when they opted, in the SHA, to submit their disputes to an arbitration seated in Singapore.

26 Finally, the Judge regarded the breach of the SHA (due to commencement of the NCLT Proceedings) as *prima facie* entitling the respondents to an anti-suit injunction. He did not regard the following objections raised by the appellant as sufficient grounds to deny the injunction: (a) the resulting award would not be enforceable in India; (b) the NCLT Proceedings were vexatious and oppressive; (c) the arbitration agreement did not bind all parties to the dispute whereas the NCLT has jurisdiction over all relevant parties; and (d) the NCLT is the natural and competent forum to hear the dispute. He thus imposed a permanent anti-suit injunction on the appellant in these terms:

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> An injunction is granted restraining the defendant, his agents or otherwise from:
>
> (a) pursuing, continuing and/or proceeding with the action commenced by the defendant by way of Company Petition No. 92 of 2021 in the National Company Law Tribunal ("NCLT") in Mumbai, India; and
>
> (b) commencing or procuring the commencement of any legal proceedings in respect of any dispute, controversy, claim or disagreement of any kind in connection with or relating to the management of People Interactive (India) Private Limited ("People Interactive"), or in connection with or relating to any of the matters set out in the Shareholders' Agreement dated 10 February 2006, as amended from time to time (the "SHA") in any other dispute resolution forum other than an arbitration tribunal constituted in accordance with the rules laid down by the International Chamber of Commerce ("ICC") and seated in Singapore, against the plaintiff, and/or Shobitha Annie Mani and/or Navin Mittal and/or Anand Mittal and/or People Interactive and/or any person in relation to any dispute relating to the management of People Interactive, or arising from, connected with or relating to any of the matters set out in the SHA.

Parties' cases on appeal

Appellant's case

27 The appellant puts forward two alternative grounds of appeal.

28 The first ground is that the parties' disputes do not fall within the scope of the arbitration agreement. The appellant argues that if, however, oppression and mismanagement disputes are covered by the arbitration agreement, it would be null and void since Indian law does not allow these disputes to be arbitrated. The argument proceeds as follows. First, that the governing law of the arbitration agreement is Indian law. Next, the parties' disputes relate to oppression and mismanagement of a company and are non-arbitrable under Indian law since the NCLT has exclusive jurisdiction over such disputes. Finally, the parties cannot have intended for the mention of disputes "relating

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to the management of the Company or relating to any of the matters set out in [the SHA]" (in cl 20.1) to cover disputes of oppression and mismanagement since the arbitration agreement would then be unworkable and liable to be nullified under Indian law.

29 The second ground of the appellant's case is that the parties' disputes referred to the NCLT are objectively non-arbitrable. Basically, he argues that subject matter arbitrability is determined solely by the law governing the arbitration agreement (*ie*, Indian law). Additionally, he argues that the International Arbitration Act 1994 (2020 Rev Ed) ("IAA") is silent on which forum's public policy should govern the question of subject matter arbitrability. Pertinently, he views arbitrability as a facet of the validity of the arbitration agreement. And as Art 34(2)(*a*)(i) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") provides that the law of the arbitration agreement determines issues relating to the validity of the arbitration agreement, arbitrability should likewise be determined by the proper law of the arbitration agreement. In the *alternative*, the appellant proposes that regard must be given to *both* the non-arbitrability rules applicable in the law of the seat and to the law governing the arbitration agreement. He argues that non-arbitrability rules of the law of the arbitration agreement (if different from the seat law) are relevant if: (a) the law of the arbitration agreement has a materially closer connection to the dispute; or (b) the court adopts the approach of determining a composite list of matters that are non-arbitrable under both systems of law.

Respondent's case

30 The respondent's case largely mirrors its arguments below, save for points that it raises in rebuttal to the appellant's new arguments.

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31 The respondent argues that the main issue is whether the subject matter of the disputes is arbitrable, and which law governs this question. It agrees with the Judge and his reasons for holding that the law of the seat is the only law which governs subject matter arbitrability at the pre-award stage. If the Judge is upheld, the disputes are arbitrable under the seat law (*ie*, Singapore law) regardless of how they are characterised. However, even if arbitrability is determined by the law of the arbitration agreement, the respondent submits that: (a) the law of the arbitration agreement is Singapore law because the presumption that the law governing the substantive contract (*ie*, Indian law) also governs the arbitration agreement is displaced by the fact that, on the appellant's case, the disputes would be non-arbitrable under Indian law; and (b) even if Indian law governed the arbitration agreement and the disputes relate to minority oppression, the disputes are arbitrable because the tribunal is only prevented from granting *relief* for oppression, but not from adjudicating the merits of the claim.

32 As to whether the disputes fall within the scope of the arbitration agreement, the respondent argues, applying Singapore as the proper law of the arbitration agreements, the disputes do fall within the language of cl 20.1 of the SHA. However, even if Indian law governs the arbitration agreement and subject matter arbitrability, the disputes are contractual or relate to the management of the Company and hence fall within the scope of the arbitration agreement. It also cites the Judge's reasoning that, even if the disputes relate to oppression and mismanagement, there is no evidence to suggest the parties intended to exclude such claims from the arbitration agreement.

33 The respondent also argues that the scope of the anti-suit injunction is not overly broad.

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Amicus curiae's submissions

34 The *amicus curiae*, Associate Professor Darius Chan ("Prof Chan"), was invited to submit on "whether the law that governs the issue of subject matter arbitrability at the pre-award stage is the law of the seat or the proper law of the arbitration agreement". This issue arises in relation to the second ground of appeal. Prof Chan submits that the *lex fori* (*ie*, the law of the court that is hearing the matter) should determine the question of subject matter arbitrability. Hence in the pre-award stage, the seat court should apply the law of the seat to this issue. He argues that the *travaux préparatoires* of the Model Law shows that: (a) while alternative governing laws were actively considered for subject matter arbitrability at the *post*-award stage under Art 34(2)(*b*)(i), the drafters deliberately retained the *lex fori*; and (b) the drafters intended the same law to govern subject matter arbitrability at the *pre*-award stage.

A further issue

35 After the oral hearing of the appeal had been completed, the Court wrote to the parties asking them to submit on three questions which the Court posed. These were:

(a) What is the status of the Bombay suit? If there has been an adjournment of the suit, what is the reason for the adjournment?

(b) Has the NCLT been asked to determine whether it has exclusive jurisdiction over the dispute in the appellant's NCLT petition?

(c) Whether (a) it is in the Court's power to stay this appeal pending the Bombay High Court's disposal of the Bombay suit and/or the NCLT's determination of its own jurisdiction; and (b) if so, whether that power should be exercised.

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36 From the submissions subsequently tendered by the parties it appears that the answer to the first question is that the main suit in the Bombay High Court has not been fixed for hearing. Two interim applications were fixed for hearing on 5 September 2022 but were adjourned and are now awaiting new dates. In one of these applications, the Bombay High Court will rule on whether the NCLT has exclusive jurisdiction over the appellant's petition there.

37 The answer to the second question is no. According to the appellant, that is because he is currently restrained by the anti-suit injunction from taking any action in relation to the NCLT Proceedings.

38 As for the third question, while they agreed that this Court has case management powers to impose a limited stay of this appeal, the parties put forward opposing views on whether that power should be exercised. We will discuss their arguments further when we come to consider this issue.

The Issues in the Appeal

39 Arising from the arguments, the following issues are to be determined in this appeal:

(a) Are questions of arbitrability to be determined according to the law of the seat or the proper law of the arbitration agreement?

(b) What is the proper law of the arbitration agreement in this case?

(c) What is the proper characterisation of the disputes here?

(d) Even if the disputes are arbitrable, should the Court order a stay of the anti-suit injunction on case management grounds?

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40 We have arranged the issues in this way because we think it more logical to deal with the question of law governing arbitrability before we decide what the law of the arbitration agreement is. Only thereafter, assuming the agreement is found to be valid and binding, can we examine whether the appellant is contractually bound to arbitrate the disputes that he submitted to the NCLT.

What law governs the issue of arbitrability?

41 The Judge and Prof Chan agree with the respondent that issues of arbitrability should be determined according to the law of the court hearing the matter irrespective of whether this issue arose at the pre-award stage or after the award had been issued. As Prof Chan noted in his Opinion, this issue of the law governing arbitrability has been much debated both by the drafters of the Model Law and by jurists in various jurisdictions. In so far as the issue arose in the post-award context, the conclusion reached and embedded in the Model Law (*vide* Arts 34(2)(*a*)(i) and 36(1)(*a*)(i)) is that the law which must be looked at to decide whether the matters contained in the award were arbitrable or not, is the law of the arbitration agreement. This is conveyed by the provision in those Arts that a challenge to an award may be made on the basis that "the [arbitration] agreement is not valid under the law to which the parties have subjected it". Prof Chan notes that "despite divergent views the Commission ultimately preferred retaining the *lex fori* in Art 34(2)(*b*)(i) [which deals with setting aside] for reasons of predictability and certainty".

42 When it came to pre-award questions of arbitrability however, nothing was embedded in the Model Law. According to Prof Chan, this was because as confirmed in the *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (United Nations, 2012), "at the pre-award stage, the drafting history of the Model Law indicates that the tribunal

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should apply the same law that the seat court would apply in ascertaining the subject matter arbitrability of a dispute in setting aside proceedings".

43 That there should be harmony on the applicable law between the pre- and post-award stages was also a view taken by the UK Supreme Court in the context of the validity of the arbitration agreement. In *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] 1 WLR 4117, that court (*per* Lord Hamblen and Lord Leggatt) opined (at [136]) that "it would be … illogical if the law governing the validity of the arbitration agreement were to differ depending on whether the question of validity is raised before or after an award has been made. To ensure consistency and coherence in the law, the same law should be applied to answer the question in either case". Further, according to Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 3rd ed, 2021) at p 644, most national courts including those of the United States, France, Switzerland, Holland, Belgium, Italy, Austria and Sweden, have applied the *lex fori* at the pre-award stage.

44 While we are cognisant of the weight of the views of the drafters of the Model Law and those jurisdictions mentioned above that have adopted the law of the forum (which is usually the law of the seat) at the pre-award stage to determine subject matter arbitrability, we consider that there is one vital factor on which that approach has not placed enough weight. This factor is the importance of public policy in relation to issues of arbitrability.

45 In its essence, an arbitration agreement is an agreement by parties to remove disputes that may arise between them from adjudication by any national court system and subject them instead to resolution by privately appointed adjudicators. Nations, however, have an interest in what issues should only be

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determined in public forums because some issues have wider public impact beyond the individual interests of the disputants. This public interest may be expressed in legislation or it may be recognised by the judicial system as part of the public policy of the state. But different nations have different circumstances and contexts and therefore their legislation or public policies on what may be the subject of private dispute resolution may not accord with those of other states.

46 The relationship between arbitrability and public policy was extensively considered by this court in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen*") with emphasis on s 11 of the IAA. We can do no better than quote the following passages from *Tomolugen*:

> **The concept of arbitrability**
>
> 71. We turn now to the question of arbitrability. The absence of arbitrability has come to be associated with that class of disputes which are thought to be incapable of settlement by arbitration. The concept of arbitrability has a reasonably solid core. It covers matters which "so pervasively involve 'public' rights and concerns, or interests of third parties, which are the subjects of uniquely governmental authority, that agreements to resolve … disputes [over such matters] by 'private' arbitration should not be given effect": *Gary Born* ([33] *supra*) at p 945. However, the outer limits of its sphere of application are less clear. Lord Mustill and Stewart Boyd QC, for instance, suggest that "[i]t would be wrong … to draw … any general rule that criminal, admiralty, family or company matters cannot be referred to arbitration": Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1999) at pp 149–150.
>
> …
>
> 75. The concept of arbitrability finds legislative expression in s 11 of the IAA, which reads as follows:

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> **Public policy and arbitrability**
>
> **11.**—(1) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration *unless it is contrary to public policy to do so*.
>
> (2) The fact that any written law confers jurisdiction in respect of any matter on any court of law but does not refer to the determination of that matter by arbitration shall not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration.
>
> [emphasis added]

It is evident from this that the essential criterion of non-arbitrability is whether the subject matter of the dispute is of such a nature as to make it contrary to public policy for that dispute to be resolved by arbitration. Beyond this, the scope and extent of the concept of arbitrability has been left undefined, as a consequence of which, it falls to the courts to trace its proper contours (see the *1993 Report on Review of Arbitration Laws* ([65] *supra*) at paras 26–28; *Larsen Oil v Petroprod* at [24]).

76. In our judgment, the effect of s 11 of the IAA is that there will ordinarily be a presumption of arbitrability so long as a dispute falls within the scope of an arbitration clause. This presumption may be rebutted by showing that (*Larsen Oil v Petroprod* at [44]):

> (a) Parliament intended to preclude a particular type of dispute from being arbitrated (as evidenced by either the text or the legislative history of the statute in question); or
>
> (b) it would be contrary to the public policy considerations involved in that type of dispute to permit it to be resolved by arbitration.

47 We would like to reiterate the statement in [75] of *Tomolugen* that "the essential criterion of non-arbitrability is whether the subject matter of the dispute is of such a nature as to make it *contrary to public policy* for that dispute to be resolved by arbitration" [emphasis added]. This is putting forward the

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obverse of the proposition espoused by s 11 of the IAA which is that an arbitration agreement must be abided by unless it is contrary to public policy.

48 The question that immediately springs to mind is as to which public policy is referred to in s 11 of the IAA. It is our view that the public policy referred to in that section is not limited to the public policy of Singapore but extends to foreign public policy where this arises in connection with essential elements of an arbitration agreement. In s 11, the term "public policy" is not circumscribed or limited in any way and in its natural meaning may be read as referring to the public policy of any country; not only to that of Singapore. The lack of restriction in s 11 may be contrasted with s 31(4)(*b*) of the IAA which empowers the court to refuse to enforce a foreign award if it is contrary to the "public policy of Singapore". This is in line with Arts 34(2)(*b*)(ii) and 36(1)(*b*)(ii) of the Model Law which authorise the Singapore courts to set aside an award made under the IAA or refuse to enforce it on the basis of "the public policy of *this* State" [emphasis added]. Obviously, "this State" in the context of the Model Law as the First Schedule to the IAA means Singapore. The drafters of the Model Law might have thought that public policy at the pre-award stage should be the same as that at the post-award stage, but they did not draft any article to that effect. Thus, the drafters of the IAA were not constrained in any way when they crafted s 11.

49 Bolstering our approach to the interpretation of "public policy" in s 11 is the whole purpose of the IAA. It was enacted to facilitate international commercial arbitration based on the principles embodied in the Model Law. Only "international" arbitrations, meaning arbitrations which have a substantial foreign element, are covered by the IAA. It was obviously well within the drafters' contemplation that many arbitrations that might subsequently be seated

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in Singapore would have no connection with this country apart from it having been chosen as the seat. In such situations, conceivably, the public policy of a foreign jurisdiction could impact the parties or the arbitration in some way. In choosing the language of s 11, the drafters could have ruled out that possibility, but they did not, and in our view, rightly so.

50 We do not consider that the interpretation we have given to public policy in s 11 is foreclosed by *Tomolugen* at [76]. While there the court was plainly referring to the Singapore Parliament and its policy, this was required by the issue the court was considering which was whether under Singapore law oppression claims were arbitrable. There was no need in that case to consider foreign public policy since the dispute involved a share sale agreement in respect of a Singapore limited company, the arbitration clause provided for arbitration in Singapore and there was no foreign law element involved. The court's discussion therefore proceeded entirely on the basis that only domestic law and domestic public policy were engaged.

51 This appeal presents an entirely different factual situation. The parties are mainly Indian (although the respondent is incorporated in Mauritius, its representative on the Board of the Company, Ms Mani, is Indian), the Company is an Indian company, their disputes arise under or in connection with a contract, the SHA, which contains an Indian choice of law clause, and there is an Indian law that provides that oppression disputes can only be decided by the NCLT. The only connection that Singapore has with the dispute and the parties is that any arbitration arising from the SHA is to be seated in Singapore. The appellant contends that the arbitration agreement is also governed by Indian law. The Judge did not decide the point; he thought it irrelevant to the issue of arbitrability. With respect, we do not agree.

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52 Reading s 11(1) of the IAA as we do, what it means is that if it is contrary to local or relevant foreign public policy to determine a dispute arising under an arbitration agreement by arbitration, that dispute cannot proceed to arbitration in Singapore. In the case of a foreign arbitration agreement that would be the result even if Singapore law might hold the dispute in question to be capable of resolution by arbitration. In this connection, by "foreign arbitration agreement", we mean an arbitration agreement that is indisputably governed by foreign law even if one of the parties is Singaporean or the transaction has some other connection with Singapore. In almost all cases for an arbitration agreement to be indisputably governed by foreign law, that law would have been expressly chosen by the parties as its governing law albeit they would also have provided for Singapore to be the seat of the arbitration.

53 An arbitration agreement derives its authority from the consensus of the parties. Therefore, it is in our view unarguable that the arbitration agreement together with the law that governs it must determine exactly what the parties have agreed to arbitrate. The arbitration agreement is the fount of the tribunal's jurisdiction. The law of the seat deals with matters of procedure but the law of the arbitration agreement deals with matters of the validity of the agreement and is, in that sense, anterior to the actual conduct of the arbitration. If in an arbitration agreement the parties agree to arbitrate a range of questions that includes, for example, the question of custody of a minor, and they also agree that the arbitration agreement is governed by a law under which custody would not be arbitrable, surely the question of custody simply cannot be arbitrated regardless of what the seat law or any other law provides. This is because the agreement from which the jurisdiction of the arbitrators is derived is governed by a law that provides that those parties cannot arbitrate the question of custody. Consequently, the tribunal would not have jurisdiction to decide a custody

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dispute. And the Singapore court must recognise this want of jurisdiction and give effect to it.

54 To put it another way, if by the express choice of a governing law of the arbitration agreement, the parties have made part of or all their disputes non-arbitrable, there can be no question of an arbitration coming into effect to deal with the non-arbitrable part of the dispute. And it is only when an arbitration agreement does come into effect that the law of the seat kicks in. This does not mean that the law of the seat is irrelevant to the arbitrability issue. On the contrary, if the arbitration concerns an issue that happens to be non-arbitrable by the law of the seat, that would be an *additional* obstacle by reason of Art 34(2)(*b*)(i) of the Model Law. That article, as noted earlier, authorises the seat court to set aside an award in such circumstances. Likewise, in respect of the law of the place of enforcement, by virtue of s 31(4)(*a*) of the IAA, if the subject matter of the dispute is not arbitrable by Singapore law, then the foreign award may not be enforced here. Since enforcement may be sought in a court other than the seat court, it stands to reason that there is no basis at all for thinking that the question of arbitrability is to be governed solely by the law of the seat.

55 Accordingly, it is our view that the arbitrability of a dispute is, in the first instance, determined by the law that governs the arbitration agreement. If it is a foreign governing law and that law provides that the subject matter of the dispute cannot be arbitrated, the Singapore court will not allow the arbitration to proceed because it would be contrary to public policy, albeit foreign public policy, to enforce such an arbitration agreement. Further, because of the operation of s 11, where a dispute may be arbitrable under the law of the arbitration agreement but Singapore law as the law of the seat considers that

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dispute to be non-arbitrable, the arbitration would not be able to proceed. In both cases, it would be contrary to public policy to permit such an arbitration to take place. Prof Chan refers to this as the "composite" approach.

56 The Judge considered at [48] of the Judgment, that applying the law of the seat would avoid potential anomalies that would otherwise arise from applying the proper law of the arbitration agreement to the question of pre-award subject matter arbitrability. He gave two examples. In both examples, he assumed that the arbitration agreement provided for arbitration in Singapore but that it was governed by a foreign law and that the dispute in question was not arbitrable under Singapore law but could be arbitrated under the foreign law of the arbitration agreement.

57 In the first example, at [50] of the Judgment, party A commences court proceedings in Singapore against party B and party B then applies under s 6 of the IAA for a stay of the court proceedings in favour of arbitration. The Singapore court finds, applying the foreign proper law of the arbitration agreement, that the dispute is arbitrable and orders a stay of the court proceedings. The arbitration then starts and proceeds to an award against party A. After the award is rendered, party A, who had opposed the stay application unsuccessfully, applies to the Singapore court to set aside the award under Art 34(2)(*b*)(i) of the Model Law. Party A succeeds because the court has then to apply Singapore law on arbitrability.

58 In the second example, given at [51] of the Judgment, party A commences arbitration in Singapore and party B challenges the jurisdiction of the tribunal on the basis that the subject matter of the tribunal is not arbitrable. The tribunal, applying the proper law of the arbitration agreement, decides it

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has jurisdiction. Party B then applies to the High Court under s 10(3) of the IAA for the court to consider the matter and the court agrees with the tribunal. The arbitration continues and an award is rendered against party B who applies to set it aside under Art 34(2)(*b*)(i). The same court would then have to apply Singapore law as the law of the seat and set aside the award on the basis that the subject matter was not arbitrable under Singapore law.

59 The Judge commented that it would be illogical for the same court to come to two different conclusions on subject matter arbitrability of the dispute in question merely because the argument or challenge is raised at different stages in the process, *ie*, pre-award versus post-award. We accept that such anomalous results would arise in a situation when one law is applied at one stage and another at the next. However, the conclusion that we have come to avoids these anomalous results because it means that at the pre-award stage, whenever the subject matter of the dispute is not arbitrable either under the proper law of the arbitration agreement or under Singapore law, the arbitration would not be able to proceed in Singapore (or anywhere else for that matter) and thus the outcome that the Judge finds objectionable would never arise.

60 In relation to the "composite approach", Prof Chan considers that this approach "combines the disadvantages of both approaches [*ie*, of the lex fori and the proper law], without offering any clear benefit" and was "unnecessarily restrictive and not in line with the general tendency to favour arbitration". We do not accept this criticism – whilst it is public policy in Singapore to encourage arbitration, such encouragement cannot override principles of comity or insist on the application of Singapore law to a substantive matter involving a foreign system of law expressly chosen by the parties. The solution to problems that may arise due to differences in subject matter arbitrability between the proper

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law and the law of the seat lies in the hands of the parties themselves and their legal advisors. There is no reason why during the contract negotiation process, they should not be able to investigate possible differences in public policy between the two systems and craft an arbitration agreement which in its choices of proper law and seat would prevent such difficulties from frustrating the parties' desire to settle disputes by arbitration.

61 It is common ground that under Singapore law disputes involving claims of corporate oppression can be arbitrated while under Indian law they can only be resolved by the NCLT. Accordingly, we now turn to the issue of whether Indian law is the proper law of the arbitration agreement and thus to be given primacy.

What is the proper law of the arbitration agreement?

62 The three-stage test to determine the proper law of an arbitration agreement was laid down in *BCY v BCZ* [2017] 3 SLR 357 ("*BCY*") and involves considering at:

(a) Stage 1: Whether parties expressly chose the proper law of the arbitration agreement.

(b) Stage 2: In the absence of an express choice, whether parties made an implied choice of the proper law to govern the arbitration agreement, with the starting point for determining the implied choice of law being the law of the contract.

(c) Stage 3: If neither an express choice nor an implied choice can be discerned, which is the system of law with which the arbitration agreement has its closest and most real connection.

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63 Applying the test here, the initial inquiry is whether the parties expressly chose the proper law of the arbitration agreement. This involves a consideration of cl 20 of the SHA. This is a fairly long clause but at this point the first two sub-clauses are most directly relevant. These are: cl 20.1 dealing with the governing law of the main contract and cl 20.2 containing the arbitration agreement. For convenience, we repeat the full wording of these clauses below:

> 20. **GOVERNING LAW AND ARBITRATION**
>
> 20.1 *This Agreement and its performance shall be governed by and construed in all respects in accordance with the laws of the Republic of India.* In the event of a dispute relating to the management of the Company or relating to any of the matters set out in this Agreement, parties to the dispute shall each appoint one nominee/representative who shall discuss in good faith to resolve the difference. In case the difference is not settled within 30 calendar days, it shall be referred to arbitration in accordance with Clause 20.2 below.
>
> 20.2 *All such disputes that have not been satisfactorily resolved under Clause 20.1 above shall be referred to arbitration* before a sole arbitrator to be jointly appointed by the Parties. In the event the Parties are unable to agree on a sole arbitrator, one of the arbitrators shall be appointed jointly by the Founders and the second arbitrator will be appointed by [the plaintiff] and the third arbitrator will be appointed by the other two arbitrators jointly. The arbitration proceedings shall be carried out in accordance with the rules laid down by International Chambers of Commerce and *the place of arbitration shall be Singapore*. The arbitration proceedings shall be conducted in the English language. The parties shall equally share the costs of the arbitrator's fees, but shall bear the costs of their own legal counsel engaged for the purposes of the arbitration.
>
> [emphasis in original omitted; emphasis added]

64 The appellant contends that the express wording of cl 20.1 not only makes it clear that the SHA is to be "governed by and construed in all respects in accordance with the laws of the Republic of India", but that these words ought to be construed to mean that the arbitration agreement in cl 20.2 is to be governed by Indian law as well. The fact that Indian law is the law of the

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arbitration agreement, he argues, is even more apparent because the governing law clause and arbitration agreement clause make express reference to each other and are intended to be read together.

65 The respondent contends that contrary to the appellant's case, there is no express choice of any law in the arbitration agreement. The fact that the SHA itself was to be governed by the laws of India is insufficient to make Indian law the law of the arbitration agreement. This argument is based on the holding of this court in *BNA v BNB and another* [2020] 1 SLR 456 ("*BNA*") that specifying that the contract shall be governed by a particular law is "insufficient to constitute an express choice of the proper law of the arbitration agreement" (at [59]).

66 We agree with the respondent, applying *BNA*, that the language of cl 20.1 does not constitute an express choice of law for the arbitration agreement. The reference in cl 20.1 to Indian law being "in all respects" the governing law of "[the SHA] and its performance" is not to be construed as expressly choosing the law to govern the arbitration agreement as well even if that agreement is contained within the main contract. An express choice of law for an arbitration agreement would only be found where there is explicit language stating so in no uncertain terms.

67 We next consider whether the choice of Indian law to govern the SHA makes Indian law the implied choice of law to govern the arbitration agreement. As a general rule, a choice of law for the main contract will lead a court to hold that the same law also applies to govern the arbitration agreement. The leading authority in this regard is *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others* [2013] 1 WLR 102 ("*Sulamérica*"), where the

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English Court of Appeal considered the authorities and observed in relation to the determination of an implied choice of law to govern an arbitration agreement at [26] that:

> … [W]here the arbitration agreement forms part of a substantive contract an express choice of proper law to govern that contract is an important factor to be taken into account. … The concept of separability itself, however, simply reflects the parties' presumed intention that the agreed procedure for resolving disputes should remain effective in circumstances that would render the substantive contract ineffective. Its purpose is to give legal effect to that intention, not to insulate the arbitration agreement from the substantive contract for all purposes. *In the absence of any indication to the contrary, an express choice of law governing the substantive contract is a strong indication of the parties' intention in relation to the agreement to arbitrate.* A search for an implied choice of proper law to govern the arbitration agreement is therefore likely (as the dicta in the earlier cases indicate) to lead to the conclusion that the parties intended the arbitration agreement to be governed by the same system of law as a substantive contract, *unless there are other factors present which point to a different conclusion.* These may include the terms of the arbitration agreement itself or the *consequences for its effectiveness* of choosing the proper law of the substantive contract …
>
> [emphasis added]

68 The principle enunciated in *Sulamérica* thus was that although where an arbitration agreement is part of the main contract, the governing law of the main contract is a strong indicator of the governing law of the arbitration agreement when the court is seeking to imply the governing law, this indication may be displaced by the facts of the case, in particular the terms of the arbitration agreement itself or how its effectiveness will be impacted by the choice of the same governing law for the arbitration agreement. In *Sulamérica* itself, the main contract was governed by Brazilian law but the arbitration clause provided for arbitration in London. Under Brazilian law, the arbitration agreement could be enforceable only with the consent of one of the parties and this meant that although parties had at the contractual stage agreed to arbitrate, subsequently

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one party could refuse to consent. This ability to opt out was likely to render the arbitration clause ineffective. On this basis, the court held that therefore the parties could not have made an implied choice of Brazilian law to govern the arbitration agreement. Instead, the law governing the arbitration agreement had to be determined by considering which system of law had the most close and real connection with the arbitration agreement. In that case, this was found to be English law, the law of the seat.

69 *Sulamérica* was considered by the High Court in *BCY*. Steven Chong J, as he then was, adopted the principle in *Sulamérica* that the governing law of the main contract is a strong indicator of the governing law of the arbitration agreement unless there are clear indications to the contrary. The choice of a seat different from the law of the governing contract would not in itself be sufficient to displace that starting point. The court observed that the governing law of the main contract "should only be displaced if the consequences of choosing it as the governing law of the arbitration agreement would *negate* the arbitration agreement even though the parties have themselves evinced a clear intention to be bound to arbitrate their disputes" (at [65] and [74]).

70 On that basis here, at the second stage, Indian law would be found to be the proper law of the arbitration agreement unless there is something in the circumstances that negates that implied choice. The respondent argues that the presumption that Indian law applies ought to be rebutted as applying it would frustrate the parties' intention to arbitrate their disputes relating to the management of the Company since, on the appellant's case, minority oppression disputes are non-arbitrable in India. The respondent points out that cl 20.1 specifically refers to disputes "relating to the management of the Company" and brings these within the ambit of the arbitration agreement as opposed to limiting

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its application to matters arising out of and/or in connection with the SHA. This, the respondent says, is significant as it manifests the parties' intention that management disputes are to be settled by arbitration, in addition to other matters set out in the SHA. This displaces the indicator that parties had made an implied choice for Indian law to be the law of the arbitration agreement.

71 Before we consider that argument, we need to say something about *BNA*. In that case, the main contract was governed by PRC law and the seat of the arbitration was Singapore. Under PRC law, the arbitration agreement was invalid, but it was valid according to Singapore law. The respondent in the case argued that PRC law could not be the governing law of the arbitration agreement because parties could not have chosen to invalidate the arbitration agreement at the same time as they expressed a manifest intention to arbitrate. The respondent urged the court to consider the PRC law position as part of the contextual interpretation of the arbitration clause. This argument was, however, rejected by the court on the basis that the respondent had not shown that the parties were, at the very least, aware that the choice of proper law of the arbitration agreement could have an impact upon the validity of the arbitration agreement. So, the differing effects of the two systems of law were not in themselves sufficient to displace the implied choice of PRC law as the proper law of the arbitration agreement in *BNA*.

72 In our view, the present case can be distinguished from *BNA* because the facts here demonstrate, much more strongly, the parties' desire for all disputes to be resolved by arbitration. First, the agreement was made in India among shareholders of an Indian company. In the general course, disputes among shareholders of a company are decided within the jurisdiction of the company's country of incorporation and, usually, in court. These shareholders specifically

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crafted a provision for all disputes concerning the agreement and its performance, including as to management of the Company, to be dealt with in arbitration. It is impossible to contend that as shareholders they were not aware that disputes arising under the SHA and also in connection with the management of the Company would give rise to questions of *Indian* company law that would generally fall to be determined by the *Indian courts* (at the time of the agreement). Yet, not only did they choose to arbitrate but they also chose to arbitrate under Singapore law in Singapore and according to the rules of the ICC, thereby choosing a seat and an arbitral body the common feature of which was that neither had any connection with India. In this regard, it should not be overlooked that the respondent although a shareholder of an Indian Company, is itself a foreign entity, a private equity fund incorporated under the laws of Mauritius. It is certainly not fortuitous that cl 20.1 was deliberately drafted to encompass disputes "relating to the management of the Company". Singapore was likely chosen as an Asian arbitration-friendly jurisdiction where an ICC arbitration could be held. These were obviously choices made after some amount of thought. Secondly, it is material in this regard that the parties paid some amount of attention to the mechanics of the arbitration. This is shown by cll 20.3, 20.4, 20.5 and 20.6 of the SHA which provide as follows:

> 20.3 The award of the arbitral tribunal shall be final and conclusive and binding upon the Parties, and the Parties shall be entitled (but not subject) to enter judgement thereon in any Court of competent jurisdiction. The Parties agree that such enforcement shall be subject to the provisions of the Indian Arbitration and Conciliation Act, 1996 and neither Party shall seek to resist the enforcement of any award in India or elsewhere on the basis that award is not subject to such provisions. The award rendered shall apportion the costs of the arbitration.
>
> 20.4 The Parties agree that the relevant courts of competent jurisdiction shall have the jurisdiction to entertain any

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> proceedings for interim relief related to this Agreement whether during pendency, or after expiry or termination.
>
> 20.5 The Parties further agree that the arbitrators shall also have the power to decide on the costs and reasonable expenses (including reasonable fees of its counsel) incurred in the arbitration and award interest up to the date of the payment of the award.
>
> 20.6 When any dispute is referred to arbitration, except for the matters under dispute, the Parties shall continue to exercise their remaining respective rights and fulfil their remaining respective obligations under this Agreement.

73 Thus, the intention of the parties was that their disputes should be settled by arbitration with the courts (whether Indian or Singaporean) playing, basically, a supporting role by granting interim relief, and enforcing any award in terms issued by the tribunal. This intention is not consistent with an implied choice of Indian law as the proper law of the arbitration agreement as such choice would negate the agreement since oppression claims (which are often intertwined with management disputes) are not arbitrable in India.

74 We are satisfied that in this case there are sufficient indications to negate the implication that Indian law was intended to govern the arbitration agreement in the SHA as that implication would mean frustrating the parties' intention to arbitrate all their disputes. We would note in this connection Singapore's strong public policy in favour of arbitration as shown by the incorporation of the Model Law as part of Singapore law and its accession, ratification and adoption of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards *vide* the incorporation of the same as the Second Schedule of the Model Law. The courts must give effect to that public policy by upholding arbitration agreements and the obligation to arbitrate thereunder unless there is good reason not to do so.

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75 Accordingly, we proceed to the third stage of the governing law inquiry. This is to determine which law has the most real and substantial connection with the arbitration agreement in the SHA. This is a straightforward exercise. Under cl 20.2, the arbitration is to take place in Singapore. As the law of the seat of the arbitration, Singapore law will govern the procedure of the arbitration including challenges to the tribunal or its jurisdiction and the award when the same is eventually issued. Accordingly, Singapore law is the law of the arbitration agreement.

What is the nature of the disputes in the NCLT petition?

76 Having concluded that the arbitration agreement is governed by Singapore law, we now need to consider whether the commencement of the NCLT Proceedings by the appellant was in breach of that agreement. This question must be approached by considering whether the claims in the NCLT Proceedings would fall within the ambit of the arbitration agreement. In this regard, the disputes that must be submitted to arbitration are, *per* cl 20.1, those "relating to the management of the Company or relating to any of the matters set out in [the SHA]". There are therefore, two categories of disputes that must be submitted to arbitration. The first comprises disputes relating to the management of the Company and the second comprises disputes relating to the provisions and interpretation of the SHA. It should be noted that in deciding whether any particular dispute falls within one category or the other or neither, this term in the arbitration agreement would be interpreted in accordance with Singapore law as the governing law of the arbitration agreement. There was a suggestion that the appellant's complaints of mismanagement of the Company would not relate to the "management" thereof as the term was used in cl 20.1. We reject that submission. A complaint that alleges mismanagement is,

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logically, a complaint that the management of the Company is being mishandled and must therefore lead to a dispute about how the Company is being managed.

77 The petition filed in the NCLT Proceedings contains six main complaints/claims by the appellant and we will examine these in turn.

78 The first complaint relates to the appellant's assertion that his continuation in the post of executive director of the Company is valid. He complains that a malicious and illegal attempt is being made to oust him from that executive role. The background to this complaint is that the appellant managed the Company as its managing director for some 15 years. Then, on 28 November 2019, he was appointed executive director by a board resolution approved by Ms Mani, but the respondent alleged on 25 May 2020 that this appointment was invalid notwithstanding its nominee's approval.

79 The appellant has two bases for his contention that he should remain as executive director. The first is that the shareholders had an understanding that he would manage and control the Company's operations and that this understanding is reflected in the SHA. Further, Ms Mani had consented to his appointment within the terms of the SHA and the respondent had acquiesced in that appointment. Secondly, he contends that he had a legitimate expectation of retaining an executive position and that this expectation went "beyond the provisions of the SHA". On the appellant's contentions alone, his first claim can be regarded broadly as a management dispute (arising from the SHA) albeit he is using arguments relating to oppression as additional justification for his claim and that his contentions if proved could contribute to a finding of oppression.

80 The second claim relates to the respondent's attempts to appoint AM as the managing director of the Company and its alleged refusal to adopt a method

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which will ensure that a suitable independent non-partisan and impartial candidate can be appointed as the new managing director. The appellant alleges that AM is unfit to lead the Company and that his proposed appointment is part of the respondent's plan to prejudice the appellant. In relation to this complaint, the appellant is seeking an order directing the respondent, Ms Mani, AM and NM to initiate a process for identifying and appointing a suitable candidate as managing director and an interim injunction against the appointment of AM as managing director.

81 Looked at from one perspective, this complaint could be an issue of what is in the best interests of the Company, and it might turn on commercial considerations that lie beyond the scope of the SHA. Under cl 17.1.15 of the SHA, the respondent is given the right to consent to the appointment of members of the key management team. The appellant's point in the NCLT Proceedings is that the respondent is misusing this right and wants to appoint AM as managing director to facilitate its plan to sell the Company to a Significant Competitor.

82 It could be said that the substance of the appellant's complaint is that the majority shareholders are conducting the Company's affairs with a lack of probity and fair dealing and in order to install themselves in positions of power. This would be a typical case of oppression. The respondent submits in response, however, that this issue can equally be seen as a question of how the Company should be managed and the extent of the respondent's power under the terms of the SHA to control such management. We agree with the respondent. As explained earlier, the arbitration agreement is not limited to contractual disputes arising out of the terms of the SHA. It also encompasses "dispute[s] relating to … management" and this phrase is important in indicating a particular category

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of disputes that are to go to arbitration. In this connection, if a dispute relates to management, it will have to be arbitrated notwithstanding that it may not be of a contractual nature. We therefore agree with the respondent that the second complaint is subject to the arbitration agreement.

83 The third matter of which the appellant complains in the NCLT Proceedings is the attempts which AM and the respondent have allegedly made to bring NM back on to the Board of the Company as a "Founder Nominee Director" under the terms of the SHA.

84 The context for this complaint is that before 2014, NM was a "Founder" as defined in the SHA and the shares that he held were called Founder Shares. The SHA confers certain benefits on a holder of Founder Shares including the right to appoint and remove four directors on the Board (cl 16.2 SHA). In 2014, NM transferred all his shares to the respondent and resigned from the Company. In 2021, AM, who is also a Founder, transferred 1,000 of his shares to NM. In the NCLT Proceedings, the appellant's complaint is that according to the terms of the SHA, NM cannot claim the benefit of holding Founder Shares even though he has received them from AM. The appellant further alleges that the fact that Ms Mani, AM and NM are calling for NM to be reinstated as a Founder Director shows that they are colluding with the objective of driving the sale of the Company to a Significant Competitor. In the NCLT Proceedings, the appellant is seeking a declaration that NM is not entitled to the benefits/rights attached to the Founder Shares and an interim injunction preventing the other shareholders from appointing him a Founder Director.

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85 The respondent contends that whether NM can hold the position of Founder by virtue of AM's transfer of 1,000 shares to him is a matter of contractual interpretation.

86 In our view, the dispute relating to NM's position as a shareholder, *ie*, whether he is now an ordinary shareholder or a Founder and the dispute over whether the 1,000 shares he received from AM retain their character as "Founder Shares" under cl 1.1(xx) of the SHA, is a dispute over matters set out in the SHA. The preamble of the SHA states that the "Founders" are the appellant, AM and NM. The adjudicator of this dispute, whether it be the arbitral tribunal or the NCLT, will have to decide in terms of the SHA what the effect of NM's original disposal of his Founder Shares was on his status and whether that status runs with the shares. There is also the question as to whether under cl 16.2 of the SHA the appellant is entitled to veto the re-appointment of NM as a Founder's Nominee Director. Although the appellant alleges that this complaint is evidence of oppression because NM is being brought in to weaken his control of the Board and indeed that may also be so, such allegation cannot change the character of the dispute over NM's rights as a shareholder as falling within the category of disputes described as "any of the matters set out in this Agreement".

87 The fourth complaint made by the appellant in the NCLT Proceedings is regarding efforts by the respondent, AM and NM to alter the strength and composition of the Board of the Company. On 24 February 2021, these three shareholders requisitioned an extraordinary general meeting ("EGM") of the Company to appoint one Mr Vikas Nanda ("Mr Nanda") as the respondent's nominee on the Board, NM as a Founder's Nominee Director, AM as managing director and one other person as a director. The appellant submits that these

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intended appointments show that the respondent wants to make him a "complete minority" on the Board and that "in a quasi-partnership" any such changes to the composition to the Board by appointing new/additional directors from one group only are acts of oppression.

88 The respondent argues that its appointment of Mr Nanda is merely an exercise of its contractual rights under cl 16.3 of the SHA to appoint two directors of the Board. It also points out that it has a right under the SHA to veto any change in the size or composition of the Board.

89 In our view, this complaint relates to the management of the Company. We agree with the appellant that it is not simply a matter of the exercise of contractual rights but could turn out to be an instance of oppression in that the respondent in pushing for a slew of appointments in the directorship of the Company is trying to isolate the appellant on the Board. It is relevant in this connection that the appellant has a further complaint in that he gave a notice putting forward his nominee, one Mr Khan, as a Founder's Nominee Director and this notice was ignored by the other parties. He also alleges that he is being excluded from the chain of command and his legitimate expectations of management participation are being violated.

90 In our view, the fact that these complaints may result in a finding of oppression do not take them out of the arbitration agreement. They can be submitted to and determined by the tribunal as under Singapore law claims of oppression are arbitrable. What is important for present purposes is that all these claims can be classified as disputes "relating to management of the Company" and thus are encompassed by the arbitration agreement.

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91 The fifth complaint asserts that the respondent's attempts to sell the Company to Info Edge are blatant violations of the SHA and constitute gross mismanagement of the Company. The appellant's position is that under the SHA, the sale of the Company to Info Edge cannot take place without his consent as Info Edge is a "Significant Competitor" within the meaning of that term as defined in cl 1.1(xxxiv) of the SHA. This is because under cl 8.1 the respondent is not allowed to sell its shares to any Significant Competitor "except with the written prior consent of the Founders". The appellant also accuses the respondent and Info Edge of acting in concert to further their "ulterior motives". The appellant is seeking an injunction prohibiting the respondent, AM and NM, from transferring their shares to Info Edge or any other Significant Competitor.

92 The respondent submits that whether the SHA precludes the sale of shares to Info Edge is a contractual dispute over the operation of cl 3.4 of the SHA and the extent of the respondent's exit rights. It claims that cl 3.4(ii) expressly permits the sale of shares to a Significant Competitor.

93 It is clear to us that this complaint arises under the SHA and is therefore covered by the arbitration agreement. It seems that the main issue regarding whether the sale to Info Edge should be enjoined is whether the appellant's right under cl 8.1 of the SHA to veto a sale of shares to a Significant Competitor *qualifies* the respondent's exit rights under cl 3.4(ii) of the SHA. Clause 3.4(ii) expressly allows the respondent to sell its shares to "any independent third party" and this right is only available if the Company is unable to redeem the respondent's shares under cl 3.4(i) within the specified time frame. An additional contractual issue is whether the fact that the respondent has invested in Info Edge renders the latter a non-independent third party, such that a sale to Info Edge is not permitted under cl 3.4(ii) of the SHA. If either of these

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questions is resolved in the appellant's favour, there may be a strong case for enjoining the sale to Info Edge. These observations are based on the information available to us at this time and are not intended to be binding on any tribunal that may be subsequently appointed.

94 The appellant's final complaint in the NCLT Proceedings concerns, mainly but not only, alleged multiple breaches of fiduciary duties by Ms Mani and AM. In this connection the appellant alleges in the NCLT Proceedings that:

(a) Ms Mani and AM continuously arranged for Info Edge to have access to sensitive and confidential information of the Company.

(b) Ms Mani refused at the Board meeting on 10 June 2020 to consent to the annual operating plan of the Company on the basis that, under the SHA, the Company could not approve certain financial matters without having received the prior consent of the respondent.

(c) The respondent has not initiated a process to select a suitable candidate for the post of managing director despite the appellant's insistence that this be done.

(d) A recommendation made in June 2019 by AM and supported by Ms Mani was that the management team should seek the Board's consent for any expenditure beyond one crore rupees but in the appellant's view this would severely hamper the operations of the Company as its average monthly expenditure is 17 crore rupees.

(e) Ms Mani has not confirmed certain Board minutes and in the appellant's submission this has put the Company in breach of regulatory requirements under Indian company law.

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(f) Ms Mani has been attempting to intimidate senior employees of the Company to extract information from which allegations against the appellant may be made.

(g) Ms Mani has made baseless but serious allegations against the appellant, including allegations of financial impropriety.

(h) AM and the respondent are colluding to influence the valuation of the respondent's shares by insisting that a non-binding "Expression of Interest" provided by Info Edge be taken into account by the valuation firms appointed by the Company.

(i) The respondent is trying to delay the valuation and buy-back process including stalling the audit of the Company with the motive of rendering the Company unable to fulfil its buy-back obligation under cl 3.4(i) of the SHA within six months as specified in that clause.

95 It can be seen from the list above that many of the allegations of breach of duty have arisen in the context of the management of the Company. Others clearly relate to the SHA. Among these is the last complaint listed above which involves actions by the respondent which could be viewed as an attempt to manipulate the SHA for the respondent's benefit since if the Company fails to redeem the respondent's shares within the stipulated period, the respondent can exercise its drag along rights under cl 3.4(ii) of the SHA and force the appellant to sell his own shares in the Company. There are some complaints which do not involve management or the SHA, for example, Ms Mani's alleged attempts to intimidate senior employees of the Company and the allegation she has made about the appellant's alleged financial impropriety. In the main, however, the

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sixth complaint substantially rests on allegations of mismanagement and contractual misbehaviour. These are covered by the arbitration agreement.

96 From the analysis above, practically all the complaints made by the appellant in the NCLT Proceedings can be said to relate either to the management of the Company or to the SHA in some way. Proof of these complaints to the satisfaction of the adjudicator may justify a finding that the respondent and/or AM and/or Ms Mani have acted unfairly towards the appellant or managed the Company in such a manner as amounts to oppression. But the simple fact that all these allegations might eventually support a finding of oppression cannot take them out of the categories of disputes that the SHA expressly provides should be submitted to arbitration. Accordingly, we agree with the Judge that the institution of the NCLT Proceedings was a breach of the arbitration agreement. On that basis, there is no ground on which to discharge the anti-suit injunction granted by the Judge.

97 We should make it clear that nothing that we have said here in regard to the complaints made by the appellant in the NCLT Proceedings should be regarded as endorsing the respondent's submission that all the complaints are contractual in nature and do not come within the jurisdiction of the NCLT. Our analysis was directed at determining whether the disputes fall within the ambit of the arbitration agreement.

98 This brings us to the last issue which is whether despite the breach of the arbitration agreement these proceedings in Singapore should be stayed on case management grounds so that the appellant is not enjoined from continuing with the Bombay suit and obtaining an Indian court's determination on whether the appellant's claims have been correctly submitted to the NCLT.

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Should these proceedings be stayed?

99 This court has case management powers under s 49(2) of the Supreme Court of Judicature Act 1969 (2020 Rev Ed) ("SCJA") read with s 18(2) and para 9 of the First Schedule to the SCJA to stay these proceedings until the concurrent proceedings in the Bombay High Court and the NCLT have been concluded. This would be a limited stay and the main reason for it would be to avoid conflicting decisions. In this regard, para 9 of the First Schedule of the SCJA confers on the court the power to stay proceedings "where by reason of multiplicity of proceedings in any court or courts … the proceedings ought not to be continued".

100 The grant of a limited stay pursuant to the SCJA is a discretionary exercise of the court's case management powers. In exercising these powers, the court is entitled to consider all the circumstances of the case. The underlying concern is the need to ensure the efficient and fair resolution of the dispute as a whole: see *BNP Paribas Wealth Management v Jacob Agam and another* [2017] 3 SLR 27 ("*BNP*").

101 *BNP* at [34] sets out a list of non-exhaustive factors to be considered in determining whether to grant the limited stay. These are:

> (a) which proceeding was commenced first;
>
> (b) whether the termination of one proceeding is likely to have a material effect on the other;
>
> (c) the public interest;
>
> (d) the undesirability of two courts competing to see which of them determines common facts first;
>
> (e) consideration of circumstances relating to witnesses;
>
> (f) whether work done on pleadings, particulars, discovery, interrogatories and preparation might be wasted;

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> (g) the undesirability of substantial waste of time and effort if it becomes a common practice to bring actions in two courts involving substantially the same issues;
>
> (h) how far advanced the proceedings are in each court;
>
> (i) the law should strive against permitting multiplicity of proceedings in relation to similar issues; and
>
> (j) generally balancing the advantages and disadvantages to each party.

102 The court must also aim to strike a balance between three higher order concerns that may pull in different directions: first, a plaintiff's right to choose whom he wants to sue and where; second, the court's desire to prevent a plaintiff from circumventing the operation of an arbitration clause; and third, the court's inherent power to manage its processes to prevent an abuse of process and ensure the efficient and fair resolution of disputes. The balance that is struck must ultimately serve the ends of justice: *Tomolugen* at [188].

103 The appellant submits that factors (a), (d), (g), (i) and (j) (*per* [101] above) favour granting the limited stay (but no elaboration is offered). The respondent opposes a limited stay because: (a) the Bombay suit was commenced in direct contravention of a valid arbitration agreement between the parties and the appellant should not be permitted to circumvent the arbitration agreement; (b) the Bombay suit was not commenced *bona fide*; (c) Singapore is the only appropriate forum to hear the dispute as it has supervisory jurisdiction over the prospective arbitration and enforcement of the arbitration agreement; (d) the Bombay suit will likely be pending for ten to 12 years; and (e) if a limited stay were granted, parties seeking to circumvent arbitration agreements in the future could commence proceedings in other jurisdictions to hinder the enforcement of arbitration agreements.

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104 We raised the issue of a limited stay with the parties in the first instance as we were concerned about the consequences of compelling the appellant to arbitrate his disputes with the respondent, AM and NM. The appellant has submitted that even if he succeeds in the arbitration, the award in his favour will not be enforceable in India. In this regard the Arbitration and Conciliation Act 1996 (No 26 of 1996) of India provides by s 48(2) as follows:

> (2) Enforcement of an arbitral award ***may*** also be refused if the Court finds that —
>
> > (*a*) the subject-matter of the difference is ***not capable of settlement by arbitration*** under the law of India; or
> >
> > (*b*) the enforcement of the award would be contrary to the public policy of India.
>
> [emphasis added in bold italics]

105 The respondent is aware of the possibility that an award may not be enforceable in India, but that possibility has not affected its desire for the disputes to be arbitrated in Singapore as *per* the arbitration agreement. Additionally, it submits that the grounds for non-enforcement of foreign arbitral awards are discretionary. It relies on the word "may" in s 48(2). However, the respondent did not address the decision of the Indian Supreme Court in *Vijay Karia and others v Prysmian Cavi E Sistemi SRL and others* [2020] SCC Online SC 177 which held that if the subject matter of the dispute is non-arbitrable under Indian law, Indian courts have no discretion to enforce the award. The respondent offered no authority to contradict or distinguish the case. It would seem that the appellant has substantial basis on which to be concerned that if he succeeds in the arbitration ultimately the whole process would be a waste of effort as the Indian courts will not assist him in enforcing the award.

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106 We are therefore in a situation in which two of the higher order concerns that we noted in [102] above are pulling in opposite directions. On the one hand, we have found that the arbitration agreement binds the appellant and, taking account of that finding alone, he should be prevented from circumventing that obligation. On the other hand, the court is always concerned to ensure the fair and efficient resolution of disputes and making the parties undergo an arbitration which may result in an award that cannot be enforced may not conduce to such a resolution here.

107 Having balanced these factors, we have concluded that the appellant should be held to his obligations under the arbitration agreement and no limited stay of these proceedings should be granted. We have two reasons for this. The first is that there does not appear to be a likelihood that the Bombay suit will be dealt with and resolved within the next year and we do not think that any limited stay that we impose should run for longer than 12 months. To recap, the Bombay suit was commenced on 18 March 2021 and shortly thereafter, on 21 March 2021, the appellant filed "Interim Application 1010" applying for temporary restraining orders against the respondent to stop him enforcing the anti-suit injunction or interfering with the NCLT Proceedings. A second interim application was filed by the appellant in October 2021. This one may now be moot as it related to Info Edge's offer to buy the respondent's shares in the Company, and that offer has now lapsed. Both applications, albeit filed in 2021, were fixed for hearing on 5 September 2022 but that hearing could not go on due to the non-availability of a judge. The applications have now been re-listed for hearing but, to our knowledge so far, no new hearing date has been given. This is an unsatisfactory position as there is no telling how long the stay would have to be in place before even a preliminary adjudication is made. And then more time may be taken for possible appeals and the final hearing. In this

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balancing exercise, we have to consider the position of the respondent as well as that of the appellant and it is highly undesirable for allegations of breach of the SHA and mismanagement (including oppression) to be hanging over the respondent's head for a lengthy period of time.

108 The second reason is that it is too speculative to conclude that it is fruitless to conduct an arbitration just because of the possibility that the award would not be enforceable in India. The process of the arbitration in itself could be beneficial to the parties in that it will compel them to collect and test their evidence and legal arguments and give them a strong indication of the strength of their respective cases. The determination of the tribunal could give rise to *res judicata* and estoppel points that would assist the appellant (and the respondent, of course) if after the issue of the final award, court proceedings have to be taken in India or elsewhere to implement (if not directly enforce) the award or the findings of the tribunal. On balance, we have concluded that whatever may be the position on arbitrability of the disputes taken by the Indian courts, an arbitration of these disputes cannot be unequivocally held to be a fruitless endeavour and a waste of resources.

Conclusion

109 For the reasons given above, we dismiss the appeal and maintain the anti-suit injunction in the terms ordered by the Judge.

110 Having considered the parties' submissions on costs, we award the respondent costs in the sum of $100,000 all in. There will be the usual consequential orders.

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111 We conclude by expressing our gratitude to Prof Chan for his learned submissions and detailed research which we found to be most helpful.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

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Thio Shen Yi SC, Tan May Lian Felicia, Uma Jitendra Sharma and Juliana Lake (Lu Zhixuan) (TSMP Law Corporation) for the respondent;
Assoc Prof Darius Chan (School of Law, Singapore Management University) as *amicus curiae*.

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